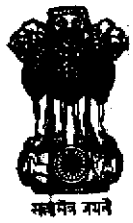

LAW COMMISSION OF INDIA

FIFTY-FOURTH REPORT

ON

THE CODE OF CIVIL PROCEDURE, 1908

FEBRUARY, 1973

D.O. No. F.2(1)/71--L.C.

P. B. GAJENDRAGADKAR

CHAIRMAN

LAW COMMISSION
Shastri Bhavan
New Delhi—110001
February 6, 1973

My dear Minister,

I am forwarding herewith the Fifty-fourth Report of the Law Commission on the Code of Civil Procedure, 1908. The circumstances in which the subject was taken up by the Commission and the procedure adopted by it are described in the first few paragraphs of the Report.

With kind regards,

Yours sincerely,

P. B. GAJENDRAGADKAR

Hon'ble Shri H. R. Gokhale,
Minister of Law & Justice,
Government of India,
Shastri Bhavan,
New Delhi.

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APPENDIX

CHAPTER 1

INTRODUCTION

1.1. This Report deals with some aspects of revision of the Code of Civil Procedure, 1908. The subject was considered at length by one of the previous Commissions, which duly forwarded to Government a detailed Report on the code.[1] In that Report,[2] the Commission considered the Code at length, and the mass of case-law that had accumulated around the previous Code during half a century of its life, the local amendments made in various provisions of the Code, as well as the reforms introduced in other Countries,—including, in particular, the changes made in England in 1962 by way of revision of the Rules of the Supreme Court.

It also took into account the recommendations relevant to the Code made in the Report on the Reforms of Judicial Administration.[3]

1.2. A Bill intended to implement this Report was duly introduced in Parliament but the Bill lapsed. When the question of reintroduction of the Bill arose, the Government of India considered it proper to request the present Commission to examine the Code afresh from the "basic angle of minimising costs and avoiding delays in litigation and taking into account its revised terms of reference"[4].

Scope of the Report

1.3. Accordingly, in this Report, we propose to examine the Code from the angle of—

(1) minimising costs;
(2) avoiding delays in litigation; and
(3) the revised terms of reference of this Commission, the most important of such terms being the implementation of the directive principles.

1.4. In this Report, we have not considered it necessary to deal again with the matters dealt with in the earlier Report, except where we disagreed with the recommendations in the earlier Report or considered it necessary to reiterate and emphasise particular recommendations made therein. As a matter of fact, even the question of costs and delay was considered by the Commission at that time also; however, as that Report was given long ago,[5] we shall—as we have been specifically requested—consider what amendments are needed to avoid delay and to minimise costs in civil proceedings.

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1. 27th Report of the Law Commission.
2. It is hereafter referred to as the earlier code.
3. 14th Report of the Law Commission.
4. Law Minister's letter No. F. 40(9)/72-J, dated 14-2-1972 to the Chairman of the Law Commission.
5. In 1964

Radical amendments needed

1.5. At the outset, we should make it clear that in our view, at least in certain respects, radical changes are required in the Code in principle.

In the earlier Report,[1] it has been mentioned that, on the whole, the Code has worked smoothly and satisfactorily, and the Commission there had added that it had been 'very cautious' in proposing radical changes. No doubt, caution has to be exercised before disturbing statutory provisions of long standing. But we think that caution should not act as a constraint where the expenses of procedure and the necessities of the times require radical changes.

Litigation when causing burden

1.6. As the Supreme Court has observed[2]—

> "The principal function of courts and tribunals is to settle the dispute between the parties and thereby give a quietus to the social frictions generated by the unresolved disputes. As long as a litigation lasts, the tension continues and useful energies will be wasted. This is not all. Every litigation means heavy financial burden to the parties."

Obviously, an expensive procedural system is a self-defeating instrument of justice.

Reforms needed to be considered

1.7. If, therefore, reforms in procedure appear to be needed to reduce the burden on parties, a body entrusted with the business of law reform need not hesitate to consider their suitability.

Course adopted with reference to earlier Code

1.8. The course which we have adopted with reference to the recommendations made in the earlier Report may be stated here. First, where we agree with the recommendations made in the earlier Report, we have not considered it necessary to deal with the matter, except as stated below. Secondly, where we agree with the earlier recommendations, and also consider it necessary to emphasise it, we have made a brief reference to it in this Report. Thirdly, where we disagree with an earlier recommendation, or agree with it subject to a modification, we have naturally stated so in this Report, and indicated our own recommendation, if any. Fourthly, on matters not considered in the earlier Report, which required to be discussed, we have expressed our views and suggested additional amendments wherever we thought necessary.

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1. 27th Report, page 4, para 6.

2. *Probhavati* v. *Pritam Kaur*, A.I.R. 1972 S.C. 1910, 1912, (Hegde J.).

1.9. Thus the position is that on matters falling within the first and second categories referred to above, the recommendations in the earlier Report should be consulted. On matters falling within the third category, the earlier recommendations should be taken as superseded or modified (as the case may require) by our recommendations. And, on matters falling within the fourth category, our recommendations should be taken as supplementing those made in the earlier Report.

Questionnaire

1.10. We may mention here that when the subject was referred to us, we had, in order to elicit opinion on some of the important questions which required consideration, issued a questionnaire,[1] we are grateful to all those who have favoured us with their views in response to the questionnaire. We have, wherever we consider it necessary, referred in this Report to the views expressed on the relevant questions; but it is needless to add that the replies on every question have received our most careful consideration.

1. The Questionnaire was issued in March, 1972.

CHAPTER 1-A

MAIN OBJECTIVES OF REFORM

Introductory

1-A.1. We deal in this Chapter with the main objectives of reform of the Code as envisaged in this Report.

Stages of procedure and cases of delay

1.A.2. We refer first to delay. The stages of procedure as provided in the Code are not numerous. But delay could occur because—

(i) the interval between the stages becomes very long in a particular case, or

(ii) a particular stage of procedure itself consumes excessive time, or

(iii) extraneous factors prevent a particular stage from being reached—for example, where the suit has to await its turn for a long period because of the heavy file of the court.

1.A.3. Examples of all these three types of delay could be furnished. For example, if, between the issue of a summons to the defendant and his actual appearance in Court an interval of two months elapses because of obstacles in the service of summons, delay of the first type occurs.

Same is the case where frequent adjournments are granted without justification. Delay of the second type is illustrated by the parties producing too many witnesses, or counsels unduly prolonging the cross-examination of a particular witness. An illustration of the third type of delay is furnished by the familiar situation of a revision against an interlocutory order, whereby the next stage in the logical sequence of the case is prevented from being reached.

1.A.4. It will be our endeavour to bear in mind these three aspects, while making concrete recommendations for amendment of the Code.

Expenses

1.A.5. We refer next to expense. The principal expenses of a civil litigant in India are made up of—

(1) court fees;

(2) counsel's fee;

(3) expenses on witnesses;

(4) expenses for obtaining copies of documents.

(5) personal expenses for attending court consulting counsel, and the like;

(6) costs, when directed to be paid to the opposite party.

Various heads of expense

1.A.6. None of these items is governed by the Code of Civil Procedure. The first of them—court fees—is regulated by the Court Fees Act, (or by the corresponding State law where a full-fledged state law has been enacted).

The second item is not, as between party and counsel, regulated by law.

The Third and fourth items are regulated by rules made by the High Courts.

The fifth is, in its very nature, elastic. So also is the sixth."

Court fees

1.A.7. These items of expenditure are, thus, outside the Code, but we think it proper to deal here with the first item—Court fees—since the matter is of great importance. This we have chosen to do notwithstanding the fact that Parliament's legislative competence to legislate on court fees is limited to Union Territories, as the subject falls in the State List.[1]

1.A.7. We may in this connection mention that in one of the Reports of a previous Commission, the question of court fees has been considered at length.

1.A.8. The recommendations in that Report regarding court fees may be summarised as follows.[2]

(1) It is one of the primary duties of the State to provide the machinery for the administration of justice and on principle it is not proper for the State to charge fees from suitors in courts.

(2) Even if court fees are charged, the revenue derived from them should not exceed and cost of the administration of civil justice.

(3) The making of a profit by the State from the administration of justice is not justified.

(4) Steps should be taken to reduce court fees so that the revenue from it is sufficient to cover the cost of the civil judicial establishment. Principles analogous to those applied in England should be applied to measure the cost of such establishment. The salaries of judicial officers should be a charge on the general tax-payer.

(5) There should be a broad measure of equality in the scales of court fees all over the country. There should also be a fixed maximum to the fee chargeable.

(6) The rates of court fees on petitions under Articles 32 and 226 of the Constitution should be very low, if not nominal.

(7) The fees which are now levied at various stages such as the stamp to be affixed on certified copies and exhibits and the like should be abolished.

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1. Constitution, Seventh Schedules, State List, Item 3 "……fees taken in all courts except the Supreme Court."

2. 14th Report, Vol. 1, page 509, para 12.

(8) When a case is disposed of or is compromised before the actual hearing, half the court fee should be refunded to the plaintiff.

(9) The Court fee payable in an appeal should be half the amount levied in the trial court.

1.A.9. We would like to express here our broad agreement with the approach adopted in the Report in respect of court fees, and with the recommendations set out above.

Directive principles

1.A.10. Our revised terms of reference require us to consider the changes needed to bring laws in harmony with directive principles. Of the articles in the Constitution dealing with directive principles, the article most relevant to the sphere of civil procedure is that relating to social order,[1] which is as follows:—

> "38. *State to secure a social order for the promotion of welfare of the people*—The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

We have kept this in mind in making our recommendations in this Report.

1. Article 38 of the Constitution.

CHAPTER 1-B

OUR APPROACH AND PRINCIPAL RECOMMENDATIONS

Main objectives

1-B.1. Our main objectives in this Report, as already stated,[1] will be two-fold—

(a) to consider the need for such major changes as could cut down the delay, and expense of civil procedure, of course, to the extent to which the delay or expense could be attributed to defects in or deficiencies of the provisions in the Code of Civil Procedure.

(b) to consider the need for such changes as are desirable in order to implement the directive principles in Part 4 of the Constitution.

Procedure, a means to justice

1.B.2. Any system of procedure must subserve the ends of Justice. Procedure is a means, and not an end. When the means assume undue prominence, and the end is lost sight of, or even sometimes apt to be defeated in the process, citizens affected have a legitimate right to complain. And it is the duty of the State to see that its legal system does not leave scope for processes which are likely to hinder or defeat justice.

Overhauling of entire procedure not required

1.B.3. This does not, of course, mean that a total replacement of the existing system of procedure by a new one, or such a radical overhaul as would change its face entirely, is necessarily required.

1-B.4. As Lord Kilbrandon has observed—

> "The ship is well designed, fundamentally sound, and is for most of the time on a correct course; what is wanted is an overhaul and modernisation of the navigational instruments, so that she is more easily kept on that course. And some of the officers are getting a bit elderly—This will always be true"[2].

Means must be effective

1-B.5. Since procedure is a means, and justice the end, the means must be effective for realising the end. This requires that the procedure must be simple, fair, effective, speedy and inexpensive To spell out these requirements, we need; (a) an adequate organisation of the courts for the efficient distribution and despatch of business; (requirements of effectiveness); (b) freedom from mere

1. See Chapter 1, *Supra*.
2. Lord Kilbrandon, other People's Law, (1966) pages 3-4.

technicalities at all stages (requirement of simplicity and speed); (c) clear definition of issues (requirement of fairness); (d) wherever possible, the elimination of any element of surprise at the trial (requirement of fairness); (e) control and supervision by the court of the progress of the proceedings (effectiveness of the trial); (g) effective methods of execution (ultimate effectiveness of the trial); and (h) a speedy and authoritative system of appeal (requirement of fairness, and substantial justice in the end).

Impediments to justice not to be multiplied

1-B.6. As Cardozo observed,[1] "a system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity."

The same idea has been expressed more recently by Chief Justice Warren,[2] who aptly stated that—

> "the orderly and expeditious processing of litigation is a right which each of us should be able to ask of our judicial system, no matter what our status in life or how meagre or non-existent our resources may be. In the name of human dignity we can ask no less, yet we must admit that we are falling far short of our goal."

Secondary objectives of procedure

1.B.7. Procedure, thus, exists for the sake of something else, for the sake of the substantive law.[3] This is its primary objective. But procedure has many secondary objectives. It must give the parties a feeling that they are being dealt with fairly. It must serve the cause of efficiency. And it must yield final and lasting adjudication.[4]

Ideal system of procedure

1-B.8. These objectives may sometimes come into conflict with each other.[5] In an imperfect world, limits have to be put on the length and amplitude of an inquiry into truth. An ideal system of procedure would be one which could achieve these objectives to the maximum extent practicable, and harmonise them to the extent possible.

Importance of procedure to ordinary citizen

1-B.9. The importance of procedure to the ordinary man must also be pointed out. As has been observed,[6]—

> "It is from the practice and procedure of the courts—that is, the way in which a case is conducted, the facts discovered from examination and cross-examination and the like—that the ordinary citizen, as litigant, witness, or even

1. Cardozo J. dissenting in *Read v Allen*, (1932) 286 U.S. 191, 209.
2. Quoted in Sutherland, The Path of the Law from 1967 (1968), page 216.
3. Hepburn, The Historical Development of Code Pleading, (1897), pages 19-20, cited in Fleming, Civil Procedure (1965) page 2.
4. Fleming, Civil Procedure, (1965) page. 2.
5. *Ibid.*
6. Final Report of the Evershed Committee on Practice and Procedure, (1953), para 1.

spectator, obtains his experience of our legal system; and on that evidence he is likely to form his judgment on the claim commonly made by Englishmen to excellence in the administration of Justice."

Importance of Procedure

1-B.10. Long ago, a writer, emphasising the importance of adjective law, observed.[1]—

> "Procedure should always be indeed the "handmaiden of justice", its motto should be that of the Prince of Wales, *Ich dien*. This cardinal fact is widely admitted, but has often been overlooked in practice."

But, to recognize that procedure exists primarily to implement substantive right, does not detract from its importance. In an ideal world where every one obeyed implicitly the commands of substantive law, procedure would possess no importance.[2] Nor would it be of much value where the time and the means and the will to get the bottom of every dispute and grievance were all unlimited.

1-B-11. At the same time, as an American writer has observed[3]— of life, and limitations on the amount of human energy worth spending on this one phase of human activity, all conspire to make procedure of very great importance and also to give it functions beyond that of serving substantive law"[2]

Need for improvement

1-B.11. At the same time, as an American writer has bserved[3]—

> "The need for procedural improvement in the civil courts is a subject of much current interest and effort on the part of the organised American bar, as well as of the judicial and other official agencies. It is fair to state that a steady progress in the improvement in civil procedure is being made. It is doubtful, however, whether any efforts at reform, no matter how sincere or how long continued, can reduce our civil procedure to that degree of simplicity which the layman is likely to think it ought to have. The situations which rules of procedure are designed to meet are in many cases rather complicated; and the framing of 'simple' rules to control complicated situations too often results not in simplicity, but rather in uncertainty and ambiguity, the resolving of which in turn entails the exercise of uncontrolled, and in procedural matters virtually, unreviewable, discretion by the judge."

1-B12. These are the principles which have guided our approach.

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1. Hepburn, the Historical Developments of the Code Pleading, (1897), 19, 20, cited in Fleming, Civil Procedure, (1965) page 2.
2. See Fleming, Civil Procedure, (1965) page 2.
3. Mayers, the American Legal System, (1955), page 242.

Important recommendation

1-B.13. We shall now refer to some of the important matters in respect of which we have recommended an amendment of the law.

Res Judicata

1-B.14. One of the significant provisions of the Code[1] relates to *res judicata*. The provision in the Code on subject is, however, not comprehensive enough to cover a few proceedings, and we have considered it necessary to suggest an amendment in order to extend its scope by an express provision to certain proceedings.

Further, the present requirement that the court whose judgment is sought to be set up as *res judicata* in the later suit should have been competent to try the subsequent suit, creates difficulties when a question which was decided by the previous court comes up for decision before a later court of higher jurisdiction. We are therefore recommending an amendment in the procedure in this regard, under which a court of lower jurisdiction will, when such a question comes up incidentally, be expected to refer the matter to the District Court, so that the trial of the entire litigation before a more competent court can be arranged. These amendments should not be regarded as merely technical, because it is well-known that the doctrine of *res judicata* is based on the principles that there ought to be a finality in litigation and that a person ought not to be vexed with the same controversy twice.

Suits relating to public matters

1-B.15. While our recommendation regarding *res judicata* and certain other matters is intended to reduce delay, there is another object of law reform which we have sought to achieve, namely, modernisation and simplification of the law, in proposing expansion of the scope of suits relating to public matters. In the Code, there are, at present, two main provisions[2] covering suits relating to public matters, namely, section 91 which deals with suits relating to public nuisances, and section 92 which deals with suits relating to public trusts. As society advances and the life of the community becomes more complex, the importance of injuries to the public (as contrasted with injuries to private individuals) increases. The relevance of these phenomena is seen not only in the criminal law—we had occasion to deal with this aspect in the field of criminal law in one of our Reports,[3]—but also in the field of civil law. Public nuisances are familiar and well understood types of injuries to the public; but there are other injuries to the public, and there ought to exist a provision for enabling responsible persons to file suits for the removal of public injuries of other kinds. It is from this point of view that we are recommending an amendment of section 91, which will widen its scope so as to cover all injuries to the public.

1-B-16. We need not deal elaborately with the scope of injuries to the public that will be covered by the amended section, but we may state, by way of illustration, that in the case of big frauds on

1. Section 11.
2. Sections 91-92.
3. 47th Report (Social and Economic Offences).

consumers, whether they be consumers of goods, services or other objects of consumption, it will be possible, under the amended section, to bring a suit on behalf of the consuming body. Such a suit could appropriately be for declaration or for injunction. It is exiomatic that the existence of a suitable procedure facilitates the pursuit of appropriate remedies; and this, in turn, also helps in the clarification of substantive rules of law relating to the matters which are the subject-matter of the remedies pursued. It could even pave the way for legislative action. As an American writer[1] has pointed out, constitutional litigation, even where unsuccessful in the courts, may stimulate the legislature to action. "All the major social changes which have made America a finer place to live have their basis in fundamental constitutional litigation. Somebody had to sue somebody before the legislature took long overdue action"[2].

1-B.17. In respect of the right of second appeal, we recommend an amendment which will reduce both expense and delay. The increasing number of second appeals in the High Courts has added to the arrears of the High Courts, with the result that appeals which are more than five years old, come up for hearing today; but quite apart from this aspect, the jurisdiction of the High Courts in second appeal has, to a large extent, been wrongly invoked in order to seek interference at the hands of the High Courts in respect of questions which are really questions of fact. Questions of law are the only questions which ought to be dealt with in second appeal. The role of the High Court, as we conceive it, is not that of correcting errors of fact in matters which come before it. Its proper role is of maintaining and re-establishing uniformity in matters of law, and re-introducing certrainty, where necessary, and of keeping the content of the law intelligible and accessible by means of a binding precedent. This is our approach, and consistently with this approach, we are recommending an amendment of section 100 which will permit second appeals only on substantial questions of law. We have dealt with the broad features of our approach in the relevant chapter, where we consider the question of amending section 100.

Revision

1-B.18. Analogous to the topic of second appeals is that of revisional jurisdiction of the High Court under section 115 of the Code. Controversies galore have, from time to time, arisen as to the exact scope of this jurisdiction; and it is well-known that some of the expressions which occur in the section,[3] such as "case decided", "material irregularity" and the like, have offered a fertile field for the exercise of legal ingenuity. But these expressions have also been the cause of considerable delay in the administration of justice, and of avoidable suffering to litigants.

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1. Yannacone, "A Lawyer answers the Technocrats" (August-September, 1969) 5 Trial at 14-15 cited in "The New Public Interest Lawyers" (1970) Yale Law Journal, 1069-1101.
2. Yannacone, quoted in Rogin, All He Wants to Save is the World, Sports Illustrated Feb. 3, 1969, at 24, cited in "The New Public Interest Lawyers" (1970) Yale Law Journal 1069-1109.
3. Section 115.

1-B-19. As Rangnekar, J. observed[1] with reference to section 115—

"Here a professional lawyer is sorely perplexed and bewildered by the conflict of judicial decisions as to what is the meaning of the expression "case which has been decided" in S. 115, Civil P. C. and what is the meaning of Cl. (c) in that section when it is said that the Court has acted in the exercise of its jurisdiction "illegally or with material irregularity", and one can only express a pious hope that the legislature may step in and say precisely what it means and fix the limits of revisional jurisdiction of the High Courts, in a manner intelligible even to a layman."

The first two clauses (a) and (b) of S. 115 do not present any difficulty; it is the last clause that does.

1-B.20. We have, after careful consideration, come to the conclusion that revisional jurisdiction exists solely for the purpose of correcting manifest and serious injustice; and the correction of such injustice is amply taken care of by the powers of High Courts under section 227 of the Constitution. Any other matters decided by lower courts—even though the decision may appear to be erroneous—should not be taken to the High Court in revision. On this principle, we are recommending the deletion of section 115.

Written Statements

1-B.21. Litigation cannot be properly conducted if the points for determination are not properly presented to the Court. And, the points for determination cannot be properly presented if the court has not, before it, the case of each party in a precise and concise form. It is on this philosophy that procedural codes require the parties to file pleadings, and lay down elaborate requirements as to the form and contents of pleadings. This may sound elementary; but we are constrained to refer to these aspects, because we find that the rule which deals with the written statement (defence) of the defendant,[2] leaves it to the discretion of the court to require the defendant to file his defence. We are of the view that it should, in every case, be obligatory for the defendant to file a written statement, and that failure to do so should empower the court to pronounce judgement against him. There are provisions on the subject in the Code—0.8, r. 1 to 0.8, r. 10, but they are either incomplete in their scope or defective in their expression. We are recommending amendments to remove these defects.

Disposal of case on preliminary issues

1-B.22. Considerable delay is often caused by the tendency of courts to avoid the decision of all the matters in issue in a suit, on the ground that the suit could be disposed of on a preliminary point. In such cases, when the decision of the trial court on the preliminary point is reversed in appeal, the matter has ordinarily to be remitted to the trial court again, with the result that the inquiry

1. *Bai Chandan* v. *Chholalal*, A.I.R. 1932 Bombay 584, 586.
2. Order 8, Rule 1.

into other issues commences after the expiry of a long period of time, when documents might have been lost, the memory of witnesses might have faded, and, in general, the grip of the judge over the litigation would have been lessened.

We think this should be avoided, and we are, therefore recommending an amendment of the relevant rules, under which it would be obligatory for the court to decide all issues, subject to certain specified exceptions relating to jurisdiction and bar of suit.

Suits concerning the family

1-B.23. Litigation in the past, in India, has revolved mainly round questions of property. Even where questions concerning personal law and allied branches of the law were at issue, the indirect objective of the litigation was, in many cases, the establishment of proprietary rights, for example, in suits for adoption and proceedings as to guardianship. Litigation in future, is, however, likely to gain new dimension. By way of this illustration, we may state that disputes concerning the family will be brought with increasing frequency into the arena of litigation.

1-B.24. In her remarkable work, *The Century of the Child*, Ellen Key[1] quotes a dramatic work called *The Lion's Whelp*:

> "The next century will be the century of the child, just as this century has been the woman's century. When the child gets his rights, morality will be perfected. Then every man will know that he is bound to the life which he has produced with other bounds, than those imposed by society and the laws. You understand that man cannot be released from his duty as father even if he travels around the world; a kingdom can be given and taken away, but not fatherhood".

1-B.25. We do not, in this Report, pause to consider whether the traditional judicial machinery is an ideal system for the resolution of such disputes; but, so long as it remains the only machinery available for the purpose, it should be so moulded as to enable and encourage the judge, to perform more satisfactorily the duty of adjudicating on these new types of disputes. This basic consideration has encouraged us in recommending the insertion of a set of new provisions[2] to deal with litigation involving matters concerning the family.

1-B.26. When courts encounter problems concerning the family in the context of conventional litigation, they tend to deal with them in a conventional way. This is understandable. "The judge is, above all, a skilled lawyer; a lifetime lived in the law has inculcated in his its promises, its analytical techniques, its principles"[3]. To correct this attitude in so far as litigation concerning the family is concerned, a few amendments would, we think, be desirable.

1-B.27. The law is never more nobly applied then when it is for the alleviation of the economic suffering of those who approach

1. Ellen Key, The Century of the Child, (1909), page 45, cited in Graham Parker, "Century of the Child" (1967) 35 Canadian Bar Review, 741, 743.
2. Order 32-A (proposed).
3. H.W. Arthur, "Developing Industrial Citizenship, (1967) 25 Can. Bar Rev. 796, 815.

its portals. The Code has a Chapter[1] dealing with suits by paupers. We are recommending certain changes in this respect, which will, we hope, improve its utility as a weapon in the fight against poverty. We may add that the question of the impact of law on poverty deserves to be considered in a comprehensive manner.

1-B.28. A few other matters relevant to poverty—the question of legal aid and the question of court fees—are outside the scope of the Code. The former is being considered by a separate Committee.[2] We have not, therefore, gone into these two aspects at length, but even so, wherever a point concerning legal aid or court fees required serious attention, we have thought it appropriate to refer to it, and are making appropriate recommendations in the matter, in the hope that the Union Government will be able to persuade the State Governments to adopt these recommendations.

1-B-28-A. At present, in suits on mortgages, the Code[3] makes it compulsory to have two decrees—preliminary and final—whether the suit be for foreclosure, redemption or sale. This makes the procedure cumbersome, and almost invariably if two appeals are filed against two decrees in the same suit. We think that the procedure could be made simpler by substituting one decree (corresponding, broadly, to the present preliminary decree), and the rest of the proceedings could be relegated to execution. Following this approach, we are recommending a recasting of the relevant provision of order 34.

Summary procedure

1-B.28-B. To prevent unreasonable obstruction of a suit by a defendant who has no defence the Code[4] has a Chapter providing for summary procedure. The utility of this Chapter is obvious. The application of this Chapter is, however, limited to certain specified courts and to particular classes of suits. In order that greater use may be made of this useful chapter, we are recommending certain amendments in the relevant rules.

Delay caused by stay orders

1-B-29. The chronology of litigation under the Code is, in its bare essentials, fairly simple. But it gets clogged by a variety of hindrances. Examples of such hindrances are furnished, at the stage of trial of a suit, by appeals and revisions against what have come to be known as 'interlocutory orders'. At the stage of execution, obstacles abound owing to stay orders obtained on one ground or another by taking recourse to miscellaneous appeals or appeals from orders or revisional applications. To minimise the delay caused by such obstacles, we are recommending certain amendments in the relevant rules.[5] We hope, that they will advance the cause of expedition, without undue hardship to litigants.

1. Order 33.
2. Legal Aid Committee.
3. Order 34.
4. Order 37.
5. (a) Order 41, rule 5;
   (b) Order 21, rule 26;
   (c) Order 39, rule 1.

1-B-30. In one of the Chapters appearing towards the end of our Report,[1] we have thought it necessary to discuss the problem of training our junior judicial officers and to make some important and radical suggestions in that behalf. We ought to add that, though the subject-matter of this Chapter is technically outside the scope of our present inquiry and report, we are satisfied that it is our duty with all the emphasis we can command, to earnestly appeal to the Union Government to request the State Governments to take immediate and suitable action in terms of our recommendations. We are quite clear in our minds that the terms of service under which junior judicial officers are employed and the fringe benefits and general amenities which are made available to them are wholly unsatisfactory and meagre to a degree, and that they need to be immediately improved if competent and capable lawyers have to be attracted to the judicial career. It must be borne in mind that the work which these junior judicial officers discharge in their respective courts in small taluk towns is, in substance the foundation of what is described as the Rule of Law. As Justice Holmes once observed, the basis of the rule of law is laid down not necessarily in important and sensational constitutional cases, but in small and humble disputes between litigants who bring their causes to the courts.

1-B-31. For efficient, satisfactory and expeditious administration of justice which would command public confidence and enjoy public respect, an enlightened, speedy, fair and progressive procedure is no doubt, essential; and that is what we have attempted to do in our present report. But procedure alone will not solve the problem of accumulating arrears which have assumed alarming proportions in all the courts in our country. Procedure can hope to succeed in attacking this problem, provided the Judges who preside over the courts are conscious of their obligations to the community at large and exercise their powers and discharge their functions determined to remove from the administration of justice the widely spread and somewhat justified complaint of delay, costs and unpredictability. It is our confident belief that, in the context of today, and having regard to the hopes and aspirations of the common men and women in this country, the judiciary can no longer be content to play merely the role of an umpire and allow the adversary character of our litigation to proceed uninterrupted by the wise and judicious interventions from the judges from time to time. Since, in our view, the junior judiciary has to play a major role in the conduct of the causes which are filed before them, we think it is of utmost importance to initiate them into the philosophy of law and its major role in relation to the changing society. Besides, it is hardly necessary to emphasise that, in course of time, District Judges and some of the High Court Judges are drawn from this class of junior judicial officers. That is why we have set out our thoughts in the last chapter and made recommendations which we think might serve the purpose we have in mind.

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1. See Chapter 53.

1-B.32. "Training" has been described[1] as the "process of developing skills, habits, knowledge and attitudes in employees for the purpose of increasing the effectiveness of employees in their present positions, as well as preparing employees for future Government positions". Judicial officers have responsible and varied functions to perform, and should receive adequate training before they enter on their office. We have not in mind merely the inculcation of professional skill and knowledge. Training must also aim at broadening the mental horizons, values and attitudes[2] of the officers, by instilling the right mental attitudes on the question of judicial conduct. This becomes relevant because the judge holds a pivotal position, and has a vast variety of discretionary functions which are vital in the effective working of the law as an instrument of social justice.

1-B.33. In every organisation, the training of employees, which sets the tone and quality of the organisation, is useful. It is more so in a career service,[3] with opportunities for successive promotions to higher grades.

1-B.34. The detailed recommendations on the subject[4] will show that when we speak of "training" we do not have in mind the organisation of mere lectures. What we have in mind is the introduction of judicial training at the initial stage. Case studies on particular events in the life of litigation, which illustrate typical situations, would be eminently suitable, because "a generalised understanding must emerge from experience of the particular."[5]

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1. William G. Torpey, Public Personnel Management, New York, (D. Van Nostrand Company, Inc.) (1953), page 154.

2. Cf. H.V. Kamath, Principles and Techniques of Administration, Bharatiya Vidya Bhavan, Bombay-7. (1971) page 19.

3. Avasthi and Maheshwari, Public Administration (1966), Chapter 17, Education and Training, pages 311—315.

4. See Chapter 53.

5. C.M. Chadwick, "Administrative Training: Notes of Syllabus". Journal of Administration Overseas (London), Vol 5, No. 3, July 1966, pages 167—176, Abstracted in Indian Institute of Public Administration, New Delhi, Public Administration Abstracts (January 1967), pages 5-6.

CHAPTER 1-C

EXTENT OF AND APPLICATION OF THE CODE AND OTHER PRELIMINARY MATTERS

Introductory

1-C.1. The extent and application of the Code and other preliminary matters are dealt with in sections 1 to 8 in the body of the Code.

Section 1 and Laccadive Islands

1-C.2. There is one point to be considered regarding the territorial extent of the Code. This relates to the Laccadive Islands.

In the earlier Report,[1] it was stated—

> "Incidentally, it may be addded that the Administrator of the Laccadive, Minicoy and Amindivi Islands has, in his suggestion relating to the Civil Procedure Code sent to the Commission, suggested that sections 36 to 43 should, for uniformity, extend also to Laccadive and Minicoy Islands. (At present, they extend only to Amindivi Islands). This has been accepted, and Order 34 also proposed to be extended to those Islands".

1-C.3. This was a very limited suggestion. we find, however, that by a Regulation,[2] practically the whole Code of Civil Procedure has been extended to those Islands. Having regard to the rather undeveloped condition of those islands, we suggest that Government should reconsider the question how far the Code of Civil Procedure should extend to these Islands.

1-C.4. From a letter[3] which the Commission has received from the Member of Parliament representing the Islands, it would appear that there are no lawyers in the Islands, and English knowing people are few. Facilities for prompt movement are also not available, and a sophisticated Code of Procedure may not be quite appropriate for these areas.

Similar observations were made in a judgment of the Kerala High Court.[4]

We express no opinion on the point; but recommend that the Government may have this aspect examined, after inquiring into local conditions prevailing in the Islands, and consider the question whether the law should be simplified.

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1. 27th Report, page 89, note on Section 1, paragraph (vi).
2. Regulation 8 of 1965, effective from 1st October, 1967.
3. Letter of Shri P.M. Sayeed, M.P. to the Law Commission, dated 20th April, 1972.
4. *M.P. Atta Kova* v. *N.K. Kova Thangal and others*, Second Appeal No. 1119 of 1969 decided on 23rd October, 1970 (Kerala).

CAPTER 1-D

SUITS IN GENERAL

Introduction

1-D.1. Part I of the Code deals with litigation in the simplest case, from the time the plaintiff decides to sue and has to select his forum, to the time, when, having obtained a decree, he proceeds to execute it. It assumes that the plaintiff is sane and adult, and neither an indigent person, nor a soldier etc. It also assumes that the defendant is, similarly, sane and adult, and is not an indigent person, a soldier etc. Further, it assumes that the suit is not compromised, and that, in the course of the litigation, neither party dies, becomes insolvent, or otherwise assigns his interest in the subject matter of the suit; and, most important of all, it assumes that the suit is not delayed by reason of interlocutory appeals.

1-D.2. These assumptions explain the apparent simplicity of sections 9 to 35-A, contained in this part of the Code. Moreover, most of the important stages of the trial are left to be dealt with by rules in the Orders contained in the First Schedule.

Section 2—Definition of "decree"

1-D.3. Section 2(2) defines the expression "decree". In the Commission's earlier Report[1] the question whether an order rejecting a memorandum of appeal on the ground of deficit in court-fees should be treated as a "decree", was considered. The Commission thought that it would not be convenient to insert a provision on the subject in the definition of "decree", as there is no specific provision in the body of the Code or in the rules, relating to *rejection* of a memorandum of appeal (except Order 41, rule 3(1) and (2) which deal with rejection on the ground of certain formal defects).

Recommendation

1-D.4. We appreciate the difficulty felt by the previous Commission, and have, after some discussion, come to the same conclusion.

Section 9

1-D.5. With reference to section 9, the previous Commission[2] had in the earlier Report, occasion to consider a question relating to religious offices. Reviewing the case law, on the subject, it stated the position as follows:—

> "(i) *Suits relating to religious offices to which fees are attached. Such suits raise no difficulty.*

1. 27th Report, page 89, note on section 2(2).
2. 27th Report, pages 90-91, note on section 9.

(ii) *Suits relating to religious offices to which fees are not attached.* These can be classified into:—

(a) offices which are attached to a sacred spot;

(b) offices which are not so attached.

(2) The Bombay High Court seems to have recognised a distinction between (a) and (b) above, and the majority of the decisions[1] of the High Court allow a suit for an office under (a) above but not for an office under (b) above.

(3) The other High Courts do not seem to recognise this distinction".

1-D.6. Its principal conclusion was thus expressed:

"Since the distinction made between cases (a) and (b) is not recognised by the majority of the High Courts, it is unnecessary to amend the section".

1-D.7. It appears to us, however, that opportunity should be taken of clarifying the position on the particular point about which the Bombay view differs with that of other High Courts.

1-D.8. The general propositions stated below are not in doubt—

(1) A suit for a declaration of religious honours and privileges simpliciter will not lie in a civil court.

(2) But a suit to establish one's right to an office in a temple, and to honours and privileges attached to the said office as its remuneration or perquisites, is maintainable in a civil court.

(3) The essential condition for the existence of an office is that the holder of the alleged office shall be under a legal obligation to discharge the duties attached to the said office and for the non-observance of which he may be visited with penalties.

1-D.9. The controversy is only in relation to an office not attached to a sacred spot and not carrying any fees. We may illustrate the controversy by referring to a Bombay case,[2] where it was held that a suit to establish a claim to perform the Urs ceremonies and to manage the offerings can be entertained in a civil court, because, though the offerings may be uncertain and voluntary, still, when they are made to a particular deity, they are the property of the temple (or shrine) concerned, and can be the subject-matter of a civil suit. One of the reasons which the court gave in its judgment is relevant to the present point, and may be quoted—

"Again, it is not in respect of what may be called an 'itinerary', right over a certain territory, such as formed the

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1. A number of cases were cited.

2. *Kasam Khan* v. *Kaji Isab*, A.I.R. 1926 Bom. 161.

subjects of the suits in *Madhusudan Parvat* v *Shankaracharya* and *Sayad Nurudin* v. *Abas*. The present suit is in regard to a religious office attached to a shrine, and if the distinction suggested by Mr. Mulla at page 22 of his commentary for reconciling the decisions of this High Court is justified, the suit is not barred".

1-D.10. This distinction, however, does not appear to have found favour with the other High Courts.[1] In our view, the distinction is unnecessary, and the law should be clarified so as to override the distinction made in some of the Bombay cases.

Though the controversy relates to religious offices, the clarification has to apply to all offices, in order to avoid the argument that other offices are governed by any other rule.

1-D.11. Accordingly, we recommend that the following Explanation should be inserted[2] below section 9:—

"Explanation 2.—For the purposes of explanation 1, it is immaterial whether fees are attached to the office or not, and whether the office is attached to a particular place or not".

Section 11 whether requires amendment in consequence of recommendation for trial of all issues

1-D.12. It is being recommended[3] that a Court must decide all issues, even if the case can be disposed of on a preliminary point. This necessitates a change in the provisions as to appeal. Where the decision on the preliminary issue is favourable to the defendant, and the other issues are decided against the defendant, then, at present, he cannot appeal. This position is now proposed to be changed.[4] It would appear that an express amendment of section 11 is not necessary on this point.

1-D.13. With reference to the principle of *res judicata* (section 11), the Commssion in its earlier Report[5] proposed its extension to execution. Further, it stated[6]—

"A suggestion has been made, that an express provision should be inserted extending the principle of *res judicata* not only to execution proceedings but to all independent proceedings. It is considered unnecessary to make any specific provision of this nature and that, the matter should be left to be dealt with by the Court".

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1. See references in 27th Report, pages 90-91.
2. Section 9, *of* Explanation, to be numbered as Explanation 1.
3. See discussion relating to Order 15, rule 2A.
4. See amendment to proposed section 96.
5. 27th Report, amendment proposed to s. 47
6. 27th Report, page 91, note on s. 11.

1-D.14. The Commission referred to another question in these[2] words—"The question whether an express provision should be made to lay down the rule applicable in cases where cross-suits have been filed between the same parties and have been disposed of by two judgments, has been examined. The point is, whether, if an appeal is filed from one judgment and is not filed from the other judgment, the matters decided in the other judgment become *res judicata*. It has been considered unnecessary to make a specific provision on this point, as the matter should be dealt with by the courts according to the facts of each case."[3]

1-D.15. As regards the first point (applicability of section 11 to execution and independent proceedings), we are of the view that an express provision is desirable. As regards the second point, there is some uncertainty. We shall deal with it later.[4]

1-D.16. We recommend, therefore, that the principle of *res judicata* should be applied to the situations of proceedings in execution and independent proceedings.

Recommendation to insert new section 11A

1-D.17. Accordingly, the following new section is recommended—

"11A. *The provisions of section* 11 *apply, as far as may be, to*—

(a) *proceeding in execution, and*

(b) *civil proceedings other than suits.*"

Section 11 and competence to try subsequent suit

1-D.18. Under Section 11, one of the conditions precedent for applying the bar of *res judicata* against the trial of any suit or issue is that the previous court must have been competent to try the *subsequent suit* or the suit in which the issue is now raised. The existence of this condition, to a certain extent, detracts from the finality of judgments, and gives rise to a certain amount of multiplicity of proceedings. No doubt, the principle behind this condition is a sound one, namely, that the decision of a court of limited jurisdiction ought not to be final and binding on a court of unlimited jurisdiction, in the circumstances in which the condition applies. Nevertheless, it is true that if some method could be devised of avoiding such multiplicity, the attempt would be worth the trouble. We, therefore, set before ourselves the task of devising such a solution. The result of our study and discussions is given below:—

1-D.19. An Allahabad[5] case of civil revision is illustrative.

"The question for consideration before the High Court was whether the decision given by a Court of Small Causes in

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1. 27th Report, page 91, note on section 11.
2. For a review of the case law, see *Mst. Lachhmi* v. *Mr. Bhulli*, A.I.R. 1927 Lah. 289 FB.
3. *Narhari* v. *Shankar*, (1950) 1 S.C.R. 754; A.I.R. 1953 S.C. 419.
4. See discussion as to O. 41, R. 33.
5. *Mansurul Haq* v. *Hakim Moksin*, A.I.R. 1970 All. 604 606 (F.B.) (Case law reviewed)

a suit for arrears of rent will operate as *res judicata* in a suit filed later in the court of Munsif for the recovery of arrears of rent for a different period *and for ejectment.*

1-D.20. The Court of Small Causes had no jurisdiction to entertain the suit for ejectment and therefore, the latter suit had to be filed in the Court of Munsif. The dispute between the parties in the Court of Small Causes was about the rate of rent, whether it was Rs. 15 or Rs. 10 per month. The Judge fixed it as Rs. 10 only. In the subsequent suit, the plaintiff, while praying for ejectment, claimed rent for the period preceding the second suit at Rs. 15 per month. Therefore, the question arose whether the decision given by the Judge of the Small Causes Court about the rate of rent will operate as *res judicata.* Khare J. delivering the majority judgment, said that one of the conditions under section 11 was that the former suit should have been decided by a Court competent to try such subsequent suit. This condition has not been satisfied as the Court of Small Causes is not competent to try a suit for ejectment. It was contended by counsel for the applicants that the Court of Small Causes is a court of exclusive jurisdiction and, therefore, the general principles of *res judicata* will apply. It was also further contended that when general principles of *res judicata* will apply, the condition that the court deciding the former proceeding must also be competent to decide the subsequent suit has to be waived.[1]

1-D.21. It was held that the Court of Small Causes was not to be a Court of exclusive jurisdiction, but merely a court of preferential jurisdiction, in view of the scheme of the Provincial Small Causes Courts Act and section 15, C.P.C. In the absence of a Court of Small Causes, the Court of Munsif has the jurisdiction to entertain and decide suits for the recovery of rent. Therefore, the decision of the Small Causes Court will not bar re-agitation of the same question in the subsequent suit, which the court of Small Causes was not competent to try.

1-D.22. Tripathi J. in his dissenting judgment, held that the Court of Small Causes exercises *exclusive jurisdiction.* Following a Supreme Court case,[2] he held that on the general principles of *res judicata,* a *previous decision* on a matter in controversy, decided after full contest, will operate as *res judicata* in a subsequent regular suit *irrespective of the fact* whether the Court *deciding the matter formerly had or had not been competent to decide the subsequent suit.* Therefore, Tripathi J. held that the decision of the Judge of Small Causes Court operated as *res judicata.*

1-D.23. The Supreme Court[3] has considered the question whether the word "suit" in section 11 can be liberally construed to mean even a part of the suit. It was urged that if the competence of the earlier court is going to be judged by reference to its competence *to try the entire suit as subsequently instituted,* then in many cases where

1. *Raj Lakshmi Dasi* v. *Banamali Sen*, A.I.R. 1953 S.C. 33, relied on.
2. *Gulab Chand Chhote Lal* v. *State of Gujarat*, A.I.R. 1965 S.C. 1153.
3. *Gulab Bai* v *Manphool Bai*, A.I.R. 1962 S.C. 214, 217.

the matter directly and substantially in issue had been tried between the parties by the earlier court, it may have to be tried again in a subsequent suit, because the earlier court had no jurisdiction to tr ythe subsequent suit havng regard to its pecuniary jurdisdiction and that this wohld be anomaolus. It was held—"The world 'suit' has not been defined in the Code; but there can be little doubt that in the context the plain and grammatical meaning of the word would include the whole of the suit and not a part of the suit, so that giving the word 'suit' its ordinary meaning it would be difficult to accept the argument that a part of the suit or an issue in a suit is intended to be covered by the said word in the material clause. The argument that there should be finality of decisions and that a person should not be vexed twice over with the same cause can have no material bearing on the construction of the word 'suit'. Besides, if considerations of anomaly are relevant it may be urged in support of the literal construction of the word 'suit' that the finding recorded on a material issue by the court of the lowest jurisdiction is intended not to bar the trial of the same issue in a subsequent suit filed before a court of unlimited jurisdiction. To hold otherwise would itself introduce another kind of anomaly."

1-D.24. Therefore, the suggestion that the word 'suit' should be liberally construed was not accepted. In other words, it is the whole of the suit which should be within the competence of the court at the earlier time, and not a part of it.

1-D.25. Of course, if the earlier court was a court of exclusive jurisdiction—such as, a revenue court on matters within its competence—its decision would be *res judicata*.[1]

1-D.26. The position is substantially the same in England in this respect.

1.D.27. Diplock L. J. explained the doctrine of *res judicata*[2] in these terms—

> "The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though none the worse for that. Although *Hoystead* v. *Taxation Commissioner* did not purport to break new ground, it can be regarded as the starting point of the modern common law doctrine, the application of which to different kinds of civil actions is currently being worked out in the courts. This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect,

1. *Balwant Singh* v. *Saravij*, A.I.R. 1927 All. 70 (F.B.).
2. *Mills* v. *Cooper* (1967) 2 All E.R. 100, 104 (Diplock L.J.).

unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him. Whatever may be said of other rules of law to which the label of 'estoppel' is attached, 'issue estoppel' is not a rule of evidence. True, subject to the qualification which I have stated, it has the effect of preventing the party 'estopped' from calling evidence to show that the assertion which is the subject of the 'issue estoppel' is incorrect, but this is because the existence of the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."

1-D.28. In the leading case of *Duchess of Kingston*[1], Degrey, C. J. observed—

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a court of concurrent jurisdiction directly upon this point is as a plea, a bar or as evidence, conclusive, between the same parties upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner, conclusive upon the same matter, between the same parties, coming in incidentally in question in another court for a different purpose. But neither judgment of a tribunal of concurrent or exclusive jurisdiction is evidence of any matter which came collecterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment".

Lack of jurisdiction

1-D.29. In order that estoppel by record may arise out of a English judgment, the court which pronounced the judgment must have had jurisdiction to do so.[2] The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise.[3] Thus, a magistrate hearing a summons[4] for the expenses of making up a new street,[5] or for trespass to land,[6] and having jurisdiction for that purpose, may dismiss the summons on the express ground (in the one case) that the street was repairable by the inhabitants, or (in the other

1. *The Duchess of Kingston's case*, (1776) 168 E.R. 1750; Cookle, Cases and Statutes Evidence, (1963), pages 129, 130.
2. *Cf. Rosenfeld* v. *Neuman*, (1953) 2 All E.R. 885 (C.A.).
3. (a) *Rogers* v. *wood*, (1831), 2 B. & Ad. 245.
   (b) *Archbishop of Dublin* v. *Lord Trimleston*, (1849), 12 I. Eq. R. 152.
4. Under the Public Health Act, 1875.
5. See *R.* v. *Hutchings*, (1881) 6 Q.B.D. 300 (C.A.); followed in *Scoot* v. *Lowe*, (1902) 86 L.T. 421.
6. *A.G. for Trinidad and Tabago* v. *Eriche*, (1893) A.C. 518 (P.C.).

that the defendant had established a title to the property; but though such a finding is embodied in the order as drawn up, it creates no estoppel between the parties, for it relates to a matter which the magistrate had no jurisdiction directly and immediately to adjudicate upon, being at most incidentally cognizable, so far only as necessary to his decision on the actual question submitted'.

1-D.30. It appears that the problem is one which is inherent in the co-existence of courts of limited and unlimited jurisdiction. The problem, however, can be solved if a court of limited jurisdiction is required to submit the case to the district court—which is a court of unlimited jurisdiction—whenever the former is satisfied that the suit involves a question of such a nature that if a suit had been brought for relief based principally on that question, the court would have been incompetent to try the suit. What we have stated above may appear to be rather abstract, and we shall, therefore, deal with the matter more elaborately.

1-D.31. If, for example, a court of Munsiff or a Junior Civil Judge trying a suit for rent is faced with the question of title, which, having regard to the value of the immovable property is beyond his pecuniary jurisdiction, then he should stay the trial, and refer the case to the district court, which will transfer the suit to another court competent to decide the question of title.

Recommendation

1-D.32. In the light of what is stated above, we recommend the insertion of a new section as follows:—

To insert new section 23 A.

"23A. (1) Where any court subordinate to the district Court is satisfied that a suit pending before it and within its jurisdiction involves a question of the nature referred to in sub-section (2), the determination of which is necessary for the disposal of the case, the Court shall stay the proceedings and submit the case, with a brief report explaining its nature, to the district Court.

(2) The question referred to in sub-section (1) is a question of such a nature that if a suit had been brought for relief based principally on that question, the Court would have been incompetent to try the suit.

(3) Where a case is submitted under sub-section (1) to the district Court, the district Court shall, after notice to the parties and after hearing such of them as desire to be heard—

(a) transfer the suit for trial to any Court subordinate to it and competent to try the suit referred to in sub-section (2), or

(b) withdraw the suit to itself and try it.

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1. *Cf. Dover* v. *Child*, (1876), 1 Ex. D. 172 (magistrates' refusal to order delivery up of goods under the Metropolitan Police Courts Act, 1839 (2 and 3 Vict. c. 71), s. 40 is not an adjudication on title which he has no jurisdiction to make); *Re Vitoria, exparte Vitoria* (1894) 2. Q.B. 387 C.A. (refusal of receiving order no adjudication on the debt); applied in *King* v. *Henderson*, (1898) A.C. 720, P.C. at page 730.

(4) Where any suit has been transferred or withdrawn under sub-section (3), the Court which thereafter tries such suit may, subject to any special direction in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(5) For the purposes or this section, courts of Additional and Assistant Judges shall be deemed to be subordinate to the district Court.

(6) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(7) The district Court shall cause a copy of such order to be sent to the court by which the case is submitted".

Section 11—Explanation 2

1-D.33. According to the Explanation 2 to section 11, for the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court. It is necessary to examine the back-ground of this Explanation.

1-D.34. The reasons why the judgment of a court of record acts as an estoppel are, that it is against public policy and oppresive on the individual to re-agitate disputes which have been litigated *once for all to finish.*[1]

1-D.35. It has been stated in England[2] that matrimonial cases apart, a decision of an inferior court will operate as an estoppel in the High Court, but the decision ***must be one from which there was*** *an appeal.*

1.D.36. Again, it was stated by Savigny[3] that "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal,[3] and reciprocally in appeal is not admissible on any point not having the authority of *res judicata*".

1-D.37. The history of the second Explanation to section 11 is interesting. Before 1908, there was a conflict of views in India on the question whether a judgment from which no second appeal lay to the High Court was *res judicata.* Some High Courts held that the earlier suit operates as *res judicata,* on the ground that requirement of the section was satisfied when the Court deciding the first suit was competent to try the subsequent suit, *irrespective of the question whether the earlier decision was or was not subject to the same appeal as the decision in the subsequent suit would be, and that a different* interpretation would be straining the language of the legislature. Some High Courts, on the other hand, took the opposite

1. Spencer Bower, Res Judicata, page 2 cited in Phipson, Manual of Law of Evidence, (1959) page 84, 85.

2. *Concha* v. *Concha,* (1896) 11 App. Cas. 541 referred to in Cross on Evidence (1967), page 275.

3. Savigny, System, section 203, cited in *Ansutaben* v. *Sakharam,* (1883) I.L.R. 7 Bom 464, 468 (West, J).

view, and considered that the words "or jurisdiction...competent" in the section admitted of the provisions of law relating to appelability being considered in giving effect to the principle of estoppel which the section is intended to enforce; and that, having regard to the difference in the grades of the Courts administering justice in this country and the qualifications of Judges which differ greatly it was better not to tie down, as far as possible, a court of higher jurisdiction by the decisions of inferior Courts.'

1-D.38. The legislature, when it revised the Code in 1908, inserted the second Explanation in section 11, and, in effect, adopted the wider view.

1-D.39. The second Explanation was, thus, intended to remove doubts arising in a particular class of cases as to the applicability of the section, when judgment had been given in a suit against which no appeal or no second appeal lay, and the question arose whether such judgment could operate as *res judicata*.

1-D.40. The effect of the change made in 1908 is illustrated by post 1908 cases. It is sufficient to refer to one case.

1-D.41. In an Allahabad case,[2] a suit had been brought to recover damages on account of the fruit of a grove. The suit was dismissed on the ground that the plaintiff had failed to prove his title to the grove. There was no second appeal in the case, as the suit was one of a nature cognizable by a Court of Small Causes.

It was held that a subsequent suit between the same parties for the recovery of possession of the grove and damages was barred by *res judicata*. The fact that the previous decision was not subject to second appeal was immaterial, in view of second Explanation to section 11.

Recommendation

1-D.42. In view of the above background of the second Explanation to section 11, the Explanation should be retained.

Section 15A (proposed)—Objections as to the pecuniary jurisdiction

1-D.42A. It often happens that the judgment of a Court which has tried a suit is challenged in appeal or revision on the ground that the Court had no pecuniary jurisdiction, that is to say, the Court was not competent to try the suit having regard to the value of the subject matter of the suit. (The limits of pecuniary jurisdiction of various courts are set out in the Civil Courts Act of the State concerned). We are of the view that in the interests of expedition the Code of Civil Procedure should contain a provision, similar to that contained in the section[3] relating to objections as to place of suing, to the effect that objections as regards pecuniary jurisdiction should be raised at the earliest opportunity, and (even if so taken) should not prove fatal unless there has been a consequent failure of justice.

1. See *Avanasi Gounden* v. *Nachaminal*, (1906) I.L.R. 29 Mad. 195-199 (reviews cases).
2. *Musaddi Lal* v. *Jwala Prasad*, 16 I.C. 496 (Allahabad) (Chamier, J.).
3. Section 21.

While we recognise that there is a distinction between territorial competence and pecuniary competence, we have, after some discussion, come to the conclusion that any theoretical basis that may exist for the present position should be regarded as over-ridden by the paramount consideration of avoiding delay.

Recommendation

1-D.42B. Accordingly, we recommend that the following section should be inserted after section 15:—

> "15A. *No objection as to the competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice*".

Section 20 and suits against the Government

1-D.43. The next section which we have to discuss is section 20, which deals with forum. In connection with suits against the Government, questions of forum sometimes present difficulty, because the Government has no "residence", and the question how far the Government can be said to "carry on business" is one which, for a long time, engaged the attention of courts.[1] It will be more convenient, from the practical point of view, if the place of the plaintiff's residence is treated as a proper forum, in case of suits against the Government, in addition to the forum permitted under the existing provisions. There will be no hardship to the Government.

1-D.44. In connection with the forum for suits against the Government, it would be of interest to note that in the U.S.A., the plaintiff's residence constitutes the forum. The relevant provision[2] is as follows:—

> "S. 1402. *United States as defendant*—
>
> (a) Any civil action against the United States under sub-section (a) of section 1346 of this title[3] may be prosecuted only in the judicial district where the plaintiff resides.
>
> (b) Any civil action on a tort claim against the United States under sub-section (b) of section 1346 of this title[4] may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

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1. 27th Report, pages 94-95, note on section 20, and suits against the Government.
2. 28 U.S. Code, 1402.
3. Title 28, s. 1346 (a) of U.S. Code relates to various suits in the district courts of the U.S. against the Government for money wrongfully collected as tax etc. The jurisdiction is concurrent with the Court of Claims.
4. Title 28, s. 1346 (b) of U.S. Code relates to Civil Claims against the United States in the district Court not exceeding 10,000 dollars, founded upon the Constitution, federal law, or regulation, contract etc.

Recommendation

1-D.45. While it is not necessary to confine the forum *only* to the plaintiff's residence (as has been done in the rule in the U.S.A. quoted above), that should constitute an additional forum. We, therefore, recommend that the following clause should be inserted in section 20—

> "(bb) or, in the case of a suit against the Government, the plaintiff, or any of the plaintiffs, if there be more than one, resides, carries on business or personally works for gain."

Section 20—Explanations

1-D.46. There is another point concerning Section 20 (forum for suits other than those relating to immovable property). Broadly speaking, under the section, the forum is the place where the defendant actually and voluntarily resides, carries on business or personally works for gain, or where the cause of action arises in whole or in part. There are two Explanations annexed to the section, quoted below:

> *"Explanation I.*—Where a person has permanent dwelling at one place, and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.
>
> *Explanation II.*—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

1-D.47. Both the Explanations *prima facie* appear to be obscure and redundant, and one of them suffers from a drafting flaw also, as is shown below.

1-D.48. First, we discuss Explanation I. If a person has a permanent dwelling and a temporary residence at different places, the first Explanation provides that he shall be deemed 'to reside' at both places, in respect of any cause of action arising at the temporary residence. Now, it is not clear whether this Explanation is intended *to expand* the scope of the main part of the section or *to limit* the scope of the main part of the section. Under the main part, a suit can be filed either where the defendant "actually and voluntarily" resides or carries on business or personally works for gain, or where the cause of action arises in whole or in part. If the object of the Explanation is to indicate that temporary residence is enough to give jurisdiction, then the further requirement as to the cause of action is not intelligible, because the place where the cause of action arises is the proper forum even under the main part, and the Explanation gives no additional forum. If, on the other hand, the object of the Explanation is to give jurisdiction to the court of permanent dwelling, even then the requirement as to cause of action renders the Explanation useless.

1-D.49. There is also a drafting flaw, inasmuch as while the main part of the section is in terms of "actually and voluntarily resides", the fiction created by the Explanation extends only to "resides". In other words, the Explanation is not in total harmony with the main part.

1-D.50. If the object of the Explanation is to *limit* the operation of the main part as regards a place of temporary residence, then the Explanation fails to carry out that object clearly, for, under the main part, even a temporary residence would suffice, and the Explanation does not indicate in definite terms that a temporary residence *shall not suffice.*

1-D.51. The Explanation could, no doubt, be made more intelligible by removing the requirement of the cause of action, and by providing that the place of permanent dwelling is also a place where the defendant *is deemed* to "actually and voluntarily" reside etc., notwithstanding that the permanent dwelling place is not his actual residence. But, as a matter of policy, this is to be avoided. If the permanent dwelling is an abandoned home and is a "dwelling" only in name, there is no reason why it should constitute a possible forum. The only course left, therefore, is to delete the first Explanation, because it is redundant as it stands now, and cannot, by any modification, be made to perform a useful function.

1-D.52. We now turn to the second Explanation. The first part of the Explanation is, no doubt, useful, since, where a corporation has its main office at any place (in India), it is to be deemed to carry on its business there, irrespective of the nature of the work that is actually carried on there. But the latter part of the second Explanation is otiose. If no part of the cause of action arises at the place of the branch office, the corporation cannot, as the wording now stands, be said to transact business at the place.[1] In the presence of clause (c), the purpose of the second part of Explanation 2 is obscure.[2] Where the suit is instituted at a place where a corporation has a subordinate office, the court cannot dispense with the requirement that the cause of action must arise at such a place.[3] If no part of the cause of action arises at a branch office of the corporation, a suit is not maintainable in the court of that place.[4] The latter part of the second Explanation, therefore, serves no useful purpose.

1-D.53. The matter was discussed at length in the earlier Report[5] also, but no change in the wording of the section was suggested.

1-D.54. We are of the view that as regards Explanation 2, the latter half should be deleted. There is, in our view, a case for providing, as a forum, the place where there is a subordinate office, *irrespective of the question whether it is also the place of accrual of*

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1. *Bhola Nath* v. *Empire of India Life Insurance Co.*, A.I.R. 1948 Lah. 56, 57, paragraph 16 (reviews cases).
2. *Bharat Insurance Co.* v. *Wasudeo*, A.I.R. 1956 Nag 203, 204, para 7 (reviews cases).
3. *Bharat Insurance Co.* v. *Wasudeo*, A.I.R. 1956 Nag 203, 204, para 8.
4. *Nadungadi Bank Ltd.* v. *Central Bank of India Ltd.*, A I.R. 1961 Ker. 50.
5. 27th Report, pages 92 to 94, note on section.

the cause of action. The present restriction, as was stated in the Nagpur case,[1] causes hardship. (That case related to the business of insurance, but the hardship is common to all cases dealing with corporations).

1-D.55. It was stated in the Nagpur case—

> "It is much to be regretted that an insurance company should not be amenable to the jurisdiction of the court at the place where it maintains a subordinate office irrespective of any question about the accrual of cause of action. But few policy holders realise the implications of the forms of the contract prepared by the insurance companies which, though operating all over the country by receiving proposals and premiums through their various subordinate offices, carefully undertake to pay only at the head office situated in many cases far away from the policy holder or his assignee or nominee."

1-D.56. The observations, though made with reference to insurance business, apply equally to corporations carrying on other business also.

1-D.57. It may be noted that in the U.S.A. the rule applicable (in federal courts) as to venue generally,[2] after providing that the defendant's residence constitutes the forum in "non-diversity" cases, goes on to enact as follows:—

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
>
> (d) An alien may be sued in any district."

1-D.58. The suggestion made above would not, therefore, be novel.

1-D.59. The amendment suggested may appear to be giving a very wide forum. But, in practice, the suit will be filed only where some relationship exists between the subordinate office and the plaintiff.

Recommendation

1-D.60. In the result, our recommendation is as follows—

(a) the first Explanation to section 20 should be deleted;

(b) the second Explanation should be modified so as to read as follows:—

"*Explanation*—A corporation shall be deemed to carry on business at its sole or principal office in India and *also at any place in India where it has a subordinate office.*"

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1. *Bharat Insurance Co.* v. *Wasudeo*, A.I.R. 1956 Nag. 200, 204.
2. 28 U.S. Code 1931.

Section 20(c) and proposed Explanation 3

1-D.61. Under section 20(c), a suit can be filed where the cause of action arises wholly or in part. As a general rule, it is well settled that in the case of a suit on contract the cause of action arises in part where the contract is to be performed. The place of performance of a contract depends on the terms of the contract. The contract Act has only one provision[1] as to place of performance which, however, does not solve the problem of forum.

1-D.62. Now, in respect of payment of debts, a controversy as to the place where the debt is to be repaid has arisen. So far as the Code of Civil Procedure is concerned, this controversy has assumed this form, namely,—how far is the English rule that the debtor must find the creditor, to be invoked for the purpose of giving competence to a court having jurisdiction at the place where the creditor resides or carries on business?

1-D.63. The Calcutta[2] view is, that the English rule on the subject (referred to above) applies to determine the forum. The Bombay view[3] also is that the English rule applies.

1-D.64. The Punjab view[4] is that it does not.

1-D.65. The Madras High Court[5] has held that the English maxim has to be applied with the modifications pointed out judicially in several cases.

1-D.66. In this state of case-law, it would be desirable to make a clarification to the effect that, in the absence of a term in the contract to the contrary, in a suit for recovery of money the cause of action should be deemed to arise in part at the place where the person to whom the money is due resides.

Recommendation

1-D.67. Accordingly, we recommend that the following Explanation should be added as Explanation 3 to section 20—

> *"Explanation 3—In a suit for recovery of money, based on contract, the cause of action shall, in the absence of a term in the contract to the contrary, be deemed to arise in part at the place where the person to whom the money is due ordinarily resides, carries on business or personally works for gain."*

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1. Section 49, Indian Contract Act, 1872.
2. (a) *State of Punjab* v. *A.N. Raha*, A.I.R. 1964 Cal. 418.
   (b) *S.P.C. Engineering Co.* v. *Union of India*, A.I.R. 1966 S.C. 259, 264, para 9.
3. *Bharumal* v. *Sakhawatmal*, A.I.R. 1956 Bom. 111, 112, para 3, (Chagla C.J. and Dixit J.).
4. *Hiralal Girdharilal* v. *Baijnath*, A.I.R. 1960 Punj. 450 (F.B.).
5. *G. Venkatesha* v. *M/s. Kamlapat*, A.I.R. 1957 Mad. 201, 205.

Section 21 and execution

1-D.68. At present, section 21, which saves irregularities as to local jurisdiction, deals only with objections as to the *place of suing*. The section does not apply to execution proceedings, that is to say, where an attack is sought to be made on the validity of the *execution proceedings themselves* on the ground that they had been held in the wrong court.

1-D.69. Now, the *principle* on which section 21 is based, namely, that no objection as to the local jurisdiction of a court can be raised except as provided in the section, has been held to apply to execution proceedings in a number of decisions. Thus, as has been noted in the earlier Report,[1] it has been held that the defect of jurisdiction arising by reason of the transfer of an area pending execution proceedings, does not vitiate those proceedings. It has also been held, that after sale, an application to set aside the sale on the ground that the court had lost territorial jurisdiction, could not be made, and that such objection, if not taken at the earliest opportunity, cannot be raised subsequently.

1-D.70. The Commission, in its Report on the Code, also noted that the only case taking an apparently contrary view was a Madras one. The Commission, however, did not recommend any amendment on the point, as it considered that no express provision was necessary and that in most cases, courts would apply the principle of section 21 to execution also.

Recommendation

1-D.71. We have considered this question, and are of the view that in order to avoid delay in execution, objections as to the territorial competence of a court executing a decree, should be disallowed, and that to achieve this purpose an express provision on the subject should be inserted. Such an amendment would avoid the possibility of such objections being raised unnecessarily. The following new section is accordingly recommended:

"23A. *No objection as to the competence of the executing court with reference to the local limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection was taken in the executing court at the earliest possible opportunity and unless there has been a consequent failure of justice.*"

Section 23-A New

1-D.72. We have suggested separately[2] a new section requiring a court with limited jurisdiction to refer the case to the district court in certain situations.

Accordingly, a new section as recommended there, may be inserted.

Section 24 and transfer from court not competent

1-D.73. On the question whether section 24 applies where the transfer is from an incompetent court, a conflict of decisions has arisen.

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1. 27th Report, pages 95-96, Note on Section 21 and execution.
2. See discussion relating to section 11.

1-D.74. This is illustrated by a recent Andhra case[1] The suit was for a permanent injunction restraining the several defendants from interfering with the plaintiff's enjoyment of properties mentioned in Schedules A, B & C of the plaint. The 'A' Schedule properties were in the Nizamabad District, while 'B' and 'C' Schedules properties were in the Guntur District. Defendants 1 to 4 were resident in the Nizamabad District, while defendants 5 to 6 in the Guntur District. A single suit was laid against all the defendants. Defendant 4 filed this application under section 24, for transfer of this suit from the Guntur court to the Nizamabad court, alleging that the suit had been laid at Guntur with the only object of harassing the defendant. Counsel for the plaintiff raised a preliminary objection that the application under section 24 was not maintainable, as the petitioner had raised an objection, *regarding the jurisdiction of the Court at Guntur*. He contended that section 24 authorised transfer of a case from one competent court to another competent Court, but not from a Court which had no jurisdiction to entertain it.

It was held by the Andhra Pradesh High Court that "The language of section 24, Civil Procedure Code is very wide, and there are no restrictions or impediments in the way of the High Court exercising the power of transfer merely because there is a dispute regarding jurisdiction."

1-D.75. A similar view has been taken by some other High Courts,[2] while some High Courts have taken a contrary view.[3]

1-D.76. It is obviously desirable to clarify the position. In our opinion, it is better to adopt the wider view, in the interests of expedition.

Recommendation

1-D.77. Accordingly, we recommend that the following Explanation should be added to section 24—

> "Explanation—*A case may be transferred under this section from a Court which has no jurisdiction to try it.*"

Section 24 and execution proceedings

1-D.78. Section 24 deals with the transfer of cases. With reference to the applicability of this section to execution proceedings, there is a controversy, which was considered in the earlier Report on the Code.[4] The Commission noted that the Calcutta High Court had taken the view that execution proceedings are not covered,[5]

1. *T. Reddy* v. *M. Rao and others*, A.I.R. 1970 A.P. 104.
2. (a) *Daftry* v. *Dula*, A.I.R. 1955 Nag. 44;
   (b) *Narain Das* v. *Khunni Lal*, A.I.R. 1934 All. 569.
3. (a) *(Gangumal* v. *Nanikaram*, A.I.R. 1932 Sind 215;
   (b) *Krishnaji Rao* v. *Gokuldas*, A.I.R. 1955 Mys. 115.
4. 27th Report, pages 98-99, note on section 24 and execution proceedings.
5. *Ranjit Kumar* v. *Gaur Hari Mukherji*, A.I.R. 1960 Cal. 177.

by section 24. But other courts had taken a different view,[1] as the Commission added.

1-D.79. The Commission, however, considered a clarification unnecessary, in view of the decisions of other High Courts.

1-D.80. We have, after a fresh examination of the subject, come to the conclusion that a clarification is useful. We therefore, recommend that the following explanation[2] should be added to section 24(1):—

> "Explanation—*In this section, 'proceeding' includes a proceeding' for execution.*"

Section 28 and summons sent to another court in another State.

1-D.81. In its earlier Report,[3] the Commission noted that a suggestion had been made that when a summon is sent for execution to a court in another State, the return thereon should be made or translated in English, so that the Court which issued the summons may be able to understand the action taken on the summons. The Commission was of the view that this matter could be dealt with by appropriate provision in the General Civil Rules and Orders in force in each State, without any amendment of the Civil Procedure Code.

Recommendation

1-D.82. We, however, think it desirable to make a provision of the above nature. Its utility is obvious. Accordingly, we recommend that the following sub-section should be added in section 28—

> "(3) *Where the language of the summons is different from the language of the record referred to in sub-section* (2), *a translation of the record in English shall also be sent together with the record sent under that sub-section.*"

Section 35-B (New) (Costs for delay occasioned by party)

1-D.83. It often happens that a party, though successful in the event, has been responsible for undue delay in respect of particular stages of litigation. It is but fair that such delay should be taken into account while awarding costs. In order to elicit opinion on the subject, we had put a question[4] in the Questionnaire as follow:—

> "1. Would you favour the insertion of a provision to the effect that the court shall, while passing an order for costs, make the party responsible for delay with reference to any step in the litigation, pay the cost proportionate to that delay, whatever may be the ultimate event of the suit."

1.(*a*) *Mohammad Habibullah* v. *Tikam Chand*, A.I.R. 1925 All. 276.

(*b*) *Nasservanji* v. *Kharsedji*, I.L.R. 22 Bom. 778.

(*c*) *Rajagopala v. Turuphtia*, I.L.R. 49 Mad. 746; A.I.R. 1926 Mad. 421.

(*d*) *Fielding* v. *Jankidas & Sons*, A.I.R. 1926, Lah. 465.

2. This is apart from the provision in sections 38, 39.

3. 27th Report, page 99 note on section 28.

4. Question 1.

1-D.84. This question has led to a sharp difference of opinion. The replies received could be classified into three broad categories, namely, (i) those favouring the suggested amendment, (ii) those opposed to it, and (iii) those accepting it in a modified form, e.g. those which would leave the matter to the discretion of the court rather than insert a mandatory provision.

1-D.85. Opinion is almost equally divided between the first two categories, only a few replies favouring an amendment with a modification. Those who are in favour of the amendment posed in the question, regard it as a desirable one in order to check dilatory tactics. It has been stated that solvent parties often resort to that dilatory tactics to cripple the opposite party, or a party with a bad case tries to delay the matter.[2] It has further been pointed out that a good slice of litigation is aimed at delaying the relief to which the opposite party is entitled.[3] One of the replies adds that the payment of costs of adjournment should be made a condition precedent to the taking of the next step in the litigation, i.e. the step for the purpose of which the adjournment has been granted to the party against whom the costs are awarded.[4]

1-D.86. The replies which are opposed to the suggested provision base their opposition on a variety of grounds; for example, it has been stated that such a provision would be unworkable and would create confusion, and much time will be spent in assessing who was responsible for a particular delay.[5] It is also stated that since adjournments are granted by a judicial order, it would not be correct to make a mandatory provision of the nature contemplated.[6] One of the replies adds[7] that the court has, even now, a power to award costs where the delay is due to frivolous application or due to a deliberate omission or negligence in the prosecution of the action. Lastly, it has been suggested that such a provision will not reduce delay. Delay, it is stated, is caused by applications for adjournment or applications for time to file affidavits and the like etc., and these applications are dealt with by the court and separately provided for.

1-D.87. Some of the replies favour a modified amendment which would, while drawing the attention of the court to the need to consider this aspect, leave the matter to the discretion of the Court.[8]

1-D.88. The above general difference of opinion is reflected in the replies received from the High Courts. Thus, some High Courts favour the suggested amendment,[9] some are opposed to it,[10] while in some of the High Courts, there is a difference of opinion among the individual judges[11] of that High Court.

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1. S. No. 10 (A State Government).
2. S. No. 25 (A High Court Judge).
3. S. No. 28 (A High Court Judge).
4. S. No. 28 (A High Court Judge).
5. S. No. 11 (A High Court Judge).
6. S. No. 16 (A High Court Judge).
7. S. No. 12 (A High Court Judge).
8. S. No. 28 (A few High Court Judges).
9. S. Nos. 5 and 25.
10. S. Nos. 11, 12 and 15.
11. S. Nos. 16 and 28.

1.D.89. We have taken into consideration the opinions expressed. We have come to the conclusion that while it may not be wise to have a rigid provision, it would be useful to give a discretion to the court to take into account such delay. This should at least have the utility of focussing attention on this aspect.

Recommendation

1-D.90. Accordingly we recommend that the following section should be inserted in the Code—

> "35-B. *The Court may, while passing an order for costs, make the party responsible for delay with reference to any step in the litigation, pay the costs proportionate to that delay, whatever may be the ultimate event of the suit.*"

CHAPTER 1-E

EXECUTION

Introductory

1-E.1. In the body of the Code, sections 36 to 74 deal with the subject of execution of decrees and orders. Here again, the detailed provisions are left to the rules. The important matters dealt with in the body of the Code are:—

the Courts by which decrees will be executed, questions for the court executing the decree, the modes of executing decrees, conditions for arrest, the liability of legal representatives, property exempt from attachment, and competition between rival decree-holders (rateable distribution).

Section 51 (c) Arrest in execution

1-E.2. Section 51(c) of the Code of Civil Procedure authorises execution of a decree "by arrest and detention in prison". There are certain limitations, however, on this mode of execution imposed by several provisions, to be presently noticed. The question to be considered is, whether this mode of execution should be retained on the statute book, particularly in view of the provision in the International Covenant on Civil and Political Rights prohibiting imprisonment for a mere non-performance of contract.

Limitation on arrest in execution

1-E.3. The existing limitations applicable to execution by arrest must be stated at the outset—

(a) First, a woman cannot be arrested in execution of a decree for the payment of money.[1]

(b) Secondly, even in the case of men, where the decree is for the payment of money, its execution by detention in prison is subject to important substantive safeguards.[2]

The proviso to section 51 is as follows:—

"Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

1. Section 56.

2. Section 51, proviso.

(ii) has, after the institution of the suit in which the decree was passed dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property or

(b) that the judgment-debtor has, or has had since the date of the decree, means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

"*Explanation*—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

The proviso (with the Explanation) was inserted by the amendment of 1936. Detention in civil prison cannot now be ordered as a matter of course, but only on fulfilment of the conditions in the Proviso. The object behind the amendment, it has been stated, is to protect indigent but honest debtors.[1] Corresponding alterations in procedure were made (in 1936), in Order 21, Rules 37 and 40.

(c) Thirdly, there is a procedural safeguard constituted by the elaborate provisions as to notice and hearing.[2]

(d) Finally, in certain special situations,[3] release of the judgment-debtor already arrested can be ordered.

1-E.4. Besides decrees for the payment of money[4] (including a decree for payment of money as an alternative to some other relief),[5] a decree for specific moveable property,[6] a decree for specific performance,[7] and a decree for restitution of conjugal rights or injunction[8] can also be executed by arrest.[9]

1-E.5. There are not many restrictions of importance applicable to imprisonment in execution of decrees other than those for money.

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1. Detailed history of the Proviso is given later.
2. Order 21, Rules 37 to 40.
3. Sections 55-59.
4. Order 21, Rule 30.
5. Order 21, Rule 30.
6. Order 21, Rule 31 (1).
7. Order 21, Rule 31(1).
8. Order 21, Rule 31(1).
9. Order 21, Rule 32(1).

History of the 1936 Amendment

1-E.6. History of the amendment of 1936 could be stated in greater detail. The Bill was originally intended to protect industrial workers on receipt of wages less than Rs. 100 a month from arrest and imprisonment for a debt, as a result of the recommendations of the Royal Commission on Labour in India. But the Legislature thought that the protection should be applied to all persons. The statement of Objects and Reasons says[1]:—

> "The Bill is the outcome of the recommendations of the Royal Commission on Labour in India to the effect that in the case of industrial workers in receipt of wages less than Rs. 100 a month arrest and imprisonment for debt should be abolished except where the debtor has been proved to be able and unwilling to pay.
>
> The bill seeks to amend the Civil Procedure Code of 1908 so as to protect honest debtors of all classes, and not of the industrial worker class only, from detention in a civil prison and to confine such detention to debtors proved to be recalcitrant or fraudulent. It provides *inter alia* that no order for execution by detention in prison shall be issued unless the debtor has been given opportunity of showing cause why he should not be committed to prison, and the Court is satisfied for the reasons recorded in writing that (1) the debtor is likely to leave the local limits of the jurisdiction of the Court, or has after the institution of the suit fradulently disposed of his property, and (ii) that he is able to pay the amount of the decree otherwise than from protected assets. (2) The Bill applies to all judgment-debtors. After consultation with local Government, the Government of India decided that in this matter there was no sufficient reason for restricting the protection to small debtors."

Provision in International Covenant on Civil and Political rights

1-E.7. The question to be considered is whether any change is needed in the present position. The first point is, whether the provision in the International Covenant on Civil and Political Rights, which provides[2]—"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation" is violated by section 51.

1-E.8. This question was discussed in a Kerala case, where it was held[3] that the International Covenant on Civil and Political Rights does not have the force of Civil law. Individual citizens cannot, therefore, complain about breach in Municipal Courts. It was also held, that section 51(c) does not violate the above article.

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1. Statement of Objects and Reasons, C.P.C. Amendment Bill, 1935 (February, 1935).

2. International Covenant on Civil and Political Rights, Article 11.

3. *C.V. Zavier* v. *Canara Bank Ltd., Ernakulam*, (1969) Ker. L.T. 927, 932, (1969) Ker.L.R. 961.

The High Court observed—

> "As already indicated by me, this provision (provision in the International Covenant) only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation.
>
> "Section 51 also declares that if the debtor has no means to pay, he cannot be arrested and detained. If he has, and still refuses or neglects to honour his obligation, or if he commits acts of bad faith, he incurs the liability to imprisonment under section 51 of the Code, but this does not violate the mandate of Article 11. However, if he once had the means but now has not, or if he has money now on which there are other pressing claims, it is violative of *the spirit of Article* 11 to arrest and confine him in jail so as to coerce him into payment. The construction of the proviso to section 51 C.P.C. suggested by the Division Bench of this Court in *Francis* v. *Palai Central Bank Ltd.*[1] harmonises the noble objective of the International Covenant and the provision in the Civil Procedure Code."

We agree with this view.

Whether arrest should be abolished

1-E.9. The next question is, whether there is a case apart from the provision in the International Covenant for abolishing arrest in execution of a decree.

Position in England

1-E.10. In England, committal to prison for failure to pay a debt ordered or adjudged to be paid has recently been abolished,[2] subject to some exceptions. The exceptions include all maintenance orders and the specified Crown debts (income-tax, corporation tax, capital gain tax, selective employment tax, national insurance, national health and industrial injuries contributions and Redundancy Fund contributions). Even in these cases, the court may make an attachment of earnings order, instead of an order for committal to prison.[3]

Position in the U.S.A.

1-E.11. The position in the U.S.A. has been thus[4] stated (while discussing recovery of damages):

> "In some of the States, in a very limited class of actions for damages (of which the action for damages for personal injury is the chief), the money judgment resulting may be

1. *Francis* v. *Palai Central Bank Ltd.*, (1959) K.L.J. 1036.
2. Sections 11 and 12 read with 4th Schedule, Administration of Justice Act, 1970 (Chapter 31).
3. Sections 14(4) and 14(6), Administration of Justice Act, 1970.
4. Mayers, The American Legal System (1964), page 168.

> enforced, if proceedings against the property of the debtor are ineffective, by the arrest and imprisonment of the judgment-debtor for a limited period. In practice, owing to technical provisions which cannot here be set forth, the net effect of this remedy is to require the debtor to furnish a bond that he will not, for the period mentioned, leave the country; and unless he does so, and the judgment creditor discovers the fact and succeeds in serving certain papers upon the bandsman before the debtor returns to the country, the creditor gains nothing. This remedy is termed as 'execution against the person' and is popularly known as 'body execution'."

Situation in section 51(b)

1-E.12. Perhaps, it could be argued that imprisonment of the judgment-debtor in the situation in section 51, proviso, clause (b) causes hardship. That clause applies where the judgment-debtor (i) has the means and refuses or neglects to pay, or (ii) has had the means, and has refused or neglected to pay. The essential condition in either case is the possession of means, *coupled with* contemporaneous failure or neglect to pay. Imprisonment, if it follows in such cases, is not based on mere non-payment, nor on mere inability to pay, but is confined to cases where a person is able to pay and dishonestly makes default in payment.

1-E.13. It will, thus, be seen that the provisions as to arrest do not violate the provision in the International Covenant, as they are not based on *mere* non-fulfilment of a contract. Further, even apart from their consistency with the Covenant, they are justifiable on principle, because the conduct which attracts their operation is dishonest. Technically, no crime is committed, as there is no bodily harm to the decree-holder or direct harm to society. But, to deprive another person of his lawful dues when one has the means to pay is, in the special situations to which section 51, proviso, is confined, ultimately causing harm to society, which suffers if an individual member suffers by reason of the dishonest conduct of another member.

Present law sufficiently restrictive

1 E.14. We are, therefore, of the view that so far as the cases in which arrest may be ordered are concerned, the law in India is sufficiently restrictive, except in two respects, which we shall presently discuss. This mode of execution should not, therefore, be totally abolished.

The situations mentioned in the proviso to section 51 –which is the section dealing with arrest in execution of decrees for payment of money—are those which indicate fraud or clandestine designs on the part of the judgment-debtor. Mere inability to perform the obligation to repay a loan (or other monetary obligation) does not result in imprisonment.

1.E.15. Imprisonment is not to be ordered merely because, like Shylock, the creditor says[1]:

"I crave the law, the penalty and forfeit of my bond."

The law does recognise the principle that "Mercy is seasonable in the time of affliction, as clouds of rain in the time of drought".[2]

Two minor points concerning section 51

1-E.16. There are, however, two minor points concerning section 51 on which a clarification is needed.

Section 51, Proviso (a) and (b)

1.E.17. With reference to clause (a) of the proviso to section 51, the words "or effect" (of obstructing or delaying execution) require consideration, as they could be construed as preventing a departure by the judgement-debtor from the local limits of the court even for honest purposes. Removal of those words would increase the burden of proof on the decree-holder. One suggestion placed before us was to make the provision conditional on likelihood as to obstruction etc., so as to reduce the apparent harshness of the present provision. This is on the assumption that in the context in which the words "object or effect" occur, *mens rea* with reference to "obstructing or delaying execution" is required. We have, after some discussion, decided that in clause (a), the words "*without lawful excuse*" should be inserted before the words "leave the local limits". This will protect genuine cases of departure for honest purposes. In section 51, proviso (b) also, before the words "has refused or neglected", we recommend insertion of the words "without lawful excuse", so as to avoid hardship in cases where a person has spent up his money in *bona fide* lawful objects and therefore, could not pay the debt at the time when the refusal or neglect is alleged to have occurred.

Recommendation

1-E.18. Accordingly, we recommend that section 51, proviso, clauses (a) and (b) should be revised as follows:—

"(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree—

(i) is likely to abscond or is *without lawful excuse, likely* to leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

1. Merchant of Venice, Act 4, Scene 1.

2. Ecclesiasticus, 35, 20.

(b) that the judgment-debtor has, or has had since the date of the decree, means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has *without lawful excuse* refused or neglected to pay the same, or".

Section 60(1)--property attachable or exempt from attachment

1-E.19. Section 60(1) authorises, subject to certain exceptions, the attachment and sale of the property of the judgment-debtor. In the main paragraph of this sub-section, after enumerating property liable to attachment, a general principle is enunciated, whereunder, broadly speaking, saleable property which belongs to the judgment-debtor or over which he has a disposing power exercisable for his own benefit, is attachable.

The proviso to section 60(1) enumerates certain properties as exempt from attachment.

The exemptions are, for our purposes, more important, and the recommendations which we make for amendment of the law are aimed primarily at the exemptions. Before dealing *seriatim* with the exemptions, we think it necessary to consider the rationale of the exemptions, such examination will help in determining the area where an addition to, or expansion of, the present exemptions is called for.

Principles behind the exceptions

1-E-19A. What may, at first sight, appear to be a heterogeneous collection of exemptions, enumerated in an haphazard fashion in the proviso to section 60(1), could be more easily understood if it is borne in mind that the exemptions are attributable to one or more of the following broad principles:—

(1) *The principle of necessity*—The item mentioned in clause (a) of the proviso is based on this principle.

(2) *The principle of protecting the means of livelihood*—This justifies the exemptions in clause (b), clause (c)[1] and clause (d).

(3) *The principle of leaving money required for subsistence*—This explains clauses (g), (h), (i), (ia), and (j) and (l).

(4) *The principle of thrift*—That the State should encourage thrift is the principle behind clause (k).

(5) *The principle of non-transferability of the property*—Property which is not transferable by act of parties should also not be attachable under legal process. This principle justifies the exemptions in clauses (e), (f), (m) and (n).

(6) *The principle of harmony with other laws*—This principle accounts for the exemptions in clauses (c) and (p).

1. *See Badri Chandan* v. *Inderji*, A.I.R. 1932 All. 508.

We shall now proceed to consider the amendments needed in the proviso.

Section 60(1) and houses of labourers and domestic servants

1-E.20. In our view, houses and buildings of labourers and domestic servants should be exempt from attachment,[1] on the principle of necessity.

Recommendation as to section 60(1), proviso clause (c)

1-E.20A. Accordingly, we recommend that section 60(1), proviso, clause (c) should be revised as follows:—

> "(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist, a *labourer or a domestic servant*, and occupied by him."

Section 60(1) Proviso clause (i)

1-E.20B. Under section 60(1), proviso, clause (i), "salary to the extent of the first two hundred rupees", and one-half of the remainder in execution of any decree other than a "decree for maintenance", is exempt from attachment. There is a proviso which runs as follows:—

> "Provided that where such salary is salary of a servant of the Government or a servant of railway company or local authority, and the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree."

1-E.21. Two points were raised during our discussion on this clause; First, whether the limit of rupees two hundred should be increased in view of the fall in the value of the rupee; and, secondly, whether the proviso should continue.

1-E.22. The first question requires a consideration of the history of the clause. The second requires an examination of the principle behind the proviso.

1-E.23. As regards the first question, it may be stated that the amount originally exempt was twenty rupees. In 1923, it was raised to forty rupees.[2] Certain changes were made[3] in 1937, by which the salary of private employees was exempted to the extent of first

1. Compare section 60(1), proviso (c).
2. Amendment Act of 1923.
3. Code of Civil Procedure (Second Amendment) Act 9 of 1937.

hundred rupees and one half the remainder; and as regards public officers etc. the same exemption was given, and in addition, a proviso was added.

Clause (h) and (i), as they stood before the amendment of 1937, exempted—

(h) allowances (being less than salary) of any public officer or of any servant of a Railway Company or local authority while absent from duty;

(i) The salary, or allowance equal to salary, of any such public officer or servant as is referred to in clause (h) while on duty, to the extent of forty rupees monthly where the salary exceeded forty rupees, and did not exceed eighty rupees monthly. The benefit of the clause was not available to a private employee.

1-E.24. In 1937, for clauses (h) and (i), the following clauses were substituted,—

"(h) the wages of labourers or domestic servants, whether payable in money or in kind, and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(i) the salary of any *public officer* or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary:—

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree."

1-E.25. Some drafting changes were made in the clauses in 1943.[1]

1-E.26. The amount exempted from attachment was raised in 1963 to two hundred rupees,[2] in view of the merger of dearness allowance in pay after the Report of the Second Pay Commission.

1-E.27. We are of the view that the minimum amount exempt should now be further increased, in view of the fall in the value of the rupee.

Recommendation to increase the amount in clause (i)

1-E.27. Accordingly, we recommend that the amount should be raised to two hundred and fifty rupees. The net result will be, that

1. Amendment Act 5 of 1943.

2. Code of Civil Procedure (Amendment) Act (26 of 1963).

in case of persons who have a *basic pay of rupees two hundred and fifty or less*, the salary will be totally exempt, while, in other cases, the exemption will also extend to one-half of the remainder.

1-E.28. So far as the second question is concerned, apparently, the principle underlying the proviso seems to be that persons concerned with the sovereign functions of the State should receive special protection from attachment, so that the interests of the State do not suffer. While the principle was understandable at a time when the number of Government servants was small and the activities of the State were also limited, its continuance in this form at the present day is an anomaly.

Recommendation to delete the proviso, clause (i)

1-E.29. We, therefore, recommend that the proviso to clause (i) should be deleted.

1-E.30. On the question whether the exemption from attachment of wages includes bonus, recent case-law throws some light.

1-E.31. An earlier Madras case took the view[1] that bonus is not so exempt. A contrary view was taken by the Mysore High Court.[2] And, in two recent Madras cases[3-4] also, bonus has been held to be exempt. In the Madras case, the Munsiff had attached the bonus of the defendant, in execution of a money decree. The High Court reversed this decision, holding that bonus should form part of the wages.[5]

In this case, it was also contended that the petitioner was a mechanic, and therefore not a "labourer" within section 60(1), proviso, Civil Procedure Code. As the question whether he was a mechanic or a labourer had not been gone into by the Court below, the case was remanded to the Munsiff's Court, for fresh disposal.

1-E-32. Though the case-law, as it stands at present, does not reveal a serious conflict, we think that it is better to clarify the position.

Recommendation

1-E.32. Accordingly, we recommend the addition of the following Explanation below section 60(1), Proviso[6]—

"*Explanation*—"Wages" includes bonus."

"*Explanation*—"*Labourer*" *includes a skilled or semi-skilled* labourer."

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1. *Munnuswami* v. *Vishwanath*, A.I.R. 1957 Mad. 773 (Ramaswami J.).
2. *P. Nathamal* v. *Dasarath*, A.I.R. 1959 Mys. 96 (Hegde J.).
3. *Krishna Rao* v. *Thimmrekhan*, A.I.R. 1970 Madras 135.
4. *Ganapathi Pillai* v. *Swaminathan Pillai*, A.I.R. 1939 Mad. 440.
5. *Krishna Rao* v. *Thimmekhan*, A.I.R. 1970 Madras 135 following *Ganapathi Pillai* v. *Swaminathan Pillai*, A.I.R. 1969 Mad. 440.
6. Suitable numbers will have to be given to the Explanations.

Earlier recommendation as to section 60(1), Proviso (i)

1-E.33. The earlier Report[1] proposed amendment to section 60(1), proviso, clause (i), to extend the existing proviso to private salaries also. It was considered that there is no reason why the exemption from repeated attachment, embodied in the proviso, should not extend to private salaries.

But in view of the reasons which we have stated above, it is better to delete the proviso.

Section 60 and Policy of Life Insurance

1-E.34. An interesting point which fell to be considered[2] by the previous Commission, in the earlier Report, related to granting exemption from attachment to policies of insurance. We quote the relevant discussion from the Report—

> "In the Law Commission's Report on Insolvency Laws,[3] in the clause dealing with description of property of the insolvent divisible amongst his creditors, a provision has been proposed that policies of life insurance, etc., in respect of the insolvent's own life shall not be comprised in the property of the insolvent divisible among his creditors (except to the extent of a charge on the policies in respect of the amount of the premium paid on the policies during the two years preceding the insolvency). The question whether an exemption from attachment in respect of insurance policies should be given, either absolutely or subject to a certain maximum, has been considered. It has been decided not to recommend any such change. There are certain points of difference between insolvency on the one hand and execution by a single decree-holder on the other. In insolvency, the hypothesis is that the debtor has not sufficient assets for meeting his debts, and therefore (apart from the property specifically exempted), everything else goes for the satisfaction of the creditors. Secondly, in insolvency the law has to strike a balance between the debtor's needs and the claims of the whole body of creditors, while that is not so in the case of execution of a single decree. Thirdly, in insolvency, the carrying on of business, the acquisition of property and other economic activities by the insolvent are subject to the control of the court, which is not the case in execution."

1-E.35. We have reconsidered the matter. This is not because we found the reasoning given on the Report on the Code defective—we regard it as cogent so far as it goes—but because the changed social and political climate appeared to justify a re-thinking on the subject. In order to encourage thrift, the habit of life insurance should be encouraged, and that consideration, in its turn, justifies

1. 27th Report, page 109, note on section 60, para 2.
2. 27th Report, page 112, note on section 60 and policies of insurance.
3. 26th Report (Insolvency Laws), app. I, clause 48(1)(b).

a more liberal approach as regards exemption of policies of life insurance from attachment. No doubt, considerations justifying an exemption have to be balanced against the legitimate claims of a creditor who has taken all the trouble of obtaining a decree, and who is engaged in the still more troublesome venture of executing it. The less obstacles are placed in his way, the better. Nevertheless, on the same principle on which moneys in certain provident funds are exempt from attachment[1], there is a case for the exemption of moneys due on a policy of life insurance. Further, we do not think that there should be any limit as to the maximum that is to be exempt out of the amount due on the policy.

Recommendation to insert new clause (ka)

1-E.36. We, accordingly, recommend that the following clause should be added in the proviso to section 60(1),—

"(ka) *money payable under a policy of life insurance.*"

Section 60(1), Proviso and controlled tenancies

1-E.37. The question whether tenancies to which the Rent Control Act in force in the State concerned applies, should be exempt from attachment, was considered by the previous Commission.[2] A provision exempting them from vesting in the Official Assignee on insolvency had been proposed in the Law Commission's Report on insolvency.[3] But, as regards exemption from attachment, the Commission took the view that the case stood on a different footing, and no change was, therefore, considered necessary on this point.

1-E.38. We have considered the matter further. By virtue of provisions in the Rent Control laws, such tenancies usually become incapable of assignment except under certain restrictions. The Bombay Rent Control Act,[4] for example, provides: —

> "15. (1) Notwithstanding anything contained in any law, (but subject to any contract to the contrary) it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein: —
>
> (Provided that the State Government may, by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such leases or class of leases and to such extent as may be specified in the notifications)."

1.E.39. We think that in order to prevent harassment to tenants, an amendment in section 60 also is called for in this respect, so as to make them exempt.

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1. Section 60 (1), Proviso clause (k).
2. 27th Report, page 112, note on section 60 and tenancies.
3. 26th Report, (Insolvency Laws), App. 1, clause 48 (1).
4. Section 15 (1), Bombay Rents etc. Control Act, 1947.

Recommendation to insert clause (kb)

1-E.40. Accordingly, we recommend that the following clause should be added in the proviso to section 60(1)—

> "*(kb) the interest of a lessee of a residential building to which the provisions of the law relating to control of rents and accommodation for the time being in force applies.*"

Section 60(1) and agricultural labourers

1-E.41. The exemption conferred on agriculturists by the section [e.g. section 60(1)(c)], should in our view, be extended to agricultural labourers (i.e. landless labourers) also.

Recommendation to insert Explanation

1-E.42. Accordingly, we recommend that the following Explanation[1] should be inserted below section 60(1), proviso:

> "*Explanation—For the purposes of this section, the word 'agriculturist' shall include every person who depends for his livelihood mainly on income from agricultural land, whether as owner, tenant, partner or agricultural labourer.*"

Section 60(1) and waiver of the exemption

1-E.43. Waiver of the right conferred by section 60 should, in our view, be made inoperative. On this point, we are departing from the approach adopted in the earlier Report.[2]

Recommendation to insert new sub-section (1A)

1-E.44. We, therefore, recommend the insertion of the following sub-section, as sub section (1A), in section 60:—

> "(1A) *Notwithstanding any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void*".

Section 63—Property attached in execution of decrees of several Courts

1-E.45. Section 63 is as follows:—

> "63. (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

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1. Suitable number will have to be given to the Explanation.

2. 27th Report, page 11.

(2) Nothing in this section shall be deemed to invalidate *any proceeding* taken by a Court executing one of such *decrees.*"

1-E.46. In the earlier Report,[1] the Commission had to consider the question as to the effect of section 63(2), (which provides that nothing in the section shall be deemed to invalidate any "proceeding taken by a court" executing one of the several decrees referred to in the section), on an order allowing a set-off to a decree-holder auction-purchaser. Does the expression "proceeding taken by a Court" exclude the amount so allowed to be set off from rateable distribution? The Commission noted that most High Courts[2,3] had answered the question in the negative, though the Calcutta High Court[4] had taken a contrary view.

The Commission took the view that the expression "proceeding" does not include such order, but did not consider a clarification to be necessary.

Recommendation

1-E.47. We agree with the interpretation placed by the previous Commission; but are of the view that a clarification is desirable, in order to settle the controversy. We recommend that the following Explanation should be added below section 63(2)—

"Explanation—In sub-section (2) the expression 'proceeding' taken by a Court does not include an order allowing, to a decree-holder who has purchased property at sale held in execution of a decree set off for the purchase price payable by him."

Section 64

1-E.48. Section 64 is as follows:—

"64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation—For the purpose of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

There has been a conflict of decisions on the question whether a transfer made after attendance in pursuance of an agreement entered into before attachment is void. The Commission in its Report on the Code,[7] considered this conflict; but was not inclined

1. 27th Report, page 112, note on section 63.
2. *Megraj* v. *Corporation of Madras*, A.I.R. 1936 Mad. 797, 798.
3. *Thannull* v. *Krishnaswamy*, A.I.R. 1935 Mad. 988, 994.
4. *Ram Chandra* v. *Digambar*, I.L.R. 1960 Bom. 8; A.I.R. 1960, Bom. 230 (F.B.).
5. *Vishnu Ram* v. *The Bank of Bihar*, A.I.R. 1946 All. 291
6. *Ahinath* v. *Nepal Chandra*, A.I.R. 1937 Cal. 55, 56.
7. 27th Report, pages 112-113 ,note on section 64.

to suggest a change. It noted that in the draft Report which had been circulated (to State Governments, High Courts etc.) for comments, an exception was proposed to section 64 to the effect that "Nothing in this section applies to any private transfer or delivery of the property attached or of any interest therein, made in execution of any contract for such transfer or delivery entered into before the attachment." But, after careful consideration, the Commission decided not to make any such exception. The principal consideration which weighed with the Commission was thus stated—

> "A sweeping provision of this kind might be abused, and the practice of bringing into existence agreements which are really executed after attachment but are ante-dated to an earlier date, might be encouraged by such exception."

The Commission also added—

> "The decision as to how far such a transfer should be recognised as valid by the Court would seem often to depend on the equities of each case. Some of the decisions are based on the specific provisions of Order 38, rule 10; a few exhibit special features arising out of the passing of a *decree* for specific performance. So far as other situations are concerned, the equities of the case should, it is considered be taken by the court into account."

1-E.49. We have carefully considered the matter. We agree that a sweeping provision saving every transfer made in pursuance of a pre-attachment agreement, might lead to fictitious claims, as was noted by the previous Commission. But we think that a provision of a limited character, applicable only where the agreement *itself is registered* before the attachment, would be harmless. A transfer in pursuance of such agreement should override the attachment, if the agreement precedes the attachment.

Recommendation

1-E.50. We therefore, recommend that the following Exception be added below section 64:—

> "Exception—*Nothing in this section applies to any private transfer or delivery of the property attached or of any interest therein, made in execution of any contract for such transfer or delivery entered into and registered before the attachment.*"

Section 66

1-E.51. Section 66 is as follows:—

> "66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

1.E.52. The earlier Report on the Code[1] contains this discussion as to this section—

"A suggestion to the effect that a "Defence" based on Benami should also be barred (just as a suit based on benami is barred) where the name of the Benamindar is entered in the sale "certificate" has been considered. According to this suggestion, where the real owner is in possession, and the Benamidar whose name is entered in the sale certificate sues him for possession, the real owner should be barred from raising a defence that the plaintiff was only a nominal purchaser. It has, however, been decided not to extend section 66 to such cases."

Recommendation for amending section 66

1-E.53. We have considered this question carefully, and have come to a different conclusion. In our opinion, it would be more consistent with recent trends to bar such defence also. Accordingly, we recommend that in section 66(1), the following words should be added at the end—

"and in any suit by a person claiming title under a purchase so certified, no defence shall be pleaded on the ground that the purchase was made on behalf of the defendant or on behalf of someone through whom the defendant claims."

Section 73

1-E.54. With reference to section 73 of the Code, the case-law as to the meaning of the expression "same judgment-debtor", was examined in the earlier Report,[2] and the result of the examination revealed no need for amendment. We have examined the later cases on the subject and, in our view also, there is no need to amend it.

1. 27th Report, page 113.
2. 27th Report, pages 113, 114, note on section 73.

CHAPTER 1-F

INCIDENTAL PROCEEDINGS

Introductory

1-F-1. Part 3, in the body of the Code (sections 75 to 78), deals with "incidental proceedings".

Section 75

1-F.2. Section 75 deals with the issue of Commissions. We notice that one matter relating to the section was discussed in the Report on the Code,[1] namely—whether the court has power to issue a commission for making inventories of account books and other articles. We see no reason why the Court should not have this power. In fact, we would go further, and invest the Court with a general power to issue commissions for the performance of all ministerial acts.

Apart from this general power, we are of the view that there should be a specific provision empowering the court to issue commissions for conducting scientific inquiries, when such an inquiry is needed for determination of any issue before the court. There should also be a power to appoint commissioners to hold sales (otherwise than in execution).

Recommendation

1-F.2A. To achieve the above object, we recommend—

(i) an amendment of section 75, and

(ii) insertion of new[2] rules in Order 26.

The amendments will be as follows:—

Clauses (bb), (bbb) and (bbbb) may be inserted in section 75. The section will then read as follows:—

"Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—(a) and (b); .....;

(bb) *to hold a scientific investigation*:

(bbb) *to conduct sales of property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved*;

(bbbb) *to perform any ministeriral act;*

(c) ...

(d) ....

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1. 27th Report, page 113, note on section 75.

2. Order 26, Rule 10A and 10B.

Order 26, Rule 10A to 10C (proposed)

1-F.3. to 1-F.5. We also recommend that the following new rules may be inserted in Order 26—

"10A. (1) Where any question arising in a suit involves any scientific investigation, which cannot in the opinion of the court, conveniently be conducted before the court, the Court may, if it thinks it necessary or expedient in the interest of justice issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.

(2) The provisions of rule 10 of this Order shall, as far as may be,[1] apply in relation to a commissioner appointed under this rule, as they apply in relation to a commissioner appointed under rule 9.

10B. (1) Where any question arising in a suit involves the performance of any ministerial act which cannot, in the opinion of the court, conveniently be performed before the court, the court may, if it thinks it necessary or expedient in the interest of justice for reasons to be recorded, issue a commission to such person as it thinks fit, directing him to perform that act and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall, as far as may be,[1] apply in relation to a commissioner appointed under this rule, as they apply in relation to a commissioner appointed under rule 9.

10C. (1) Where, in any suit, it becomes necessary to sell any movable property which is in the custody of the court pending the determination of the suit and which cannot be conveniently preserved, the court may, if it thinks it necessary or expedient in the interest of justice, for reasons to be recorded, issue a commission to such person as it thinks fit, directing him to conduct such sale, and report thereon to the court.

(2) The provisions of rule 10 of this Order shall, as far as may be,[1] apply in relation to a commissioner appointed under this rule, as it applies in relation to a Commissioner appointed[2] under rule 9.

(3) Every such sale shall be held, as far as may be, in accordance with the procedure prescribed for sales of movable property in execution of a decree."

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1. Proviso annexed to Order 26, Rule 9 may be unnecessary in regard to the new rule.

2. Section 75 to be amended separately.

CHAPTER 1-G

SUITS IN PARTICULAR CASES

Introduction

1-G-1. Part 4 of the Code, sections 79 to 88, deals with "suits in particular cases". These comprise—

(a) suits by or against the Government or public officers in their official capacity (sections 79 to 82);

(b) suits by aliens and by or against foreign rulers, ambassadors and envoys (sections 83 to 87A);

(c) suits against Rulers of former Indian States (section 87B);

(d) interpleader suits (section 88). We shall deal with only such of the provisions in this group as require change.

Section 80

1-G-2. One of the most important sections in this part is section 80. We fully concur with the recommendation made in the earlier Report,[1] for the repeal of section 80.

Section 82

1-G-3. The previous Commission[2] considered section 82 at length. It noted that section 82, as it stands at present, prescribes an elaborate procedure which has to be followed before execution of a decree can be ordered against the Government or a public servant etc. The section contemplates the following stages:—

(i) A time has to be specified in the decree itself for its satisfaction;

(ii) If a decree remains unsatisfied for the time specified, a report has to be made by the court to the State Government;

(iii) After the report, the court must wait for a *further* period of 3 months, and can issue execution only if the decree remains unsatisfied for a further period of 3 months.

1-G-4. The previous Commission considered, that this elaborate procedure is not necessary, and causes delay. The intermediate report to the Government by the court is a formality which should lay down the period of waiting, instead of requiring the court to fix the period in each case. Power should be given to the court to fix a period in a particular case. Necessary changes had been proposed.

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1. 27th Report, pages 21-22 and 114-115.
2. 27th Report, page 115, note on section 82.

1-G-5. A power to extend the period was also considered desirable, and provided for.

1-G-6. The Commission also noted that the words "such act as aforesaid" in section 82 refer to an act purporting to be done by a public officer in his official capacity. That was made clear.

1-G-7. We agree with the above recommendations, but would like to add one minor provision to the effect that the court will, within 3 months, send notice to the Government of the passing of the decree. This is in our view desirable in order to give the Government an opportunity to satisfy the decree. This requirement need not, of course, delay execution, as non-compliance with it, would not effect the validity of the execution.

Rcommendation

1-G-8. Accordingly, we recommend that section 82 should be revised as follows :—

Execution of decree against Government or public officer—

"82. (1) Where, in a suit by or against the Government, or by or against a public officer in respect of any act[1] *purporting to be done by him in his official capacity,* a decree is passed against the Union of India or a State, or as the case may be, the public officer.....
"execution shall not be issued on the decree unless it remains unsatisfied for *a period of three months, or such other period as the Court may fix in a particular case,* computed from the date *of the decree.*

(2) The provisions of sub-section (1) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

(a) is passed or made against the Union of India or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority, and

(b) is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

"(3) *The Court may, in its discretion from time to time, enlarge the period specified in sub-section* (1) *or fixed by Court under that sub-section, even though the period so specified or fixed may have expired*[2].

"(4) *Where a Court passes any such decree as is referred to in sub-section* (1) *it shall, within a period of three months from the date on which the decree is passed, send an intimation to the Government pleader thereof of the passing of the decree, but failure to give such intimation shall not affect the execution of the decree.*"

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1. *Cf.* Section 82(1) and 32(2).
2. *Cf.* Section 148, C.P.C.

Section 86

1-G-9. Under section 86, a suit cannot be instituted against the 'Ruler of a foreign State' without the consent of the Central Government. We have had this section examined in detail, in view of its importance and in view of the developments that have taken place in respect of immunity of sovereign States. A detailed study was undertaken, but here we shall include only a brief summary of the results of the study.

Principles

1-G-10. The principle of international law relevant to section 86 is that the Ruler of one State has the privilege to enter another State, a privilege based on the existence of an immunity from the jurisdiction of local courts.[1] The immunity is suggested to have been based on several principles:[2]

(i) *Par in parem non habet imperium*—One sovereign power cannot exercise jurisdiction over another sovereign power, but only over inferiors.

(ii) *Reciprocity or comity*—in return for a concession of immunity, other States make mutual concession of immunity within their territory.[3]

(iii) *Unenforceability*—A judgment of a municipal court cannot be enforced against a foreign State or its Sovereign.

(iv) *An implication from the circumstances*—The permission to a foreign State to function within a State or a foreign Sovereign to visit, signifies a concession of immunity[4] from the jurisdiction of the State.

(v) *Policy*—The merits of a dispute involving the transactions or policy of a foreign government ought not to be canvassed in the domestic courts of another country[5].

1-G-11. In a Bombay case[6] Strachey, J. while considering the provisions of section 433 of the Code of 1882 (which corresponds to present section 86), said that this privilege is based on "the dignity and independence of the Ruler, which would be endangered by allowing any person to sue him at pleasure, and the political inconvenience and complications which would result". This view has been approved by the Supreme Court[7].

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1. Brownlie, Public International Law, (1966), page 274, See also *Schooner Exchange* v. *Mc Faddon*, (1812) 7 Cranch 116.
2. Starke, International Law, (1972), p. 253.
3. According to Lord Porter, this is not a basis of, nor limits, the immunity of a State. *United States and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*, (1952) A.C. 582.
4. Jordan, C.J., has described it as "an implied obligation not to derogate from a grant". *Wright* v. *Cantrell*, (1943) 44 S.R.N.S.W. 40, 52.
5. Per *Lord Denning in Rahimtoola* v. *Nizam of Hyderabad* 5 (1957) 3 All E.R. 441, 463.
6. *Chandulal Khushalji* v. *Awad*, 21 Bom. 251, 271, 272.
7. *Ali Akbar* v. *U.A.R.*, A.I.R. 1966 S.C. 230.

Position in England

1-G-12. The position in England on the subject has been stated as follows:

> "In accordance with the *maxim par in parem non habet imperium*, the English Courts are fully committed to the view that they will not exercise jurisdiction over the person or the property of a foreign sovereign state unless it is willing to submit to process."[1]

However, from time to time proposals have been made for the reform of the existing rules.[2]

Practice in other countries—countries favouring restrictive immunity

1-G-13. The practice in other countries also varies. Some States make a distinction between acts in the exercise of the sovereign power, i.e., *jure imperii*, and acts like a private person, i.e. *jure gestionis*.[3] The immunity is allowed in the former case, but not in the latter. Examples of States which follow such practice are Austria, Belgium, Egypt, France, Greece, German Democratic Republic, Italy and Switzerland. In Canada, however, so far as non-commercial acts are concerned, the English rule is followed. The position regarding commercial activities is undesided[4]

Soviet practice

1-G-14. The position in Soviet Russia, as provided in Fundamentals of Soviet Civil Procedure,[5] is that a suit can be filed against a foreign country only with the consent of the country concerned. Regarding diplomatic representatives, they are subject to the jurisdiction of Soviet courts in civil cases within the limits determined by the rules of international law or agreements with the countries concerned. The principle of reciprocity is also followed.

For commercial activities, except maritime commerce, through a number of agreements, the Soviet Union has submitted its trade transactions to foreign jurisdiction, like a private merchant.

1-G-15. In the U.S.A., a distinction is made between 'sovereign or public acts' and 'private acts'. Immunity as of right is available only in the former case.[6]

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1. Cheshire, Private International Law, (1971), page 96. See also the *Christina*, (1938) A.C. 485, and the *Arantzazu Mendi*, (1939) 1 All E.R. 719.
2. Lauterpacht, "Jurisdictional Immunities of Foreign States", (1951) 28 B.Y.B.I.L. 220. Lyons in (1956) 42 Grotius Society, 61.
3. Mann in (1964) 27 Mod. L.R. 81.
4. *Reference re. powers of City of Ottawa*, (1943) *S.C.R. 208 (Canada)*; *Flota Maritima Browning de Cuba SA v. The Republic of Cuba*, (1962) *S.C.R. 598, 602-5. (Canada)*.
5. Section 61, Fundamental of Soviet Civil Procedure, See also Grzybowski, Soviet Public International Law (1970), p. 222.
6. Cardozo, 'Sovereign Immunity', (1954) 67 Harv. L. R. 608.

1-G-15A. In a statement of the policy[1] of the United States State Department, limiting sovereign immunity in a far more sweeping manner than ever before attempted, Professor Jack Bernard Tate,[2] Acting Legal Adviser to the Department of State, wrote:[3]

> "The Department of State has for some time had under consideration the only question whether the practice of the Government in granting immunity from suit to foreign Governments made parties defendant in the Courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases....."[4]

The type of cases excluded from immunity mainly concerned commercial transactions.

1-G-15B. It may be noted that a few years ago, the subject of immunity of foreign States was fully discussed, and a project for its reform prepared, by the Institute of International law.[5]

1-G.16. With reference to their attitude in respect of the immunity of foreign States, the various countries may be broadly classified as follows—

(i) *Countries accepting the classical or virtually absolute theory of sovereign immunity*—The classical or virtually absolute theory (of immunity) has generally been followed by most countries of the British Commonwealth, Czechoslovakia, Estonia and probably Poland.[6] Apparently, the decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway and Portugal may also be deemed to support the classical theory of immunity;[6] but the decisions are scanty, and are anterior to the development of the restrictive theory.

(ii) *Countries probably accepting absolute immunity*—In Netherlands, Sweden and Argentina, constant reference to the distinction between public and private acts of the State indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when occasion arises.

(iii) *Countries adopting the restrictive theory*—Presently, the restrictive theory (resting on the distinction between sovereign acts and other acts) is followed in Austria, Belgium, Egypt, France, Greece, Italy and Switzerland.

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1. Letter of May 5, 1952, popularly known as the "Tate letter".
2. Jack B. Tate, (Associate Dean of Yale University Law School), Department of St. Bull. Vol. 26, p. 984, June 23, 1952, a letter to the Acting Attorney General.
3. See also cases referred to in Starke, International Law, (1972), page 255, foot note 3, and in Greig, International Law (1970), page 196, foot notes 7-8.
4. See also William W. Bishop Jr. "New United States Policy Limiting Sovereign Immunity" (1953) 47 A.J.I.L. pp. 93 *et seq.*
5. Annuaire de l' Institute de droid International (1952), Vol. 1, pp. 1—136 *ibid*, (1953), pp. 112, 121. (Sir H. Lauter, pacht).
6. Greig, International Law, (1972), pages 218, 219....

(iv) *Countries where position is fluid*—The position in England appears to be fluid.

Lauterpacht's view

1-G.17. Lauterpacht has made certain suggestions,[1] for reform of the law. According to him, "In the first instance, immunity must remain the rule with respect of the *legislative acts* of a sovereign State and of measures taken in pursuance thereof". "Secondly, there must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign State within its territory". "Thirdly, the principle of immunity must continue with respect to contracts made with or by the foreign State except those concluded in the U.K." "Fourthly, no action should lie or execution be levied against a foreign State contrary to the accepted principles of international law in the matter of diplomatic immunities".

Arguments against absolute immunity—The arguments advanced in support of restricted immunity are that the sovereign who engages in ordinary commerce should be held to have waived his immunity, and that the tendency in municipal law is to place the State and State corporations on an equal footing with other legal persons.

Decision involving change of policy to be avoided

1-G.18. A decision to alter the scope of immunity involves delicate matters of policy, and we do not think it proper to make recommendations altering its scope.

Moreover, it is not possible to say with certainty how far the restrictive immunity will be adopted (in substitution of unqualified immunity), in the near future. In this state of affairs, an alteration in the policy behind these sections is not easy to recommend.

Recommendation for change in terminology

1-G.19. But one defect of section 86 should be remedied. This defect lies in its over emphasis on the concept of the "Ruler" of a foreign State. Primarily, it is the *State* which ought to be immune; the personnal immunity of the Ruler, if any, ought to be secondary, at least in modern times.

The Supreme Court has held that section 86 applies to all foreign States[2]—whether the form of Government be monarchial or not. And this interpretation should now be carried out by primarily making "foreign States" immune. The immunity "for Rulers" may be, of course, preserved for exceptional cases.

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1. Lauterpacht, "Jurisdictional Immunities" (1951) B.Y.B. I. L. 220, 237, 238.

2. *Ali Akbar* v. *U.A.R.*, A.I.R. 1966 S.C. 230.

Recommendation relating to execution

1-G.20. Another point relates to section 86(3) which prohibits execution against the property of the Ruler of a foreign State. The Supreme Court has, with reference to this provision, observed[1]—

> "The provision that a decree passed against the Ruler of a foreign State shall not be executed against the property of such Ruler, rather tends to show that what is exempted is the separate property of the Ruler himself and not the property of the Ruler as the head of the State. A distinction is made between the property belonging to the State of which the Ruler is recognised to be the head, and the property belonging to the Ruler individually".

On this point also, opportunity may be taken to make the section more comprehensive, so as to exempt the property *of the State also.*

Execution—Present practice

1-G.21. It may be stated that immunity[2] is conceded by the majority of States[3] with respect to measures of execution directed against the property of foreign states.[4]

Position in England as to execution

1.G.22. In the *Cristina*[5] the House of Lords ruled that a writ *in rem* issued in Admiralty against a vessel in the control of a foreign Government for public purposes, implied a process against *the possessory rights of a foreign sovereign.* As a condition of obtaining immunity, it is sufficient if the foreign Government produces evidence showing "that its claim is not merely illusory, nor founded on a title, manifestly defective" [6]. It is not bound to give a complete proof of its proprietary or possessory title.

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1. *Ali Akbar* v. *U.A.R.* A.I.R. 1966 S.C. 230, 236.

   The rule is usually stated as one of immunity; *cf.* Lauterpacht, "The Problem of jurisdictional Immunities of Foreign States", (1951) 28 B.Y.B.I.S. 220, 243.

2. See—

   (*a*) Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 Brit Y.B. Int'l Studies 220, 241, 250 to 272.

   (*b*) The country-by-country sketch of the approaches of the various jurisdiction to sovereign immunity in Sucharitkul, State Immunities and Trading Activity (1969) pages 162—256.

   (*c*) Brownlie, Public International Law, (1966), page 286.

4. Sorensen, Hague *Recueil* (1960) III, 17w considers that the practice is not sufficiently uniform to support a customary rule.

5. *The Christina,* (1938) A.C. 485.

6. *See Juan Yesmal & Co. Inc.* v. *Government of Republic of Indonesia,* (1955) A.C. 72; (1954) 3 All E.R. 236.

7. *Cf. Republic of Mexico* v. *Hoffman* (1945) 324 U.S. 30.

Position in some other countries as to execution

1-G.23. But a few countries apply the doctrine of restricted immunity[1] for acts *jure gestionis* at the stage of execution also.[2] Also there is acute controversy as to the exemption of foreign trading vessels.

Recommendation regarding notice to prospective plaintiff

1-G.24. A suggestion made with the U.S.A. in mind may also be noted[3]—

> "Now that the Department will have to make factual determinations in almost all cases, to decide whether the activity is 'sovereign' or 'private', in nature, it will have to establish some procedure for resolving these issues. All government procedure affecting private interests should provide for notice to the plaintiff and a chance to be heard, at least through a written argument. The need would be filled if the Department, after receiving a request for a suggestion from an appropriate representative of the foreign government, or for a ruling from the judge himself after determining that immunity was *prima facia* justified, sent a registered letter to counsel for the other side. The letter should advise him of the request and offer him a chance to appear in person or to file a brief within a limited time".

This appears to be a useful suggestion, and may be adopted, of course in a simpler form.

Recommendation

1-G.25. The following redraft of section 86 is recommended, in order to carry out the limited amendments indicated above.

Suggested re-draft of section 86—

"86.(1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a *foreign State from which* he holds or claims to hold the property.

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1. (a) Hostile to immunity for acts *jure gestionis* at least are Oppenheim 1: 274; Sucharitkul pp. 247-51, 262-3, 247-50—Garcia Mora, 42 Virginia, L.R. (1956), 264-9; Lemonon, Annuaired Kul 1, Inst. (1952, I) 28—31.

   (b) Resolution in Annuaire de 1, Inst. 1954 II, 293, Art. 5; and *Weilmann and Mc. Closker v. The Chase Manhattan Bank*, 192 N.Y. Supp. 2nd 469 (1959).

2. See the Belgian decision : *Socobel* v. *Greek State*, Int. L.R. 18 (1951), pp. 2 79 J.D.I. (1952) 244.

3. Michael H. Cardozo, "Sovereign Immunity", (1954) 67 Harv. L. Rev 469, 517.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the *foreign State* may be sued; but it shall not be given, unless it appears to the Central Government that the *foreign State*—

(a) has instituted a suit in the court against the person desiring to sue it, or

(b) *by itself* or another, trades within the local limits of the jurisdiction of the court, or

(c) is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to it by this section.

"(3) Except with the consent of the Central Government certified in writing by a Secretary to the Government no decree shall be executed against the property of any foreign State.

(4) The provisions of sub-sections (1), (2) and (3) shall apply in relation to—

(a) *any Ruler of a foreign State*:

(b) any ambassador or envoy of a *foreign State*:

(c) any High Commissioner of a Commonwealth country; and

(d) any such member of the staff or retinue of a *foreign State* or of the Ruler, ambassador or envoy of a *foreign State* or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf, as they apply in relation to a *foreign State*.

(5) *The following persons shall not be arrested under this Code, namely*—

(a) any Ruler of a foreign State;

(b) any ambassador or envoy of a *foreign State*;

(c) any High Commissioner of a commonwealth country;

(d) any such member of the staff of retinue of a *foreign State* or of the Ruler, ambassador or envoy of a *foreign State* or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf.

(6) *Where a request is made to the Central Government for the grant of any consent under this section, the Central Government shall, before refusing to accept the request in whole or in part, give the person making the request a reasonable opportunity of being heard*".

Section 87-B

1-G.9. Section 87B has been already amended[1] very recently, and is now confined to a cause of action arising before the commencement of the Constitution.

1. The Rulers of Indian States (Abolition of Privileges) Act, 1972.

CHAPTER 1-H

SPECIAL PROCEEDINGS

Introduction

1-H.1. Part of the Code, sections 89 to 93, deal with special proceedings.

Section 91(1)

1-H.2. Section 91(1) authorises the filing of a suit in respect of a public nuisance by the Advocate-General, or by two or more persons who have obtained the written consent of the Advocate-General. It appears to us that the Advocate-General should not be troubled with such questions. It is enough if the leave of the court is obtained.[1] In the coming years, problems of pollution of water and air and the emergence of new and unknown hazards to health are likely to require considerable attention. And, until a full-fledged environmental law takes shape, section 91 could serve a useful purpose in combating these kinds of nuisance.

1-H.3. It also appears to us that the procedure allowed under this section could be usefully extended to wrongful acts other than public nuisance which affect the public. As illustrations of such wrongful acts, we may refer to fraudulent practices of traders, which harm consumers in general.

Recommenation

1-H.4. Accordingly, we recommend that section 91 should be revised as follows:—

> "(1) In the case of a public nuisance, or of any other wrongful act affecting the public, two or more persons, having obtained the leave of the court, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case".

Section 92

1-H.5. In the earlier Report,[2] attention was drawn to the legislation regarding *cy pres* undertaken in England, and to the analogous provisions in the Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950), (which have been followed by certain other States also). Some difficulties were felt in England by virtue of the limited scope of the *cy pres* doctrine, under which the court had power to direct the application of the income to another purpose only in certain specified cases, for example, where the original object had failed.

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1. As to appeal against an order under section 91, see discussion relating to section 104 para 1-K. 7. *Infra.*

2. 27th Report, pages 118 to 120 , note on section 92.

1-H.6. Now, there might be cases where it would be desirable to alter the very purpose of application as mentioned in the trust instruments, because the original objects have been adequately provided for by other means, or have ceased to provide a suitable method of using the property, or have become obsolete or useless or prejudicial to the public welfare or are not substantially beneficial to the class of persons for whom the endowment was intended originally.

1-H.7. In England, the Nathan Committee[1] went into great detail in this question. The Committee was satisfied that the most urgent need was to enable the Charity Commissioners to give timely assistance to those trustees who were administering trusts "no longer adapted to modern conditions". Since the alteration of the objects of charities (where the objects can still be executed) could only be done by a statutory power, the Committee recommended suitable legislation regarding *cy pres*.

1-H.8. The Charities Act,[2] has carried out, to a large extent, the recommendations of the Nathan Committee. Briefly stated, under section 13 of that Act, the original purpose of a charitable gift can be altered to allow the property to be applied *cy pres*, where the original purpose has been fulfilled or cannot be carried out according to the directions and the spirit of the gift, or provides the use for part only of the property, or where the property available by virtue of the gift and other property applicable for similar purposes can be used in conjunction, or where the purposes were laid down with reference to an area which has ceased to be a unit or a class of persons which has ceased to be suitable or where the original purposes have been adequately provided for by other means or ceased (as being useless or harmful to the community) to be in law charitable or ceased to provide a suitable and effective method of using the property available by virtue of the gift. Thus, a failure of the original purpose is not, now, the *only ground for cy pres*.

1-H.9. Attention may also be drawn to section 56 read with section 55 of the Bombay Public Trusts Act,[3] whereunder, on an application by the Charity Commissioner, etc. the court can sanction an alteration of the original object of the public trust. It provides that, if the court is of opinion that the "carrying out of such intention or object is not wholly or partially expedient, practicable, desirable necessary or proper in the public interest", the court may direct the property or income of the public trust or any portion thereof to be applied *cy pres* to any other charitable or religious purpose.

1-H.10. The previous Commission stated—

> "The matter can be considered in 'detail' when the Law of public trusts is revised".[4]

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1. Report of the Committee on the Law, etc. relating to Charitable Trusts (1952) Cmd 8710, paragraphs 299, 316, 320, 329.
2. Charities Act, 1960 (8 & 9 Eliz., 2 c 58), section 13.
3. Bombay Public Trusts Act, 1950.
4. The Hindu Religious Endowments Commission (1960—62), Report, page 89, Chapter VI, para. 29 has also recommended adoption of section 13-14, Charities Act, 1960.

1-H.11. The doctrine of *cy pres* can, even now, be applied to suits under section 92. But its scope will, presumably, be limited by the rules of the English Law, as unmodified by statute.

1-H.12. We agree with the above recommendation. However, it appears to us that it would be desirable to make the amendment regarding the scope of *cy pres* without waiting for revision of the law of public trusts.

1-H.13. We are, further, of the view that the provision requiring leave of the Advocate-General should be replaced by a provision requiring leave of the Court. Obtaining the leave of the Advocate-General takes time, and the considerations which he takes into account can be taken into account by the Court as well. Since jurisdiction under the section is vested in the principal civil court of original jurisdiction, it can be expected that the discretion to grant leave under the amended section will be exercised in a responsible manner.[2]

1-H.14. We notice that in its application to public trusts falling within special laws or governed by local laws, those laws contain provisions substituting a defferent procedure regarding leave. An example in point is the provision in the Wakfs[3] Act, quoted below:—

> "55.(1) A suit to obtain any of the reliefs mentioned in section 14 of the Religious Endowments Act, 1893 (XX of 1893) and in section 92 of the Code of Civil Procedure, 1908 (Act V of 1908), relating to any wakf may, notwithstanding anything to the contrary contained in those Acts, be instituted by the Board without obtaining the leave or consent referred to in those Acts.
>
> (2) No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board:
>
> Provided that no such consent shall be required for the institution of a suit against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules or orders made thereunder".

1-H.15. While the procedure for leave, as laid down in such laws, need not be disturbed, it is our intention that the extended scope (of section 92) should apply to suits under section 92, filed in respect of such trusts also. An express provision in this respect in section 92 does not, however, appear to be necessary.

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1. See Muthukrishna v. Ramaswami, I.L.R. 1918 Madras 638, 639 (Sadasiva Aiyyar J.,
2. As to appeal, see section 104 and discussion relating thereto, paragraph 1-K-7, *infra*.
3. Section 55, (Muslim) Wakfs Act, 1954.

Recommendation

1-H.16. Accordingly, we recommend that section 92(1) should be revised as follows:—

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, . . . two or more persons having an interest in the trust and having obtained *the leave of the Court,* may institute a suit, whether contentious or not, in the principal Civil Court of orginal jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree.

[Rest as in existing section 92(1)].

1-H.17. We further recommend the insertion of the following new sub-section in section 92:—

"(3) The circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied *cy pres* shall be as follows:—

(a) where the original purposes, in whole or in part—

(i) have been as far as may be fulfilled; or

(ii) cannot be carried out, or not according to the directions given and to the spirits of the gift; or

"(b) where the original purposes provide a use for part only of the property available by virtue of the gift; or

(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or

(d) where the original purposes were laid down—

(i) by reference to an area which then was but has since ceased to be a unit for some other purpose, or

(ii) by reference to a class of persons or to an area which has, for any reason, since ceased to be suitable, regard being had to the spirit of the gift, or to be practicable in administering the gift; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—

(i) been adequately provided for by other means; or

"(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable. or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift".

Section 93

1-H.18. Section 93 provides for the exercise outside Presidency towns of powers conferred by sections 91-92 on the Advocate-General. In view of our recommendation[1] to substitute, in sections 91 and 92, the leave of the court in place of the sanction of the Advocate-General, section 93 becomes unnecessary.

Recommendation

1-H.19. We, therefore, recommend that section 93 should be deleted.

1. See discussion as to section 91 and 92.

CHAPTER 1-I

SUPPLEMENTAL PROCEEDINGS

Introductory

1-I.1. Part 6, sections 94 and 95, in the body of the Code, deals with what has been described as "supplemental proceedings". These proceedings are mainly concerned with temporary relief. No change is needed in this Part.

Chapter 1-J

APPEALS—FIRST AND SECOND APPEALS

Introductory

1-J.1. Part 7 of the Code, sections 96 to 112, deal with appeals With certain exceptions of a minor character, one appeal on facts as well as on law is allowed as a general rule, and a further appeal, on questions of law and on certain other questions is also allowed. In the case of first appeal, the forum of appeal is left to be dealt with by the Civil Courts Act of each State. The second appeal lies always to the High Court. The Code mainly creates the right of appeal, deals with the jurisdiction of the Appellate Court, and provides for appellate procedure. The right of appeal is dealt with in the body of the Code (Part 7), and the powers and procedure of the appellate courts are dealt with in the Order.

Section 96(1)

1-J.2. We are recommending[1] the insertion of a provision to the effect that (with certain exceptions) a court must decide all issues, even if the suit can be disposed of on a preliminary point. Where, in conformity with such a provision the court decides all issues, and the decree is in favour of a person but the finding on some of the issues is adverse to him, he cannot, as the law stands at present, appeal against the adverse finding (i.e. the finding on the issue decided against him), and the finding is not *res judicata* at least according to the view usually taken. This position has now to be changed.

Recommendation

1-J.3. We recommend, therefore, that the following Explanation should be inserted below section 96(1)—

> "Explanation—*A party aggrieved by a finding of a court incorporated in a decree may appeal from the decree in so far as it relates to that finding, notwithstanding that by reason of the finding of the Court on any other issue which is sufficient for decision of the suit, the decree, wholly or in part is in favour of that party*".

Section 96A (New)

1-J.4. Appeals in petty cases was the subject-matter of a question[2] in our Questionnaire, as follows:

"7. There is a suggestion that from the judgments of lowest courts of first instance, an appeal on facts should be excluded in petty cases, say, cases of a nature triable by a court of small Causes from the point of view of subject-matter, where the amount or value of the

1. See discussion relating to Order 14, rule. 2.
2. Question 72.

subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not more than three thousand rupees (or such other sum as may be considered proper), and the decree or order does not involve directly or indirectly some claim or question respecting property of an amount or value, exceeding three thousand rupees (or such other sum as may be considered proper).

"The proposal is that in these petty cases, the first appeal should be allowed only if the appeal court certifies that a question of law is involved, and the issue of such certificate should be decided either in chambers or in open court as the appeal court may think proper.

What are your views in the matter? Would you agree with the suggestion?".

1-J.5. The majority of the replies on the question are opposed to the suggested restriction, but a minority favour it. After giving due weight to the views received, we have come to the conclusion that no first appeal should lie in any suit of the nature cognizable by courts of Small Causes, when the amount or value of the subject-matter of the suit does not exceed three thousand rupees, except on a question of law. Our object in making this recommendation is to reduce appeals on facts in petty cases. In our opinion, some such restrictions are necessary in the interests of litigants themselves. They should not be encouraged to appeal on facts in petty cases of the nature mentioned above.

Recommendation

1-J.6. Accordingly, we recommend that the following sub-section should be inserted in section 96—

> "(4). *No appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the suit does not exceed three thousands rupees, except on a question of law.*"

Section 99

1-J.7. Section 99, which, *inter alia*, saves irregularity in respect of misjoinder of parties or causes of action, does not apply to non-joinder. In the earlier Report,[1] the Commission examined the question whether "non-joinder" should be added in the section, as in Order 1, Rule 9. It, however, considered it unnecessary to do so, as—

(a) non-joinder of an essential party should be regarded as a fatal defect, and

(b) non-joinder of a proper party would not, even now, entail variation, etc., of a decree.

1-J.8. We agree that the correct legal position is as was stated in the above Report.

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1. 27th Report, page 122, note on section 99.

1-J.9. As was stated in a Madras case,[1] objections as to non-joinder, if taken at the earliest opportunity under Order 1, rule 13, fall under two classes.

"1. If it is absolutely necessary to have the absent party, he ought to be added unless the plaintiff refuses to add him when the suit should be dismissed. If the trial Court erroneously proceeds with the suit, without following either of these courses, the objection can be repeated in appeal, when again it may be disposed of only in the above said two ways. The present appeal falls under this heading.

2. If it is not a case of imperative necessity but only a matter of convenience or expediency, either the absent party may be added or the suit may be tried without him (Order 1, Rule 9). In such a case, the objection, if repeated in appeal, may be dealt with similarly."

1-J.10. In a later Madras case,[2] non-joinder of an essential party was, on the facts of the case, regarded as going to the jurisdiction of the Court, and the suit was dismissed. The earlier Madras case was not, however, cited,[3] and the dismissal was ordered even though the objection to non-joinder had not been taken in the trial court. This was because it was found that the suit could not effectively proceed in the absence of the parties who were not joined.

Recommendation

1-J.11. We are of the view that an express provision on the subject of non-joinder is desirable, and the position should be the same as in the case of mis-joinder. At the same time, non-joinder of essential parties should not be included. Accordingly, we recommend that section 99 should be revised,[4] so as to read as follows:—

> "99. No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any mis-joinder or *non-joinder* of parties or cause of action or any error, defect or irregularity in any proceeding in the suit not affecting the merits of the case or the jurisdiction of the court.
>
> *Provided that nothing in this section shall apply to non-joinder of a necessary party.*"

Section 99A

1-J.12. As regards appeals against final orders under section 47, we had included a question[5] in the Questionnaire as to adoption of the principle that "no such order shall be reversed or substantially carried, nor shall any case be remanded, in appeal on account of any error, defect or irregularity in any proceedings not affecting the merits of the case or the jurisdiction of the Court."

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1. *Shanmuga* v. *Subbaya*, A.I.R. 1922 Mad. 317, 320 (Ramesam J.).
2. *Amirchand Nagindas* v. *Raoji Bhai*, A.I.R. 1930 Mad. 714, 718.
3. *Shanmuga* v. *Subbayya*, A.I.R. 1922, Mad. 317 (*supra*).
4. Similar amendment would be desirable in Order 1, Rule 9.
5. Question 10

1-J-13. Replies on this question generally favour the proposal, and we have come to the conclusion that it is desirable.

1-J.14. We, therefore, favour a provision of the nature suggested in the question referred to above, but after some discussion, we have decided to employ the wording "unless it has prejudicially affected the decision of the case." We further think that want of jurisdiction should also not matter, in this context.

1-J.15. Accordingly, we recommend the insertion of a new section as follows:—

> "99A. *No order under section 47 shall be reversed or substantially varied, nor shall any case relating to such order be remanded, in appeal on account of any error, defect or irregularity in any proceedings relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case*".

Section 100—Right of second appeal

1-J.16. We now come to a very important question, which pertains not to mere procedure but to a substantive right. This is the right of second appeal conferred by section 100.

1-J.16A. Any rational system of administration of civil law should recognise—and it always does—that litigation in civil causes (as described in section 9 of the Code) should have two hearings on facts—one by the trial Court and one by the Court of Appeal. That, in fact, has been the scheme of the Code of Civil Procedure ever since 1859.

According to recognised principles of administration of civil law, every litigant is entitled to take his cause before a second appellate Court on a question of law, and this right also has always been recognised in our country. The two relevant provisions in which this right is recognised are section 100 of the Code and a Article 133 of the Constitution[1].

Two categories of civil litigation

1-J.17. Traditionally, civil litigation has been placed in two categories in our country. For convenience, we may refer to the two categories as 'minor' and 'major'. In our country, there is a hierarchy of the judiciary, beginning with Munsifs or Civil Judges, Junior Division, followed by the Civil Judges or Civil Judges Senior Division, (or corresponding officers) and district Judges and, above them, is the High Court. Formerly, above the High Courts in India, there used to be the Privy Council, but, in 1947, the Federal Court took the place of the Privy Council and, since 1950, the Supreme Court is the highest Court in the country.

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1. Article 133 has been recently amended.

Chronology of litigation instituted in lowest court

1-J.18. The Code of Civil Procedure requires that all civil litigation must be instituted in the court of the lowest jurisdiction. Inevitably, minor litigation begins its career in the Court of the Munsif or the Civil Judge, Junior Division. After he pronounces his judgment and a decree is drawn, an appeal lies either to the District Court or the Civil Judge (Senior Division) on whom appellate power has been conferred. The appeal to this Court is filed under Order XLI. After the decision of the first appellate Court is pronounced and an appellate decree is drawn, the aggrieved party moves the High Court under section 100 of the Code and, broadly stated, such an appeal has to be within the terms of clauses (a), (b) and (c) of section 100.

1-J.19. Major litigation begins its career in the Court of the Civil Judge or the Civil Judge (Senior Division) and, after the trial Court has pronounced its judgment and a decree has been drawn, the aggrieved party goes to the High Court in first appeal under Order XLI. After the High Court has pronounced its judgment and an appellate decree has been drawn up, the appeal used to go to the Privy Council, then to the Federal Court and now it goes to the Supreme Court under Article 133 or with a certificate under Article 136 of the Constitution. That, broadly stated, is the position of the hierarchy of the judiciary and, if we may say so, the hierarchy of appeals contemplated by the procedural law.

Recommendation in Report on Article 133

1-J.20. Before we proceed to consider the changes which we wish to recommend in amending s. 100 of the Code, we ought to indicate briefly the reasons why we recommended to the Union Government the amendment of Article 133 of the Constitution by our Report on the subject.[1] The Union Government has accepted our Report and Article 133 has accordingly been amended. The philosophy of this amendment is that High Courts in our country should ordinarily decide all questions of law pertaining to the interpretation of State legislation and their decisions on such points should be final. If any of the provisions of State legislation use material expressions or clauses which are common to other State legislations and there appears to be conflict in the views taken by different High Courts in regard to the interpretation of such expressions or clauses, the matter can legitimately be taken before the Supreme Court for resolving such conflict. Subject to such cases, in a federal structure, it is legitimate and natural that High Courts of the State should be regarded as final Courts of Appeal so far as the interpretation of State statutes is concerned.

1-J.21. In regard to the interpretation of Central statutes, however, the position is different. A party aggrieved by the decision of the High Court in respect of any provision of the Central statute may be entitled to move the Supreme Court, provided the matter sought to be raised by him is not already concluded by a decision

1. 45th Report.

of the Supreme Court. In regard to the interpretation of provisions of Central statutes, if there is a difference of opinion amongst High Courts, the case for moving the Supreme Court for resolving such a dispute is all the stronger. It is in the light of this approach that we recommended to the Union Government to amend Article 133 in a radical way; and, in doing so, we had emphasised the fact that the test of pecuniary valuation, which had been prescribed by the erstwhile Article 133, had no relevance to our approach in this matter. The reference to the pecuniary valuation having now been deleted, it is conceivable that, even in regard to a case falling under the minor litigation, a party may be entitled to go to the Supreme Court, provided, of course, the test prescribed by the amended Article 133 is satisfied. The words used in Article 133 of the Constitution require that the point raised by the appellant should be a substantial point of general importance which, according to the High Court, it is necessary for the Supreme Court to decide.

Commission's approach to proper scope of second appeal

1-J.22. It is in the light of the amended Article 133 that we propose to approach the question about the scope of section 100 of the Code as it should be after it is amended. It would be noticed that clauses (a), (b) and (c) of section 100 to which we will presently refer, are, in a sense, very wide in effect. In fact, as we will have occasion to point out, clauses (b) and (c) have led to a plethora of conflicting judgments and it may be safely stated that ingenuity of the lawyers determined to seek admission for second appeals of their clients in the High Court, coupled with judicial subtlety which generally believes that even an erroneous finding of fact does, on the ultimate analysis, lead to injustice, has unduly and unreasonably widened the horizon of section 100. It is easy enough to understand what a point of law is; but in dealing with second appeals, courts have devised and successfully adopted several other concepts, such as a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the courts below. This has created confusion in the minds of the public as to the legitimate scope of the second appeal under section 100 and has burdened the High Courts with an unnecessarily large number of second appeals.

Approach of High Court to second appeal

1-J.23. The approach to second appeals has traditionally differed from High Court to High Court, and from Judge to Judge even in the same High Court. The Kerala High Court, for instance admits second appeals, where the appellate court has reversed the findings of fact recorded by the trial court[1]; this position is *prima facie* difficult[2] to reconcile with the plain provisions of section 100. Even where such a position does not exist, it is not uncommon that judges are more lenient in admitting second appeals where the courts below have recorded conflicting findings of fact.

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1. See Kerala amendment to section 100.

2. See 27th Report, para 123 and 14th Report Vol. I pages 377, 378, para 25, 26.

This aspect of the matter has been noticed by several Committees and Commissions which dealt with the question of the growing arrears in the High Courts, substantially because of the indiscriminate admission of second appeals and civil revision applications, and we will have to say something very radical later on. To anticipate our recommenadtion, we might say at this stage that we are recommending[1] that section 115 of the Code, relating to revision, should be deleted.

Discussion in 14th Report

1-J.24. The Law Commission, in its Fourteenth Report,[2] referred to the problem posed by the unduly lenient admission of second appeals and observed that "having regard to the terms of section 100, an appeal should not be admitted merely because the appellant has shown that an arguable or *prima facie* valid point of law arises in the appeal, but that the Court has to be satisfied that the decision of the lower appellate Court on a point of law was erroneous and that in order to do justice between the appellant and the respondent, it is essential that a further hearing should be given to both the parties". The Commission thought that the existing alarming position of arrears could be met if it was recommended that the High Court should adopt the practice of "circulating the papers relating to second appeal to a judge outside the Court hours for the purpose of enabling him to determine whether it should be admitted straightaway and notice issued to the respondent or whether the appeal should be posted for a preliminary hearing under Order XLI rule 11." The Commission further recommended that such a scrutiny should be made by a senior and experienced Judge.

1-J-25. The Commission also thought that a statutory requirement should be made providing that the Judge admitting the second appeal should state the point or points of law which arise for consideration and enabling the High Court to admit a second appeal on specified points only and it should be provided by rules that where a second appeal is filed, certified copies of the judgments of both the Courts below should accompany the memorandum of appeal and, if in any such appeal the appellant proposes to raise any question of the construction of a document, a true translation of the document should also be filed along with the memorandum of appeal.

Arrears in High Courts

1-J-26. These recommendations, however, do not appear to have been implemented and the position of the arrears pending in the High Court, partly because of indiscriminate admission of second appeals and civil revision application, grew from bad to worse. The Shah Committee, which dealt with this problem in 1972, has observed that "it is necessary to provide for a stricter and better scrutiny of second appeals and they should be made subject to special leave,

1. See recommendation relating to section 115.
2. 14th Report, Vol. 1, page 390, para 12.

instead of giving an absolute right of appeal limiting it to question of law." It reiterated the observations made by the Law Commission in its Fourteenth Report, and repeated its recommendation that the second appeals should be circulated to the Judges for reading outside the working hours of the court for determining the question whether the second appeals should be admitted straightaway and notice issued to the respondents or whether they should be placed for preliminary hearing under Order 41, rule 11.

View of High Court Arrears Committee

1-J-27. The High Court Arrears Committee was quite clear in its view that the primary cause of the accumulation of arrears in the High Courts is the laxity with which second appeals are admitted without serious scrutiny in the light of the provisions of section 100 of the Code.

View of some Judges

1-J.28. As we have already indicated[1], some Judges in the High Courts honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the Courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. However laudable and commendable such an approach may ethically claim to be, it overlooks the fact that courts administer justice according to law; and, where limits have been prescribed for the exercise of the High Court's powers under section 100, in trying to redress injustice by interfering with questions of fact, the Court, in effect, is violating the express provisions of section 100 itself. In this connection, we may quote two judgments of the Supreme Court where this aspect of the matter has been emphatically brought out.

Privy Council case

1-J-28A. Before doing so, however, it would be relevant to recall that, as early as 1890, the Judicial Committee of the Privy Council[2] stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in section 100.

Supreme Court cases

1-J-29. Reverting, then, to the two judgments of the Supreme Court, in *M. Ramappa* v. *M. Bojjappa*[3], the Supreme Court was dealing with an appeal by special leave where the High Court of Andhra Pradesh had interfered with the finding of fact recorded by the appellate Court which, in turn, had itself reversed the trial Court's

1. Para. 1-J.22, *supra*.
2. *Mst. Durga Chowdhrain* v. *Jawahar Singh*, (1890) 17 I.A. 122 (P.C.).
3. *M. Ramappa* v. *M. Bojjappa*, (1963) S.C.R. 671.

finding on the same question of fact. In setting aside the decree of the second appellate Court, the Supreme Court observed :

> "It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact, but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of **disconcerting unpredictability** which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid".

1-J-30. Similarly in *Deity Pattabhiramaswamy* v. *S. Hanymayya and others*,[1] the Supreme Court was dealing with an appeal by special leave against the judgment and decree of the High Court of Madras setting aside the judgment and decree of the District Judge, Guntur, which had confirmed the judgment and decree of the Subordinate Judge, Guntur. Reversing the decision of the High Court, the Supreme Court observed that, notwithstanding the clear and authoritative pronouncement of the Privy Council on the limits and the scope of the High Court's jurisdiction under section 100, Civil Procedure Code, "some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under s. 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the learned Judge of the High Court had no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence."

We have deliberately referred to these two decisions of the Supreme Court to emphasise the point that, notwithstanding the recommendations made by the Committees and Commissions in the past, and notwithstanding the words of caution and warning authoritatively pronounced by the Supreme Court, High Courts do sometimes unwittingly or even deliberately enlarge the scope of their jurisdiction under section 100 in pursuance of what they honestly regard as "the requirements of justice".

Search for absolute truth to be limited

1-J-31. At this stage, it may be permissible to point out that a search for absolute truth in the administration of justice, however laudable, must in the very nature of things be put under some reasonable restraint. In other words, a search for truth has to be

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1. *Deity Pattabhiramaswamy* v. *S. Hanymayya*, A.I.R. 1959 S.C. 57.

reconciled with the doctrine of finality. Cynics have sometimes said that, if appeals are provided against the judgments pronounced by the highest Court in the country, a fair percentage of the decisions of the highest Court may be reversed. Indeed, some critics, embittered by their experience in litigation, have gone to the extent of suggesting that, if the same appeal is placed before two different Benches of the same High Court or the Supreme Court, it is not altogether impossible that different verdicts may be rendered. That is what has given rise to the saying which is current at the Bar that the correct judgment is one against which no appeal lies.

1-J-32. We are referring to this aspect of the matter only to emphasise the point that, in the interests of the litigants themselves, it may not be unreasonable to draw a line in respect of the two different categories of litigation where procedure will say at a certain stage that questions of fact have been decided by lower courts and the matter should be allowed to rest where it lies without any further appel. This may sound somewhat harsh to an individual litigant; but, in the larger interest of the administration of justice, this view seems to us to be juristically sound and pragmatically wise. It is in the light of this basic approach that we will now proceed to consider the three clauses of section 100 and deal elaborately with all the point which ultimately lead to the recommendation which we propose to make to amend section 100 of the Code of Civil Procedure in a radical way.

Average litigant usually exhausted by the stage of first appeal

1-J-33. The average litigant is exhausted by the time he has travelled to the court of first appeal, and too often a wealthy litigant, (such as, a Corporation), may well be in a position to carry appeals to a point where the financial resources of the opposite party are practically exhausted. No one can deny that courts should be readily accessible to the people; and when litigation is embarked upon, there should be a remedy against erroneous decisions. But this right of appeal should be within a reasonable limit, and within the control of the resources of the litigants.

Present law considered in detail

1-J-34. Bearing in mind these broad principles we proceed to consider in detail the present law on the subject of second appeals.

Section 100

1-J-35. The relevant section[1] of the Code provides—

> "100. *Second appeal*—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:
>
> (a) the decision being contrary to law or to some usage having the force of law;

1. Section 100.

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

(2) An appeal may lie under this section from an appellate decree passed *ex parte.*

Main principle—Finality of decision on facts

1-J-36. This section was enacted for the express purpose of securing some measure of finality in cases where the balance of evidence—verbal and documentary—arose for decision.[1] It is, therefore, appropriate to consider how far the section (as interpreted judicially) is faithful to this object.

Clause (a) and (b)—Meaning of 'law'

1-J-37. Clauses (a) and (b) of the section are simple in appearance. A second appeal lies under clause (a) where the decision of the lower appellate court is "contrary to law". The term 'law' in clause (a), of course, is not limited in its meaning to statute law; it means general law.[2]

As regards, clause (b), which is not often invoked, the position would be the same.

1-J-38. But the simplicity of these clauses is deceptive, as will be apparent from the cases which we shall discuss later.

Clause (c)

1-J-39. As regards clause (c), the Privy Council found it as "not perhaps altogether happily expressed."[3] Read widely, it may convert the High Court into a Court of first appeal, because all that it requires is a substantial error or defect in procedure which might possibly have affected the decision on merits.

Case law on interpretation of section 100—What are questions of law

1-J-40. We shall first take up the meaning of the phrase 'law' in clauses (a) and (b). The flood of case-law on what are questions of fact open to interference in second appeal, shows that many questions of fact have been held to be questions of law. At one extreme are cases which hold that the question whether a transaction is 'benami' or fictitious or *bona fide*, or was vitiated by undue influence; or whether there was reasonable and probable cause for a prosecution; or whether there was negligence; or whether there was partition; is a question of fact.

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1. *Nafar Chandra Pal* v. *Shukur*, (1918) 45 I.A. 183; I.L.R. 46 Cal. 189 (P.C.)
2. *Ram Gopal* v. *Shakshaton*, (1893) I.L.R. 20 Cal. 93 (P.C.)
3. *Durga Chowdhrani* v. *Jawahir Singh*, (1891) I.L.R. 18 Cal. 23, 30 (P.C.) (Lord Macnaghten.)

1-J-41. These rulings emphasise that a court of second appeal is not competent to entertain questions as to the soundness of a finding of facts by the courts below.[1] A second appeal can only lie on one or other of the grounds specified in the present section,[2] and emphasis on this fundamental principle has brought out several aspects.

1-J-42. For example, a Judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily.[3] The limitations as to the power of the court imposed by sections 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate court upon a matter of fact.[4] Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section 100. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.[5]

Cases where "no evidence" raise questions of law

1-J-43. But, at the other end, are cases which hold that a second appeal will lie where there is, as an English lawyer would express it, "no evidence to go to the jury", because "that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge."[6]

1-J-44. Thus, where the question in a suit was whether the defendant was bound by a mortgage executed by his mother, and it was held that he was, the Privy Council held that the finding was substantially one of law, and that it was, therefore, open to question in second appeal. The Privy Council observed—

> "the facts found (by the lower appellate court) need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law."[7]

1-J-45. As stated by the Privy Council in another case,[8] "the proper legal effect of a proved fact is essentially a question of law", and the High Court is, therefore, entitled to interfere in second appeal.

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1. *Ram Gopal* v. *Shakshaton*, (1892) I.L.R. 20 Cal. 93, 99-100 (P.C.).
2. *Luchman* v. *Puna*, (1889) I.L.R. 16 Cal. 753, (P.C.).
3. *Rudr Prasad* v. *Baij Nath* (1893) I.L.R. 15 All. 367.
4. *Pertap Chunder* v. *Mohendranath*, (1890) I.L.R. 17 Cal. 291, 298, (P.C.) (Sir Richard Couch).
5. *Durga Chowdhrani* v. *Jewahir Singh*, (1891) I.L.R. 18 Cal. 23, 30 (P.C.) (Lord Macnaghten).
6. *Anangamanjari* v. *Tripura Sundari*, (1887) I.L.R. 17 Cal. 740, 747 (P.C.) (Lord Watson),
7. *Ram Gopal* v. *Shakshton*, (1893) I.L.R. 20 Cal. 93, 98, 19 I.A. 228, 232 (P.C.)
8. (*a*) *Nafar Chandra Pal* v. *Shukur*, (1918) 45 I.A. 183, 187; I.L.R. 46 Cal. 189, 195; A.I.R. 1918 P.C. 92;
   (*b*) *Dhanvat* v. *Moti Sagar*, (1927), 54 I. A. 178, A.I.R. 1927 P.C. 102;
   (*c*) *Gujarat Ginning etc. Co.* v. *Motilal Hirabhai etc. Co.* (1936) 63 I.A. 140; A.I.R 1936 P.C. 77.

Mixed questions of fact and law

1-J-46. No doubt, discussing the true scope of the above observations, the Supreme Court has pointed out[1] that there is a distinction between a pure question of fact, and a mixed question of law and fact, and the observations aforesaid had reference to the latter, and not to the former.[2]

1-J-47. But even that leaves ample scope for interference. For example, it has been held by the Supreme Court[3] that whether the dedication of a temple is to the public or is private is a mixed question of law and fact, because its decision must "depend on the application of legal concepts of a public and private endowment to the facts found."

1-J-48. So also, the question whether a property is ancestral or not,[4] or the question whether, when a *raiyat* purchased the interest of the proprietor, there is a merger of the two interests,[6] is a mixed one of fact and law. Though a second appeal does not lie from a finding of fact, yet where a legal conclusion is drawn from the finding, a second appeal will lie on the ground that the legal conclusion was erroneous.

1-J-49. Thus, the question whether possession is adverse or not is often one of simple fact, but it may also be a question of law or a mixed question of law and fact. Where the question of adverse possession is one of simple fact, no second appeal will lie; but a second appeal will lie from a finding as to adverse possession when such finding is a mixed question of law and fact, depending upon the proper legal conclusion to be drawn from the findings as to simple facts.[6]

Concurrent findings of fact

1-J.50. In general, concurrent findings of fact are not disturbed by the High Court in second appeal. But this rule is sujbect to the operation of the express grounds of second appeal enumerated in section 100.

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1. *Shri Meenakshi Mills* v. *C.I.T.* (1956) S.C.R. 691; A.I.R. 1957 S.C. 49, 63, 64, Para. 18, 19, 20 (Case under the Income-tax Act.).
2. *See also Wali Mohammad* v. *Md. Baksh*, A.I.R. 1930 P.C. 91, 93, (reviews cases on s. 100 (Sir Benode Mitter).
3. *Deoki Nandan* v. *Muralidhar* (1956), S.C.R. 756; A.I.R. 1957 S.C. 133, 136, para 4.
4. *Gopal Singh* v. *Ujagar Singh*, (1955), 1 S.C.R. 86; A.I.R. 1954 S.C. 579, 580, para. 7.
5. *Jyotish Thakur* v. *Tarakant Jha*, A.I.R. 1963 S.C. 605, 610, para 22.
6. (*a*) *Lacmeshwar* v. *Manowar*, (1892) I.L.R. 19 Cal. 253, 19 I.A. 48; (P.C.)
   (*b*) *Balram* v. *Syama Charan*, A.I.R. 1922 Cal. 54.
   (*c*) *Ram Chandra* v. *Asa Ram*, A.I.R. 1937 All. 429;
   (*d*) *Janakerama* v. *Appalaswami*, A.I.R. 1954 Mad. 772, 779, Para 23;
   (*e*) *State of A.P.* v. *K. Fakru Bi*, A.I.R. 1962 A.P. 518.

Basic Principle departed from

1-J-51. It appears to us that the wide language of section 100, and the somewhat liberal interpretation placed judicially on it, have practically resulted in giving a goodbye to the basic principle[1] that on questions of fact, decisions of the Courts of first instance should be final, subject to one appeal.

Proper role of High Court

1-J-52. This situation necessitates a restatement of the proper role of the High Court. We state below what, in our view, is its proper role.

High Court not an ordinary Court of last resort

1-J-53. Standing as it does at the apex of a hierarchy, the High Court is no ordinary court of last resort. Its special position does not fit easily into the well-worn epigram that trial courts search for truth and appellate courts search for error.

1-J-54. This is our basic approach to the role of the High Court. We do not conceive of second appeals as "yet another dice in the gamble."

1-J-55. There should be one authoritative and dignified tribunal in various appellate matters[2] to give decisions which are recognised as binding all over the State, and which keep alive the immense unity of the law.

Litigants to be discouraged from persistent appeals

1-J-56. The question could perhaps be asked, why the litigant who wishes to have justice from the highest Court of the State should be denied the opportunity to do so, at least where there is a flaw in the conclusion on facts reached by the trial Court or by the Court of first appeal.

1-J-57. Our answer to this would be, that even litigants have to be protected against too persistent a pursuit of their goal of perfectly satisfactory justice. An unqualified right of first appeal may be necessary for the satisfaction of the defeated litigant; but a wide right of second appeal is more in the nature of a luxury.

1-J.58. The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.

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1. See "Main principle, etc." *supra*.

2. *cf.* Lord Birkenhead's description of the Privy Council, (1927) 63 L.J. 304.

Justification for appeal on question of law

1-J.59. When a case involves a substantial point of law, the general interest of society in the predictability of the law clearly necessitates a system of appeals from courts of first instance to a central appeal court.

As has been observed,[1] "The real justification for appeals on questions of this sort is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court as that there should be a final rule laid down which binds all future courts and so facilitates the prediction of the law. In such a case the individual litigants are sacrificed, with some justification, on the altar of law-making, and must find such consolation as they can in the monument of a leading case".

1-J.60. There is, in our view, no justification for allowing second appeal on question of fact, and we should specifically state that procedural defects of the nature mentioned in clause (c) of section 100 cannot constitute a sufficient basis for invoking appellate jurisdiction in second appeal, unless they raise substantial questions of law.

View of previous Commissions and of High Court Arrears Committee

1-J.61. We are aware that in 1958, a previous Law Commission examined[2] the matter in detail, and, after weighing the arguments advanced in favour of curtailment of the right, did not recommend any restriction on the right to file a second appeal under section 100. The matter was again considered in the earlier Report on the Code.[3] In that Report, agreement was expressed with the previous Commission's conclusion that "considering the conditions in this country, there is not much scope for curtailing the right of appeal".

1-J.62. We are also conscious that recently the High Courts' Committee,[4] which analysed in detail the causes of arrears (including arrears of second appeals), did not recommend any change in the scope of second appeal. It observed that "the primary cause of the accumulation is the laxity with which second appeals are admitted without scrutiny in the light of the provisions of section 100, Civil Procedure Code".

Re-examination of position necessary

1-J.63. We do not mean any disrespect to these bodies when we say that the matter requires re-examination, and that there is justification for considering the scope for modification of the right of second appeal. This justification is derived not only from the spectacle of mounting arrears in the High Courts, but also from certain basic issues, which we shall discuss in due course. In that discussion, experience of the practical operation of the various clauses of section 100 will naturally occupy an important place.

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1. Douglas Payne, "Appeals on Questions of Fact," (1958) Current Legal Problem 181 188.
2. 14th Report (1958).
3. 27th Report (1964).
4. Report of the High Court's Arrears Committee, 1972.

Question included in the Questionnaire

1-J.64. Having regard to the above considerations it appeared to us when we made a preliminary study of the subject that there should be some limitation on the right of second appeal to the High Court.

1-J.65 In order to elicit informed opinion on the subject, we had, in our questionnaire on the Code, put a question[1] as follows:—

> "8. Do you agree that a second appeal should be allowed only if a substantial question of law is involved?"

Replies on the Questionnaire analysed

1-J.66. The suggestion put forth in the query has received mixed reception. Some of the High Courts[2] and some of the individual Judges of two High Courts,[3] have favoured it, as also one State Government[4] and one member of the Bar.[5] On the other hand, some High Courts[6] and individual Judges of few Courts,[7] have opposed it. Almost all Bar Associations that have replied to this question, are against[8] it.

1-J.67. The replies favouring the amendment have not considered it necessary to give explicit reasons.

1-J.68. In the replies opposing it, various reasons have been advanced. It has been stated, for example[9] that gross misappreciation of evidence ought to be provided for. One High Court[10] which has opposed the suggested amendment, has stated that the expression "substantial" will raise controversy. A Judge of another High Court[11] has stated, that ordinarily, a second appeal is admitted only if the question is not decided at the highest, and has been wrongly decided by the first appellate court.

1-J.69. Another High Court Judge,[12] who is also opposed to any amendment, has stated that the law should be uniform in all districts.

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1. Question 8.
2. S. No. 5; S. No. 11; S. No. 12; S. No. 25.
3. S. No. 28 and S. No. 16.
4. S. No. 10.
5. S. No. 19.
6. S. No. 14.
7. (*a*) S. No. 15;
   (*b*) S. No. 16;
   (*c*) S. No. 28.
8. (*a*) S. No. 1;
   (*b*) S. No. 6; S. No. 20;
   (*c*) S. No. 21; S. No. 26.
9. S. No. 2 (An Advocate).
10. S. No. 14.
11. S. No. 15.
12. S. No. 28.

1-J.70. One High Court Judge[1] favours total abolition of second appeals, with enlargement of revisional jurisdiction to correct errors of law.

Commission's conclusions arrived at after considering the replies

1-J.71. It is needless to state that in coming to our final conclusions on the subject, we have given the utmost consideration to the replies received on the Questionnaire.

Limitations on scope of second appeal desirable

1-J.72. Having considered the matter in all its aspects, we have come to the conclusion that the right of second appeal should be confined to cases where—

(i) a question of law is involved; and

(ii) the question of law so involved is substantial.

1-J.73. The mere fact that a question of fact has been wrongly decided by the Court of first appeal, should not, in our view, constitute a ground for second appeal[2] The justification for second appeal is to rest solely on the criteria which we have just now referred to.

Again, the mere fact that a finding of fact is supposed to be perverse or manifestly unjust, will not,[3] under our proposal justify admission of a second appeal. But the appeal would be admissible if a question of law—whether the question relates to substance, procedure or evidence—has been wrongly decided.

Status and calibre of final Court of appeal a vital consideration

1-J.74. Since we are retaining the right of second appeal with the above modification, the query may be raised why the litigant who, before coming to the High Court, has had one right of an appeal before a subordinate court), should have the right of two appeals on questions of law. In other words, why a multiplicity of appeals should be allowed. Now, it is to be remembered that in any legal system which recognises the binding force of precedent, the status and calibre of the final appellate court on questions of law is vital. This consideration over-balances the consideration of multiplicity of appeals.

It is obvious that the numerous subordinate courts in the districts cannot be final arbiters on questions of law. If the law is to be uniformly interpreted and applied, questions of law must be decided by the highest Court in the State whose decisions are binding on all subordinate courts.

If the right of second appeal is so abridged as to remove questions of law from the High Court, it would create a situation wherein a number of subordinate courts will decide differently questions of law, and their decisions will stand. Such a situation would be unsatisfactory.

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1. S. No. 25.
2. This is with reference to the point raised in S. No. 15.
3. This is with reference to the point raised in S. No. 17 and S. No. 23.

1-J.75. The subordinate appellate courts functioning in the districts are not superior courts of record, and their interpretations of law are not binding on other courts. In fact, ordinarily, subordinate courts in one district are not even aware of the pronouncements of other courts in other districts (except when a point of law is declared by the High Court in appeal). It is section 100 which enables the High Court to function as the author, distributor and clearing house of pronouncements of law for the benefit of all subordinate courts.

The interpretation of the law by the High Court is (subject to the law declared by the Supreme Court) binding on all subordinate courts. It is, therefore, essential for uniformity that every error of law, raising a substantial question is promptly rectified by the High Court by a correct pronouncement of the law.

Some points raised in the replies considered

1-J.76. In one of the replies[1] received on our questionnaire, an apprehension has been expressed that the use of the expression "substantial" (with reference to the question of law) will equate the right of appeal to the High Court to that of appeal to the Supreme Court. We shall deal with this point later.[2]

Nature of the question of law regarded as appropriate for second appeal

1-J.77. We shall indicate very broadly the nature of the questions of law which we regard as appropriate for submission to the High Court under section 100 as we propose to revise.

First—and the most important of all is the consideration of uniformity throughout the State. It is obvious that on questions of law uniformity must be maintained. In so far as interpretation of enacted laws having State-wise importance is concerned, it is the task of the judiciary to maintain the unity and the High Court, as the highest tribunal at the State level, should continue to have the ultimate authority to establish unity by resolving or avoiding the possibility of different views in lower courts.

Secondly, apart from questions of interpretation of enacted law which falls in the category mentioned above, there arise other questions of law. The uncodified law constitutes a fertile ground for such questions, as also general principles of construction of statutes. The law of torts, and so much of the personal law as has not yet been codified, furnish examples.

Thirdly, there may be points already decided by the High Court which may, nevertheless, appear to require further consideration. Not unoften, on a question of law on which there has already been a pronouncement by the High Court, one comes to take the view that the matter is capable of further consideration at the hands of the High Court. To illustrate the cases which may fall in this category, there may be a judgment of the High Court which contains observations that are ambiguous, and the ambiguity should be removed by clarification. There may be conflicting decisions of Divisions Benches

1. S. No. 14.

2. See "Distribution between scope of appeal to Supreme Court and scope of appeal to the High Court" *infra*.

of a High Court. There may be a decision of the High Court which seems to require re-consideration, in view of subsequent pronouncements of the Supreme Court.

1-J.73. An analogous situation would arise when there has been a difference of opinion among the judges of the High Court Bench on a question of law, and the usual avenues of settling the differences within the High Court have not been exhausted, so that the question is one of such difficulty that it ought to be allowed to be submitted for decision by a fuller Bench.

1-J.79. Lastly, even apart from questions falling within the specific categories enumerated above, there remain questions of law of which the High Court should take cognizance, questions falling within this residuary category, though not easy of definition in the abstract, can be recognised when they arise in practice.

Wide scope for appellate jurisdiction not contemplated

1-J.80. We should add that we do not visualise such a wide scope for the jurisdiction of the High Court as would embrace every question as to which a party is aggrieved. Being essentially the highest court at the State level which declares the law which is binding, the High Court should not ordinarily engage itself in settling merely factual controversies, however great the stakes may be.

Formula indicated

1-J.81. To formulate in precise language a test which, while excluding the questions to be excluded from the purview of the High Court will include all questions to be included in its purview in conformity with what we have stated above, is not easy. After careful consideration, we have come to the conclusion that in respect of second appeals to the High Court, it is necessary that the question involved must be a question of law and that it must be a substantial question.

1-J.82. It is needless to add that the extraordinary jurisdiction of the High Court under Article 227 of the Constitution—jurisdiction which is admittedly not subject to any rigid limitation pertaining to courts, proceedings or questions—is not intended to be affected by our recommendation or by the preceding discussion.

Distinction between scope of appeal to the Supreme Court and scope of appeal to the High Court.

1-J.83. We should make it clear that the formulae which we propose will not equate the scope of appeal to the High Court to that of appeal to the Supreme Court. Although the question of law, both in the case of the Supreme Court (under article 133 of the Constitution) and in the case of the High Court(under our proposal) is described as 'substantial', there is a further aspect which makes all the difference. In the former case, the question must be one which *needs to be decided by the Supreme Court and must be of general importance*, while in the latter case, there is no such restriction. The Supreme Court, broadly speaking, will concentrate on questions possessing country-wide importance while the High Court will be free to deal with a wider range of questions. For example, a question whether the purpose for which an institution provided in a

remote village is charitable in the legal sense, will hardly, if ever, be dealt with by the Supreme Court. But the High Court may deal with it. Similarly, a question of law on which other High Courts have consistently taken one view, while Benches of the particular High Court have given conflicting decisions, can be re-considered by the particular High Court, but the question may not necessarily be fit for consideration by the Supreme Court.

1-J.84. At the same time, it should be clarified that the question of law can relate to procedure, e.g. improper rejection of evidence or improper admission of evidence—in which case correction by the High Court should be available if the question is substantial.

Question need not be of general importance

1-J.85. It should be noted that we are not limiting the scope of second appeal to the questions of law of general importance. If the law has been clearly laid down by the High Court, and the decision of the subordinate court is in clear violation of the law as pronounced by the High Court, the power of the High Court to correct it should be left intact. This situation will not be covered if the limitation of general importance is inserted.

Historical aspect considered

1-J.86. We are aware that in making a recommendation for cutting down the scope of second appeals to substantial questions of law as above, we are making a departure from a position which has held the field for a century. Even then, we may note that the progress of law has been towards reduction of the scope of second appeal.

1-J.87. The predecessors of the High Courts in their Civil appellate jurisdiction were the Sadar Divani Adalats. The right of appeal to the Sadar Divani Adalat was very wide initially, but came to be severely curtailed in the course of time. The "Conwallis Scheme", for example, made provision for two appeals in every category of cases, irrespective of its value. By 1814, this was reduced to one appeal only. Only in cases of Rs. 5,000 or over, there could be two appeals; one to the Provincial Court of Appeal and second to the Sadar Divani Adalat. As Lord Hastings observed,—

> "The facility of appeal is founded on a most laudable principle of securing, by double and treble checks, the proper decision of all suits; but the utopian idea, in its attempt to prevent individual injury from a wrong decision, has been productive of general injustice by withholding redress, and general inconvenience, by perpetuating litigation".

Provisions in Codes of 1859 and 1882

1-J.88. There is another aspect of the matter. Section 100 of the present Code is the successor of section 584 (of the 1882 Code), which in its turn corresponded to section 372 of the old Code.[1] (Act 8 of 1859).

1. In between 1859 and 1882, there was the Code of 1877, but its provisions were almost the same as those of the Code of 1882.

1-J.89. When the Code of Civil Procedure was revised in 1882, only a slight change was made in clause (c). Clause (c) in the 1882 Code laid down that a second appeal would lie on the ground of "a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits". The corresponding part of section 372 of the Code of 1859 gave a right of second appeal on the ground "of a substantial error or defect in law in the procedure *or investigation of the case* which may have produced error or defect in the decision of the case upon the merits".

The absence of the phrase "investigation of the case", in section 584 of the 1882 Code (and also in present section 100) might lead to the inference that the right of second appeal was intended to be more restricted than it was under the 1859 Code; but, on the other hand, the insertion of the word 'possibly' would lead to the contrary inference. On the whole, however, the change of language in 1882 introduced no material alteration in the law.

1-J.90. As was observed[1] in an Allahabad case—

> "Investigation simply means the process by which conclusion as to the merits of the case are arrived at; procedure means the rules by which that process is to be guided. The one is the subject of the other, and the law will presume that, where there is no defect of procedure there is no defect of investigation. It follows therefore that the omission of the phrase "investigation of the case" in sections 584 implied no intention on the part of the Legislature to restrict the right of second appeal by rendering it narrower than what it was under the Code of 1859. On the other hand, the introduction of the word "possibly", does not *go far* to show that the present Code intended to extend the right of second appeal".

Direction of historical evolution

1-J.91. It would, thus, be seen that the direction of historical evolution is towards gradually narrowing down the scope of second appeal to the Sadar Divani Adalat and later to the High Court. We can, therefore, legitimately claim that having regard to the social needs of today, we are attempting to hasten the process to narrowing down the scope of second appeals.

1-J.92. In the light of the above discussion, we recommend that section 100 should be revised as follows:—

Re-draft of section 100

"100. *Second appeal*—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, *if the High Court certifies that the case involves a substantial question of law.*

1. See *Nwat Singh* v. *Bhekki Singh*, (1889) I.L.R. 7 All. 649, 657 (per Mahmood J.).

(1A) *In an appeal under this section the memorandum of appeal shall precisely state the substantial question of law on which admission of the appeal is sought.*

(1B) *Where the High Court certifies that a substantial question of law is so involved, it shall, at the time of admission of the appeal.*

(a) *formulate that question;*

(b) *state its reasons for so certifying; and*

(c) *specify any other points that were raised at the time of the hearing prior to the admission, but not accepted as raising substantial questions of law.*

(1C) *The appeal shall be heard only on the question so certified, and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:*

Provided that a question not so certified and not raised prior to the admission of the appeal may, if the High Court considers proper, be argued on such terms as to costs or otherwise as the High Court orders, after hearing the opposite party as to whether such order ought to be passed.

Main points summarised

1-J.93. It may be convenient to summarise the main points regarding section 100, as made in the above discussion:—

(i) Reasonable limitations are desirable on this right, in the interest of the public and in the interest of the litigants themselves.

(ii) The basic principle, even behind the present section, is that decisions of the first Court of appeal on facts should be final.

(iii) Clause (a) and clause (b) of section 100 purport to be faithful to this basic principle; clause (c) goes beyond it.

(iv) Even as regards clause (a) and clause (b), decided cases as to what are questions of fact and questions of law (including decisions which allow second appeal where there is no evidence) and also decided cases dealing with mixed questions of fact and law, show that in actual practice, the basic principle referred to above has been departed from.

(v) The question what is the proper scope of the right of second appeal is linked up with the proper role of the High Court. The proper role of the High Court, in the Commission's view is to introduce and re-introduce uniformity in the State, on substantial questions of law.

The High Court is not an ordinary court of appeal, to be invoked for correcting the errors of subordinate courts on all conceivable questions.

(vi) The rationale behind the right of second appeal being as stated above, only substantial questions of law should be agitated in second appeal.

(vii) Limitations on the right of second appeal are, therefore, desirable. Replies to the Questionnaire having been considered, the Commission has come to the conclusion that a second appeal should be allowed only where the case involves a substantial question of law.

(viii) Nature of the questions of law that would fall within the above formula is then indicated.

(ix) It is also made clear, that a wide scope is not contemplated for the jurisdiction of the High Court.

(x) The formula indicated is illustrated in its application.

(xi) The proposed amendment does not go against the trend of history, as is shown by the evolution of section 100.

CHAPTER 1-K

APPEALS—MISCELLANEOUS

Introductory

1-K.1. The principal provisions as to first and second appeals have been already discussed. A few miscellaneous provisions as to appeals are contained in Sections 101 to 112 in the body of the Code.[1]

Section 102

1-K.2. In the earlier Report[2] on the Code, the Commission, after taking into account the recommendation in the 14th Report,[3] recommended an increase of the amount mentioned in section 102 from Rs. 1,000 to Rs. 3,000.

Recommendation

1-K.3. We agree and recommend that section 102 should be revised as follows:—

> "No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed *three thousand rupees.*"

Section 103

1-K.4. In view of the change[4] proposed in section 100, the last few words of section 103, which refer to the illegality, error etc., mentioned in section 100, require change. Further, it appears desirable to make it clear that section 103 applies also where the failure to decide a question occurred not only in the lower appellate court but also in the trial court.

Recommendation

1-K.5. Accordingly, we recommend that section 103 should be revised as follows:—

> "103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal—
>
> (a) which has not been determined by the lower appellate court *or by the court of first instance and the lower appellate court, or*
>
> (b) which has been wrongly determined by such court *or courts* by reason of a *decision on such question of law as is referred to in section* 100."

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1. See discussion as to sections 96 to 100, *Supra.*
2. 27th Report, page 123—Note on section 102.
3. 14th Report, Vol. 1, page 377, 378, para. 25-26.
4. See discussion as to section 100.

Section 104 (fff) to be inserted to deal with order under sections 91-92, as proposed to be amended

1-K.6. We have recommended separately that where the Court refuses leave to institute a suit of the nature referred to in section 91 or section 92 (as proposed to be amended), the order of refusal should be appealable. This necessitates an addition to the list of appealable orders as given in section 104.

Recommendation

1-K.7. Accordingly, we recommend that the following clause should be inserted in section 104:—

> "*(fff) an order under section 91 or section 92, refusing leave to institute a suit of the nature referred to in section 91 or 92, as the case may be*".

1-K.8. Sections 109 and 110 of the code deal with appeals to the Supreme Court. Since the subject is also dealt within Article 133 of the Constitution, we considered the question whether these sections should be retained.

1-K.9. We have, after some discussion, come to the conclusion that since these provisions pertain to procedure, they should continue in the Code. It is appropriate that the Code should, as far as possible, be exhaustive on matters of procedure. We should, however, state[2] here that these provisions should be brought into line with the recent amendment of article 133 of the Constitution.[3]

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1. See discussion as to section 91 and section 92.
2. Amendment not drafted.
3. *Cf* Constitution (30th Amendment) Bill.

CHAPTER 1-L

REFERENCE, REVIEW AND REVISION

Introductory

1-L.1. We now come to a group of sections dealing with reference, review and revision. While an appeal is taken to a *superior* court by a *party*, in pursuance of the *right* given by the law and on questions permitted to be reagitated by the law, there are other provisions for modification or reversal of judicial decisions by the same court or by a higher court. Reference to the High Court, and revision of decisions of subordinate courts by the High Court, are, therefore, provided for, and review of its own judgments by the court itself is also dealt with. Sections 113 to 115 of the Code relate to these matters, and, in this group, the section which has created the largest amount of controversy is section 115 (which deals with revision). We shall discuss this section presently.

Section 115

1-L.2. Section 115 deals with the High Court's power of revision. Briefly speaking, in a case not subject to appeal, it empowers the High Court to call for the records of a case decided by an inferior court, and if the inferior court has exercised a jurisdiction not vested in it by law or failed to exercise jurisdiction vested by law or acted with material irregularity etc. in the exercise of its jurisdiction, the High Court can interfere.

1-L.3. Experience shows that often the cause of delay in the trial of suits is the entertainment of petitions for revision against interlocutory orders which invariably result in stay of proceedings. In fact, in many cases, the object of the parties in moving the High Courts under s. 115 of C.P.C. may be to delay the progress of the proceedings.

1-L.4. This question has been considered in the past more than once.[1] We had in our Questionnaire issued on the Code[2] put a question as to whether the present powers should not be abolished or drastically curtailed.

1-L.5. Most of the replies to the above questions do not favour a change in the law. But having considered the matter carefully, we have come to the conclusion that the provision in the Code as to revision should be deleted. The discretion of the court in granting adjournments, in granting amendment of the pleadings, in issuing or refusing to issue commissions, and with regard to many more miscellaneous matters, should not be open to revision under section 115.

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1. See 27th Report, pages 23, 27, para. 54, 60.
2. Question 13

It is against such orders that revisions are generally filed, resulting in a stay of the proceedings and consequent delay in the disposal of cases.

1-L.6. We may note that serious cases of injustice can be dealt with under article 227 of the Constitution.

1 L.7. Having regard to the above position, and to the fact that where injustice has resulted, adequate remedy is provided for by article 227 of the Constitution for correcting cases of excess of jurisdiction or non-exercise of jurisdiction, or illegality in the exercise of jurisdiction, we are of the view that it is no longer necessary to retain section 115. Article 227, we are sure, will cover every case of serious injustice; and, in that sense, that article is wider than section 115.

Recommendation

1-L.8. We, therefore, recommend that section 115 should be deleted.

CHAPTER 1-M

SPECIAL PROVISIONS RELATING TO THE HIGH COURTS NOT BEING THE COURT OF A JUDICIAL COMMISSIONER

Introductory

1-M.1. Part 9 of the Code, Sections 116 to 120, contains special provisions relating to High Courts which are not Courts of Judicial Commissioners. We do not recommend any change in this Part.

CHAPTER 1-N

RULES

Introductory

1-N.1. Part 10, sections 121 to 131 in the body of the Code, deals with rules. Section 122 empowers the High Courts to make rules regulating the procedure of civil courts subject to their superintendence, as well as rules regulating their own procedure. These rules must not be inconsistent with the body of the Code.[1] But they can amend or add to rules in the First Schedule to the Code.

Under section 129, rules can also be made by High Courts other than Courts of Judicial Commissioners, to regulate their original civil procedure. These rules can be inconsistent with the Code, but not with the Letters Patent or similar law or order establishing the particular High Court.

The two sections—sections 122 and 129—overlap to some extent, that is to say, so far as the original civil procedure of High Courts is concerned.[2] However, that does not cause any practical problems. The rest of the sections in this Part deal with the Rule—Committee and other matters of detail.

Section 123(3) and (4)

1-N.2. Under section 123(3) and 123(4), members of the Rules Committee are appointed by the Chief Justice. In our view, members of the Rules Committee should be appointed by the High Court,[3] and not by the Chief Justice. This, we believe, would be in accordance with the sentiments of an overwhelming majority of High Court Judges.

Recommendation

1-N.3. Accordingly, we recommend that in section 123(3) and 123(4), for the words "Chief Justice", the words "High Court" should be substituted.

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1. See *Shevaram* v. *Indian Oil Corporation*, A.I.R. 1969 Bom. 117, 118, paragraph 3.
2. See *Shevaram* v. *Indian Oil Corporation*, A.I.R. 1969 Bom. 117, 119, paragraph 4.
3. Cf. Article 227(2) of the Constitution.

CHAPTER 1-O

MISCELLANEOUS

Introductory

1-O.1. Part 11 of the Code, sections 132 to 158, contains various miscellaneous provisions. Though entitled "Miscellaneous", some of these provisions are of practical interest, the most important being, of course, section 151, which deals with the inherent power of the Court.

Section 132

1-O.2. Section 132(1) provides that women who, "according to the customs and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in court". Sub-section (2) of the section saves provisions for arrest.

1-O.3. We are of the view that section 132 is an anachronism. The law should not, in such cases, encourage exemption from personal appearance in court. Even where the women do not appear in public according to the "customs and manner of the country" there should, in our opinion, be no exemption from attendance in court. No serious hardship is likely to be caused by the removal of the present exemption, as social conditions have considerably changed, and this practice is getting obsolete.

1-O.3A. Today,[1] the seclusion of women is completely inconsistent with the social philosophy on which our Constitution is founded. Section 132 is not to be treated as a concession to some aristocratic families, but is a recognition of a universally observed custom. Hence, customs and manners of the country prevailing *at the present time* should be the criteria, and not the customs and manners which might have prevailed years ago.[2]

1-O.3B. Moreover, the paramount task of deciding cases[3] on the oral evidence of an important party involves the personalised process of the Judge seeing the witness at first hand, "instead of pouring over the prolix pages of a Commissioner's record". The judge must have the advantage of observing the demeanour, or at least the manner of delivery, of the witness, if he is to assess her credibility justly.

Recommendation to delete section 132

1.O.4. For the reasons stated above, we recommend that section 132 should be deleted.

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1. *Cf. Basai* v. *Hasan Raza Khan*, A.I.R. 1963 All. 340.
2. *Cf. Kunlin Mohammad* v. *Umma Haji Umma*, (1969) Ker. L.T. 418, 421-423.
3. *Kunlin Mohammad* v. *Umma Haji Umma*, (1969) Ker. L.T. 418, 421.

Section 133

1-O.5. Under section 133, certain high dignitaries of State and persons holding exalted judicial offices are exempted from personal attendance in court. During our consideration of the Code, a point was raised whether such special privileges are consistent with equality before the law, and whether the list of persons so exempted should be curtailed .

We have, therefore. considered this point at length.

Analysis of exemption

1-O-5A. Under the section, the persons enumerated in the section are entitled to exemption from personal appearance in court. The list of such persons, as given in the section is long consisting of 11 items, but, in order to facilitate discussion, the persons enumerated could be grouped into four groups. as follows:—

(i) The President and Governors; (The exemption here is obviously because of their position as the head of the State);

(ii) The Vice-President, the speaker of the House of People, the Speakers of State Legislative Assemblies and the Chairman of State Legislative Councils; (The exemption in this case is based on office held as the presiding officer of the Legislature);

(iii) Judges of the Supreme Court and High Courts;

(iv) Ministers.[2]

Justification

1-O-5B. The exemptions provided for in section 133 could be justified on one or other of the following principles, namely:—

(i) That enforcing the personal appearance of the persons exempt would be derogatory to their status; or

(ii) that forcing their personal appearance would hinder the efficient performance of important public business, whether legislative, executive or judicial.

In all the cases mentioned in section 133, one or other of these principles would apply. For example, Ministers have important duties to perform, and their being summoned in Court might interfere with the discharge of their important functions. In some cases, both the principles mentioned above may apply. For example, summoning the President of India in court, may be derogatory to his position as the head of the State, and may also cause hindrance to public business. Again, it may be derogatory to the position of a High Court Judge to be required to appear personally in a subordinate court over whose judgments he might have occasion to hear appeals. It could also interfere with his judicial business.

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1. Section 503 Cr. P.C. is narrower.

2. Section 138(1)(xi), relating to Rulers of former Indian States, may be disregarded for the present purpose.

Rules of law as contrasted with public policy

1-O-5C. We are aware that in a democratic country, such exemptions should be confined to the minimum. The rule of law postulates that no individual enjoys, by virtue of his position or office, any special privilege in contrast with an ordinary citizen. But compelling considerations of public policy may justify qualifications to this abstract rule and it is on this assumption that the section provides a departure from the abstract rule.

Position in England

I-O-5D. We may briefly deal with the position in England. In England, the sovereign in her private capacity is not subject to the jurisdiction of the courts. This position continues even after the passing of the legislation abolishing several of the immunities of the Crown[1] from litigation. It has been held that a writ of execution cannot be executed within the precincts of any palace, which is used as a residence of the sovereign, without her permission. This was held not to apply to the Hampton Court Palace, on the ground that it was not a *residence* of the Sovereign.[2]

English law does not seem to provide for a *general exemption* from personal appearance in Courts as regards Ministers or Judges, or even as regards presiding officers of the Houses of Parliament. It should, of course, be added that there is immunity from liability in the case of judges, by reason of special rules of law. Any Parliamentary privilege may restrict the operation of the general power of the court to enforce the attendance of witnesses. But there is no general exemption from personal appearance as is conferred by section 133.

No change in law recommended

1-O-6. We have given thought to the matter since, at first sight, the privilege may not seem to accord with the spirit of the Constitution. We are reluctant to recommend any change in the law; but, at the same time, we do express the hope that those who have occasion to claim this privilege will, before asserting it, consider whether it is absolutely necessary to do so in the particular case. In this connection, we must refer to the salutary example, which was set recently by the President, who, when it became necessary for the Supreme Court to examine him as a witness, insisted on attending that court in person.

Section 133(1), item (xi)

1-O-7. In section 133(1), item (xi) relates to persons to whom section 87B applies. We may note that section 87B has been now confined to pre-Constitution causes of action.[3]

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1. The Crown Proceedings Act, 1947.
2. *A. G.* v. *Dakin*, (1870) 18 W.R. 111, (C.A.) cited in Annual Practice, under Order 42, rule 3.
3. See discussion as to section 87B.

Section 135A

1-O-8. Section 135A, broadly speaking, confers exemption from arrest on Members of Parliament and of State Legislatures, for the period of the legislative session and for a further period of 14 days before and after each session.

1-O-9. In the earlier Report[1] the following recommendation was made with reference to this section:—

"It is considered desirable to increase the period from 14 to 40 days, in conformity with the position obtaining in England in relation to Members of the House of Commons,—see Article 105 of the Constitution also. It is also considered, that this amendment should apply to Members of State Legislatures also. The view that the subject-matter (so far as concerns such Members) falls within the competence of State Legislatures, under article 194(3) of the Constitution, has not been accepted. It is felt, that the matter falls within entry 13, Concurrent List,—'Civil Procedure including all matters dealt with in the Code of Civil Procedure at the commencement of the Constitution'."

Recommendation

1-O-10. We have, after some consideration, come to the same view, and recommend that section 135A should be amended as recommended in the earlier Report. We agree with the previous Commission in its view that the matter falls within the entry relating to civil procedure.[2]

Section 139

1-O-11. Section 139 deals with persons who can administer oaths.

"Notaries" have power to administer oath under the Notaries Act.[3] The question of adding "notaries" in section 139 was considered in detail in the earlier Report[4] on the Code, with reference to the suggestions to that effect, received through the Ministry of Law. These suggestions stated that in the absence of a provision, the courts refused to accept the affidavits sworn before notaries. The previous Commission was of the view that instead of amending the Code, the matter should be left to the rules of court.

Recommendation

1-O-12. We are, however, of the view that a specific provision would be useful.

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1. 27th Report, page 124, Note on Section 135A.
2. Concurrent List, Entry 13.
3. Section 8(1)(b) Notaries Act, 1952.
4. 27th Report, page 125, note on section 139.

1-O-12A. Accordingly, we recommend that section 139 should be amended by inserting a new clause (aa). The section will then read as follows:—

"139. In the case of any affidavit under this Code—

(a) .....

(aa) *Any notary appointed under the Notaries Act*, 1952.

(b) and (c) .....

may administer the oath to the deponent."

Section 141

1-O-13. The applicability of section 141 to various types of proceedings has been the subject of controversy. The principal proceedings with reference to which the question has arisen may be mentioned:

(1) Proceedings under the C.P.C.

(a) Execution.

(b) Others.

(2) Proceedings under other Acts—

(a) Where a specific provision deals with the matter;

(b) Where no specific provision deals with the matter.

(3) Proceedings under the Constitution.

(4) Other proceedings.

Section 141,—applicability to execution proceedings

1-O-14. The case-law is not uniform as to the applicability of section 141 to execution proceedings: for example, do Order 9, rule 8 and Order 9, rule 9, apply to execution proceedings? The position is not very clear on the point. We have considered the question whether section 141 should be extended to execution proceedings. It is not, however, feasible to extend section 141 to proceedings in execution. Such an omnibus provision would cause hardship. There may be rules—e.g. Order 9, rule 9,—which ought not to apply, in all their rigour, to execution. We have, however, considered the utility of applying specific provisions[1] of the Code to execution and, wherever necessary made recommendations in that regard.

Section 141 and Order 9, rule 9

1-O-15. The applicability of section 141 to proceedings under Order 9 is itself a matter of debate. Under Order 9, various kinds of orders and proceedings—e.g. *ex parte* proceedings and orders of dismissal for default—can be set aside (for sufficient cause). But, where an application for obtaining such relief is itself dismissed for default or decided *ex parte*, what is the position?

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1. See for example, discussion as to Order 9, Order 21, rules 104-105, Order 23, rule 1, Order 26 etc.

Does section 141 apply so as to bring into application the beneficent provisions of Order 9 itself? That is the question that has arisen; and it appears that three different views have been expressed on the point.

(i) The High Court of Bombay has held that section 151 applies in such cases, and not section 141. Reference was first made to a Privy Council case,[2] in which it was held that—

> "..... the proceedings spoken in section 647 (of the 1882 Code of Civil Procedure which corresponds to section 141 of the present code), include original matters in the nature of suits, such as proceedings in probates, guardianships *and so forth*, and do not include executions."

1-O-16. The Bombay High Court took the view that the remarks of the Privy Council and the expression "so forth" must be taken as referring to applications which are *ejusdem generis* with proceedings in probates, guardianships and so forth, that is to say, they do not refer to interlocutory applications or applications which arise out of other proceedings such as suits but which in themselves indicate a *lis*. Hence, section 141 did not apply to the instant case.

1-O-17. Further it was pointed out that the instant case related[3] to an application to restore a suit to file which had been dismissed for default, and not to a case where an *ex parte* order was issued. The court distinguished a Supreme Court case[3] which was concerned with an *ex parte* decree passed in a summary suit under Order 37 of the Civil Procedure Code. There, the question was whether such a decree could be set aside under section 151. The Supreme Court pointed out that Order 37, rule 4 expressly gave power to the Court to set aside an *ex parte* decree passed under the provisions of that Order, and there was therefore no scope for resort to section 151 for setting aside the decree. The present case did not relate to any such question.

1-O-18. Accordingly, it was held that the further application to restore the application under Order 9, rule 9, to the file could be considered under the inherent powers of the court under section 151; and the case was sent back to the trial court, for disposal in conformity with this decision.

1-O-19. In an Orissa case,[4] it was held that Order 9 has no application to a proceeding under Order 9, itself, but that section 151 can be applied. Apparently, section 141 was regarded as inapplicable to such a case.

Same is the Calcutta view.[5]

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1. *Laxmi Investment Co.* v. *Tarachand*, A.I.R. 1968 Bom. 250, 253 (D.B.).
2. *Thakur Prasad* v. *Fakirullah*. (1895) I.L.R. 17 All. 106 (P.C.)
3. *Ramakrandas* v. *Bhagwadnas*, A.I.R. 1965 S.C. 1144.
4. *Kunj Bihari Das* v. *Chanchla Das*. A.I.R. 1966 Orissa 24 (G.R. Misra, J.)
5. *Saral Krishna Bose* v. *Bishwesar Mitra*. A.I.R. 1927 Cal. 534 (D.B.).

1-O-20. The Andhra view is that section 141 applies.[1] Same is the Madras view.[2]

1-O-21. The Patna view[3] is that section 141 does not apply in the absence of special circumstances and section 151 also does not apply. The applicant can, however, appeal under Order 43, Rule 1(c)(d).

Recommendation as to section 141 and Order 9

1-O-22. There is no great reason why such applications should not be dealt with under section 141. A clarification on the subject is desirable.

Other proceedings under other Acts

1-O-23. As regards other proceedings under other Acts, the question has mainly arisen with respect to references under section 146, Criminal Procedure Code.

Section 141, C.P.C. and reference under s. 146, Cr. P. C.

1-O-24. On the point whether the provisions of section 141, Civil Procedure Code, are attracted to a reference made by the Criminal Court under section 146 Code of Criminal Procedure to a civil court, there was previously a conflict of decisions. In an Andhra Pradesh case,[4] proceedings were instituted under section 145, Cr. P.C. The Criminal court made a reference under section 146, Cr.P.C. to a civil court for a decision of the question of possession. The court of first instance came to the conclusion that the provisions of section 141, C.P.C. applied to such a reference, as it was not a proceeding before a civil court within the meaning of section 141, C.P.C. Against this order, a revision was filed.

It was held by the High Court that since a reference under section 146, Cr.P.C. was not a "Proceeding" within the meaning of section 141, C.P.C., the provisions of that section were not attracted to such a reference. Hence, the court was justified in rejecting an application under Order 19, Rule 1, C.P.C. made in such a reference. Such an application was not maintainable.

The contrary view[5] had been taken by the Allahabad High Court.

Amendment as to proceedings under section 146, Cr P.C. not needed

1-O-24A. Now, however, the Supreme Court has held[6] that *section 141 applies to such cases.* Hence, no amendment is required.

1. *Raj Appa Rao* v. *Veera Raghava*, A.I.R. 1966 A.P. 263.
2. (*a*) *Venkatanarasimha Rao* v. *Suranarayan*, A.I.R. 1926 Mad. 325.
   (*b*) *Kaliakkal* v. *Palam Gounda*, A.I.R. 1926 Mad. 654.
3. *Doma Choudhary* v. *Ram Naresh Lal*, A.I.R. 1959 Pat. 121 (F.B.)
4. *Janga Reddy* v. *Hafezurmisa Begum*, A.I.R. 1965 A.P. 17.
5. *Ram Chandra* v. *State of U.P.*, A.I.R. 1965 All 446, 449.
6. A.I.R. 1966 S.C. 1888, 1891; (1966) S.C.R. 393.

Section 141 and proceedings under the Constitution

1-O-25. The question whether an application under article 226 of the Constitution is a "proceeding in a court of civil jurisdiction" within the contemplation of section 141, has been the subject-matter of controversy.

1-O-26. The Andhra High Court, for example, holds that section 141 applies to such proceedings.[1] The Calcutta High Court[2] takes a different view.

1-O-27. The Madras High Court[3] holds that Order 1 of the C.P.C. cannot be applied to proceedings under Article 226, as section 141 is not attracted.

1-O-28. The Allahabad High Court[4] has also held that Order 2, rule 3, C.P.C. does not apply to writ proceedings, and that section 141 cannot be invoked for the purpose.

1-O-29. The Punjab High Court in a 1968 case,[5] held that section 141 does not apply. It expressed itself thus—

> "What is provided in section 141 is that the procedure laid down in the Code in regard to suits is to be followed so far as it can be, in all proceedings in any court of civil jurisdiction. A High Court when it exercises extraordinary jurisdiction under Article 226 of the Constitution, cannot be said to be a court of civil jurisdiction. This special jurisdiction of a High Court aims at securing a very speedy and efficacious remedy, to a person whose legal or constitutional right has been infringed. If all the elaborate and technical rules of Civil Procedure laid down in the Code, were to be imported through section 141 of the Code into these writ proceedings, their very purpose is likely to be defeated by their becoming bogged down in procedural delays. In short, the provisions of the Code of Civil Procedure do not, in terms, govern writ proceedings under Article 226 of the Constitution."

1-O-30. However, it was held that the court will, in appropriate cases, apply the principles (as distinguished from the technical provisions) of Order 22, rules 3 and 4 of the C.P.C. in the exercise of its discretion on the grounds of justice, equity and good conscience. In this particular case, the court refused to exercise its discretion in favour of the petitioners, as the petitioners had delayed their applications for substitution without any "explanation worth the name"

1. *Aunain Adsinarayan* v. *State of Andhra Pradesh*, A.I.R. 1958 A.P. 16.
2. *Bharat Board Mills Ltd.*, v. *Regional Provident Fund Commissioner*, A.I.R. 1957 Cal. 702.
3. *Management of Rainbow Dyeing Factory, Salem* v. *Industrial Tribunal*, A.I.R. 1959, Madras 137, 141, para 32.
4. (*a*) *Uma Shankar Rai* v. *Divl. Superintendent, N. Rly.*, A.I.R. 1960 All. 366.
   (*b*) *Khurjawala Buckles Manufacturing Co.*, v. *Commissioner, Sales Tax, U.P.* A.I.R. 1965 All. 517, 519, paras 4 and 8 (Desai C.J. and R.S. Pathak J.)
5. *Bhagwan Singh* v. *Addl. Director, Consolidation*, A.I.R. 1968 Punj. 360.

Recommendation as to proceedings under article 226

1-O-31. It is desirable to *exclude* the applicability of section 141 (by suitable amendment) in respect of proceedings under Article 226 of the Constitution.

Amendment of section 141

1-O-32. In the light of the above discussion it is desirable that an express amendment[1] should be made in section 141—

(a) to *include* in its scope, proceedings under Order 9;

(b) to *exclude* from its scope, proceedings under article 226 of the Constitution.

Amendment of section 141

1-O-32. We, therefore, recommend that an Explanation should be inserted in section 141 as follows:—

"Explanation—*In this rule, the expression "proceeding" includes proceedings under Order 9, but does not include proceedings under Article 226 of the Constitution.*"

Section 145

1-O-33. Section 145 was considered in the earlier Report,[2] and an amendment recommended. We agree with the earlier Report.

Section 146 and Order 21, Rule 16

1-O-34. The general principle that a transferee succeeds to the right of his predecessor, is to be found in section 146 of the Code, which is as follows:—

"146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceedings may be taken or the application may be made *by or against any person claiming under* him."

The special provision as to the execution of decrees by assignees of the decree is contained in Order 21, rule 16, which provides that a decree may be executed by assignees, if there is an assignment of the decree in writing.

The question has arisen whether a person who does not have a written assignment of the decree assigned (Order 21, rule 6), but who has succeeded to the decree holder's right, is entitled to execute the decree under section 146.

A conflict of decisions

1-O-35. A Madras case[3] illustrates the conflict. In that case P (through her attorney, the contesting respondent) filed a suit in Madurai against 29 defendants, for delivery of possession of certain

1. Amendment not drafted.
2. 27th Report, page 126, note on section 145.
3. *Ponniah Pillai* v. *Natarajan*, A.I.R. 1968 Mad. 190 (Kailasam J.).

property. A decree was passed in 1944. Pending the appeal, P *transferred all her rights in the property in* favour of the respondent, N. for a certain sum of money. Later, P died, and N was brought on record in the appeal. N sought to execute the decree by filing Execution Petition 373 of 1950. This petition was opposed by one L, who claimed that he was the legal representative of the deceased P. L. contested the right of N. to execute the decree, and the executing court found that the dispute between N and L could not be gone into under section 47, C.P.C. It was held that N was not an assignee decree-holder, and could not execute the decree.

N then filed a suit for the declaration that he was entitled to execute the decree; the suit was dismissed by the subordinate court. On appeal to the High Court, the appeal was compromised, and a compromise decree was passed in which N's right to execute the decree was recognised. Subsequently, an execution petition was filed by N which was dismissed. Subsequently, another Execution Petition 209 of 1957 was filed, out of which the present second appeal arose.

A number of questions were raised, but only one is material for the present purpose. It was contended that N could not be said to be an assignee decree-holder, and therefore could not avail himself of Order 21, rule 15, C.P.C. and that, as the transfer of the property by the decree-holder was made after the decree was passed, he could not maintain an execution petition even under section 146, C.P.C.

It was held that this was not a transfer of the rights of the decree in writing as required under Order 21, rule 16, C.P.C. but was a transfer of property after the decree was passed *without transferring the rights in the decree.* Reference was made to a Supreme Court case,[1] in which it had been held that:

> "Either the respondent company are transferees of the decree by an assignment in writing or by operation of law, in which case they fall within Order 21, Rule 16, C.P.C. or they are not such transferees, in which case even they may avail themselves of the provisions of section 146, if the other condition is fulfilled."

Following this Supreme Court judgment, it was held in the Madras case that transferees, if they do not fall within the provisions of Order 21, rule 16, may avail themselves of the provisions of section 146. Further, it was held that this would also include a transferee of the property *after the decree is passed.*

And, Kailasam J. in the Madras case referred to above,[2] did not accept the interpretation put by Jagadisan, J. in an earlier case[3] on the 1955 Supreme Court case.[1] In that case it had been held by Jagadisan J. the true principle is, that a decree cannot be executed

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1. *Jugalkishore Saraf* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376.

2. *Ponnish Pillai* v. *Natarajan*, A.I.R. 1968 Mad. 190 (Kailasam J.).

3. *Sampath Mudaliar* v. *Sakuntalammal*, (1964), 2 M. L.J. 563 (Jagadisan J.)

by anybody other than the decree-holder, except by an assignee who satisfies the requirements of Order 21, rule 16 and that section 146, C.P.C. cannot have the effect of overriding the provisions of Order 21, rule 16.

The result was, that the contention that N being an assignee of the property after the decree was passed was not entitled to maintain an execution petition, was not accepted.

1-O-36. The later Madras view is in accord with the view of the Andhra Pradesh,[1] Patna[2] and Kerala[3] High Courts.

Recommendation as to Order 21 Rule 16

1-O-37. In the above state of the case-law, it appears to be desirable to amend Order 21, Rule 16, to make it[4] clear that it does not affect the provisions of section 146, and a transferee of rights can obtain execution of the decree *without a separate assignment of the decree*.

Section 148

1-O-38. With reference to section 148, we have taken the opportunity of studying judicial decisions during the last ten years, including a judgment of the Supreme Court,[5] but we do not see need for any amendment.

Section 148A (New) (Caveat)

1-O-39. In order that a party who wishes to indicate his intention to have notice of an intended application by an adverse party may be authorised to do so, a provision for caveat may be, in our view, useful. The relevant provision[6] in the Supreme Court Rules[7] is intended for cases where no appeal is pending, but a similar provision, modified so as to be applicable to cases where a suit is pending as well as to those where a suit is about to be instituted, would be helpful.

Recommendation

1-O-40. Accordingly, we recommend the insertion of the following new section in the Code:—

> "148-A. (1) *Where an application is expected to be made, or has been made, in a suit instituted or about to be instituted in a court, any person claiming a right to appear before the court on the hearing of such application may lodge a caveat in respect thereof, and shall thereupon be entitled—*
>
> "(a) *to receive from the Court notice of making of the application, if at the time of the lodging of the caveat such application has not yet been made; and*

1. *Satyanarayana* v. *Arun Maik*. A.I.R. 1955 A.P. 81.
2. *Ramnath* v. *Anardei Devi*, A.I.R. 1964 Pat. 311.
3. *Mani Davasia* v. *Varkey Scaria*, (1960), Ker. L.T. 1077.
4. To be carried out under Order 21, Rule 16.
5. *Mahant Ram* v. *Ganga Das*, A.I.R. 1961, S.C. 882.
6. Order 19, rule 2, Supreme Court Rules.
7. *Cf.* High Court Arrears Committee Report (1972), Vol. I, page 56, Chapter 5, para 25.

(b) *if and when the application has been made, to require the applicant to serve him with copy of the application and to furnish him, at his own expense, with copies of any papers filed by the applicant in support of his application.*

(2) *The caveator shall forthwith, after lodging his caveat, give notice thereof to the applicant, if the application has been made.*"

Section 152

1-O-41. Section 152 was considered in the earlier Report,[1] but no amendment recommended. We agree with the earlier Report.

Section 153A (Proposed)

1-O-42. Sections 152 and 153 authorise the correction of mistakes in judgments etc. in specified cases. The inherent power under section 151 could also be resorted to, for the purpose. A question which has arisen with reference to these provisions is, whether, when an appeal has been summarily dismissed under Order 41, rule 11, an application for amendment of the decree should be made to the appellate court, or, whether it should be to the court which passed the substantive decree.

1-O-43. The Bombay[2] and Patna[3] view is, that it is the original Court which must be approached for the purpose, the reason being that when an appeal is summarily dismissed, the original decree is neither reversed nor varied, and is left untouched. (The Bombay case presents complicated facts but the principle applied was as stated above).

1-O-44. But the Allahabad[4] and Andhra[5] view is that there is no difference in essence between a judgment dismissing an appeal under Order 41, rule 11, Civil Procedure Code and that made under Order 41, rule 27, Civil Procedure Code. In both the cases, the judgment of the appellate court adjudicates upon the rights of the parties, though in one case, the manner of disposal is concise and speedy, and in the other it takes a more elaborate form and longer time. Whether the appeal is dismissed *in limine* against the *ex parte* respondent or dismissed after hearing the respondent, it is the decree of the appellate court that governs the rights of the parties.

As the appellate decree is the final decree and the decree of the lower court merges with it, it follows that the application for amendment of the decree should be made to the appellate court. The doctrine of merger applies even when a second appeal has been dismissed by the High Court summarily under Order 41, rule 11, Civil Procedure Code.

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1. 27th Report, page 126, Note on section 152.
2. *Hussain Sab* v. *Sitaram*, A.I.R. 1953 Bom. 122 (Chagla C.J.).
3. *Batuk Prasad* v. *Ambika Prasad*, A.I.R. 1932 Pat. 238.
4. *Durga Singh* v. *Wahid Raja*, A.I.R. 1965 All. 226 (D.B.).
5. *Ramanna* v. *Sreeramulu*, A.I.R. 1958 A.P. 768 (D.B.).

I-O-45. and 1-O-46. Having regard to the conflict of decisions on the subject, a clarification is needed. It is suggested that the Bombay view should be adopted. No doubt a decision under Order 41, rule 11, is also a determination of the appeal, but, since the decree of the lower court is, for all practical purposes left untouched, it is not improper to give power to amend the decree to the original court. It may be convenient to have a separate section,—say, as section 153A—on the following lines:—

> "153-A. *Where an appeal from the decree or order of a court has been dismissed by the appellate court without hearing the respondent, the power of the court to amend the decree or order or other proceeding in the case may be exercised by the court which passed the decree or order, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order.*"

Section 153B (New) (Duty of the Court to assist litigants)

1-O-47. It is common experience that litigants who have not previously been to court feel lost in the court, and not being familiar with procedural rules, often do not realise the consequences of this or that default. Some provision drawing the attention of the court to its duty in such cases would be useful.

1-O-48. In the Fundamentals of Soviet Civil Procedure,[1] there is an interesting provision:—

> "It shall be the duty of the court, without confining itself to the pleadings and materials submitted, to take all the measures prescribed by law for the full, comprehensive and fair clarification of the actual facts of the case, and the rights and duties of the parties.
>
> "It shall be the duty of the court to explain to the litigants their rights and duties, to warn them of the consequences of procedural acts and omissions, and to help litigants in the exercise of their rights."

1-O-59. The earlier half of the above provision is not appropriate for our system. But the latter half contains a provision which could be inserted in the Code, at least for cases where the litigant is not represented by counsel. When legal aid on a comprehensive scale becomes feasible, it could be deleted.

Recommendation

1-O-50. It is believed that a provision on the following lines would not impose too heavy a burden on the presiding officers—

> "153-B. *Where a party to a suit is not represented by pleader, the court shall explain to that party his rights and duties in relation to the procedure in the suit, and acquaint him with the significance of every material step necessay for the progress of the suit.*"

We recommend the insertion of such a provision.

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1 Article 16, Fundamentals of Soviet Civil Procedure.

Section 153C (New) (Proceedings in Camera)

1-O-51. The Code of Civil Procedure has, at present, no provision as to holding the proceedings in open court and as to the power of the Court to hold proceedings *in camera*. At present, the matter is dealt with under section 151. It would be appropriate to have an express provision on the subject. The matter pertains to "civil procedure" and should present no difficulty as to legislative competence of Parliament.

1-O-52. The Supreme Court has elaborately considered, in *Naresh's case*,[1] the importance of public trial, and the necessary exceptions. The Supreme Court stated that the primary function of the judiciary to do justice between the parties, is not to be overlooked. If the primary function of the Court is to do justice in causes brought before it, then on principle, (the court stated) it is difficult to accede to the proposition that there can *be no exception* to the rule that all causes must be tried in open court.

It was held that the High Court has inherent jurisdiction under section 151 of the Civil Procedure Code, to hold a trial *in camera*, if the ends of justice clearly and necessarily require the adoption of such a course; the High Court has also jurisdiction to prohibit excessive publication of a part of the proceedings at such trial.

1-O-53. It may be noted that the Code of Criminal Procedure has an express provision[2] on the subject.

Recommendation

1-O-54. In view of what is stated above, we recommend the insertion of a new section as follows:—

> "253-C. The place in which any civil Court is held for the purpose of trying any suit shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
>
> *"Provided that the presiding Officer may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or, be or remain in, the room or building used by the court."*

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1. *Naresh Mirajkar* v. *State of Maharashtra*, A.I.R. 1967 S.C. I.
2. Section 352, Cr. P.C.

CHAPTER 1-P

PARTIES TO A SUIT

Introductory

1-P.1. The first question for a person seeking judicial relief is whether a suit is competent. This is dealt with in the body of the Code. When this question is answered in the affirmative, the second question for the person seeking judicial relief is, to which court he ought to resort. This question is also answered in the body of the Code, by a set of provisions dealing mainly with the competence of courts with reference to pecuniary value of the subject-matter and the place of suing. Having ascertained the court to which he must resort, the third question for the person seeking judicial relief is, for and against what parties such relief must be claimed. This is dealt with in Order 1.

1-P.2. In general, a wide latitude is given, in this respect, to the plaintiff, as is evidenced by various permissive words, such as, "may", "may be joined", "it shall not be necessary", "the plaintiff may at his option join" and "where the plaintiff is in doubt", which occur in various rules in Order 1.

To avoid conflicting decisions and multiplicity of proceedings, there is a provision under which one person may, with the pemission of the court, sue or defend on behalf of numerous persons having the same interest in one suit.

Mis-joinder and non-joinder of parties, in general, would not affect a suit, except where a necessary party is omitted to be joined.

This, in brief, is the scheme of Order 1. While the first seven rules do not seem to have much scope for improvement, rule 8 and some of the subsequent rules require discussion.

Order 1, rule 8 and numerous parties

1-P.4. Order 1, rule 8 deals with what are known as 'representative suits'. Under this rule, where there are numerous persons having the 'same interest' in one suit, one or more of them may, with the permission of the court, sue or be sued or defend in such suit, on behalf of all of them. The other persons have, of course, to be notified, and can apply to be made a party to the suit.

1-P.5. Now, a question which presents some difficulty is, what is meant by the expression "same interest". It is not necessary to go into the cases on the subject. But, in one respect, a clarification is needed. The impression seems to prevail that the party representing and the parties represented should have the same cause of action. This is not, in our view, necessary; nor is there any reason why it should be so. What is more important is community of interest. If, for example, A sues one hundred persons who have, in pursuance of

a conspiracy, trespassed on his land, or have wrongfully confined him, and A asks for declaratory relief, the Court should have power to permit him to sue, say, three of the opponents as representatives of all the hundred, provided there is community of interest among them. Such community of interest can, ordinarily, be said to exist where there is concerted action or a common object. The cause of action against each trespasser is separate. But, if their interests are common, one suit should be permissible, of course with the leave of the court.

Recommendation

1-P.6. We, therefore, recommend that the following Explanation should be inverted below Order 1, Rule 8:—

> "Explanation—*It is not necessary that the person who sue or are sued or defend should have the same cause of action as the persons on whose behalf or for whose benefit they sue or are sued or defend, as the case may be.*"

Order 1, rule 8 and execution

1-P.7. The Commission, in its earlier Report on the Code,[1] proposed some changes in Order 1. rule 8 regarding execution. The main change to which it drew attention was the proposed provision to the effect, that while a judgment under this rule should be binding on all persons on whose behalf the suit is brought or is defended, it shall not, except with the leave of the court, be executed against any such person who is not actually a party to the suit. In suggesting this amendment, the Commission followed the provisions of Order 15, rule 12(2), of the Revised Supreme Court Rules of England.

1-P.8. The relevant provisions as formulated in the Appendix to the Report[2] are as follows:

> "(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf or for whose benefit the suit is instituted or defended, as the case may be; but such decree shall not be executed by or against any person not a party to the suit except with the leave of the court.
>
> "(7) Notice of an application for the grant of leave under sub-rule (6) shall be served on the person against whom the decree is sought to be executed in the manner provided in this Code for the service of a summons.
>
> (8) Notwithstanding that a decree to which any application for the grant of leave under sub-rule (6) relates is binding on the person against whom the application is made, that person may dispute liability to have the decree executed against him on the ground that by reason of facts and matters peculiar to his case he is entitled to be exempted from such liability."

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1. 27th Report, page 28, para. 62.
2. 27th Report, Appendix showing the draft amendments, Order 1, rule 8, Proposed sub-rules (6) to (8).

Recommendation

1-P.9. We have carefully considered this particular point, and we think that such a restriction is unnecessary. We, therefore, recommend that while carrying[1] out the amendment in Order 1, rule 8, as proposed in the earlier Report on the Code, the restriction as to execution without leave need not be incorporated.

Order 1, rule 8A (New)

1-P.10. The Code has, at present, no provision for permitting the joinder of an organisation interested in the legal issues in a suit, i.e. an organisation which, though not concerned with the narrow questions of fact arising between the parties, has a view to offer on some broader issues.

1-P.11. It may be noted, in this connection, that in Soviet Russia, there is a provision for participation, in the trial by organs of State administration, trade unions, establishments, enterprises, organisations and citizens in defence of the rights of others. The Fundamentals of Soviet Civil Legislation porvide as follow[2]:—

> "In the cases provided for by law, organs of State administration, trade unions, state establishments, enterprises, kolkhozes and other co-operative and mass organisations or citizens may take action in defence of the rights and lawful interests of others.
>
> "Organs of State administration, in the cases provided for by law, may be caused by the court to join the suit on their own motion to present their "opinion on the case in order to perform their duties or to act in defence of the rights of citizens or interests of the state.
>
> "The organs of state administration, establishments, enterprises and organisations enumerated in the present Article, through their representatives, and citizens may acquaint themselves with the materials of the case, make challenges, deliver pleadings, submit evidence, take part in the examination of evidence, file petitions, and also perform other procedural acts provided for by law."

1-P.12. It has been stated,[3] that in the U.S.S.R., social organisations are drawn into civil proceedings just as they are drawn into criminal proceedngs.[4] A civil case may be initiated on the petition of a social organisation.[5] The Court may "permit representatives of social organisation.....to participate in the trial"[6] "in order to present the court with the opinions of authorised persons of their organisations ..... concerning the case under consideration

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1. To be borne in mind while amending Order 1, rule 8, as per 27th Report.
2. Article 30, Fundamentals of Soviet Civil Legislation and Civil Procedure.
3. See Harold Berman, "Educative Role of Soviet Court" (January, 1972) 20, I.C.L.Q. 81 -86.
4. Apparently, the reference is to section 259, R.S.F.S.R. Cr. P.C.
5. R.S.F.S.R. Code of Civil Procedure, Art. 4.
6. R.S.F.S.R. Code of Civil Procedure, Art. 141(6).

by the court"[1]. Representatives of social organisations appearing in civil cases have the same rights as counsel for the parties[2]. "In practice, social organisations do frequently participate in civil cases—especially in housing disputes, labour and family law".

1-P.13. Some such provision—suitably adapted, of course, so as to suit Indian conditions—would be useful. It is true that it may not be in harmony with the adversary system on which our procedure is based. Some safeguards may also be required, in order to prevent busy bodies from interfering with private disputes.

Nevertheless, it would be worthwhile inserting a provision which could be pressed into service in suitable cases.

Recommendation

1-P.14. The provision could be somewhat on the following lines and find a place in Order 1:

> "8A. *The court may, if satisfied that a person or body of persons is interested in any question of law in issue in the suit, and that it is in the public interest to allow that person or body to present its opinion, permit that person or body to take such part in the proceedings as the court may specify.*"

1-P.15. This will not be exactly the same as the practice of appointing an *amicus curiae*, because the organisation concerned would have *its own views* to present, and its role would not be confined to assisting the court, though its participation may help the court in elucidation of some of the issues.

Order 1, rule 9

1-P.16. Order 1, rule 9, which deals with the effect of misjoinder and non-joinder of parties, provides as follows:—

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Recommendation

1-P.17. We are of the view that non-joinder of essential parties should be excluded from the scope of this rule.[3] Accordingly, we recommend the insertion of the following proviso:

> "*Provided that nothing in this rule shall apply to non-joinder of a necessary party*".

Order 1, rule 10(2)

1-P.18. The following changes were proposed in Order 1, rule 10(2), in the earlier Report on the Code,[4] in order to make the rule comprehensive:—

(a) A power to strike off the name of any person who has, for any reason, ceased to be a proper or necessary party, should be added.

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1. R.S.F.S.R. Code of Civil Procedure Art. 147.
2. R.S.F.S.R. Code of Civil Procedure, Art. 147.
3. *Cf.* discussion as to section 99.
4. 27th Report, page 128, note on Order I, rule 10(2).

(b) A power to remove any person who has been unnecessarily joined, should be added.

While we see the utility of such an amendment, it appears to us that the proposed amendment will inevitably give rise to the question whether the party struck off under the rule (as proposed to be amended) should be given a right of appeal against any determination of a question which might have been rendered before he ceased to be a party. It becomes necessary to consider this aspect, because such a person would not be a party on record when the suit is finally disposed of and the decree is passed.

1-P.19. The right of appeal against an original decree is governed by section 96, which is silent as to *the person* who can appeal. Courts have, in general, taken a wide view in this respect,[1] and, without confining the right to the parties on record, they have entertained an appeal by a person whose rights are affected by a decree, even where he was never a party.

1-P.20. Even then, a controversy could arise as to whether the person whose name is struck off can be recognised as having a right of appeal against the decree that may be ultimately passed after he has ceased to be a party, if the decree affects his interest.

Recommendation in earlier Report not to be carried out

1-P.21. In the circumstances, we have come to the conclusion that the recommendation in the earlier Report as to Order 1, rule K10(2) should not be carried out.

Order 1, rule 10A (New)

1-P.22 The Code contains no express provision, empowering the court to ask counsel (not appearing in the case) to assist the court by agreements. Such a practice is common. It may be desirable to give legislative recognition to this practice.

Recommendation

1-P.23. Accordingly, we recommend that the following new rule should be inserted in Order 10:—

> "10-A. *The Court may, in its discretion, request any pleader to address the Court as to any interest which is likely to be affected by the decision of the matters in issue and which is not represented.*"

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1. *Surendra Das* v. *Bhola Prasad*, A.I.R. 1950 Assam 22 (Case-law reviewed).

CHAPTER 2

FRAME OF THE SUIT

Introductory

2.1. Order 2 deals with the frame of the suit; and the dominant rule here is that, as far as practicable, every suit shall be so framed as to afford ground for final decision upon the subjects in dispute and to *prevent further litigation concerning them*. With this end in view, the Code provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and, similarly, he must claim all the reliefs which he is entitled to, in respect of the same cause of action.

2.2. As has been observed.[1]

> "Were the rule otherwise, a man might be sued repeatedly in respect of the same matter, and conflicting judgments might be pronounced regarding separate portions of the same property, included in the same cause of action.

"And as the value of the property claimed by the plaint determines the class of judges by which a suit is cognisable and the remedies of the parties in an appeal, a suit might be split up, so that each branch of it should be decided by a judge of a lower class than that by which, with reference to the value of the whole property in litigation, it ought to be decided, and the right of the parties to appeal would be unfairly limited".

2.3. The Code also encourages the plaintiff to unite, in the same suit, several causes of action against the same defendant jointly,—the object here again also being to avoid numerous proceedings. Of course, where there are several defendants or plaintiffs, and several causes of action, and one or more of the plaintiffs or defendants are not interested in one or more of the causes of action, the nice question of "multifariousness" arises. The Code expressly provides that objections on the grounds of mis-joinder of causes of action must be taken at the earliest possible stage.

We do not recommend any changes in this Order.

Order 2, rule 2 and Execution Proceedings

2.4. Since the provisions of O.2, r.2 do not apply to execution proceedings, it has been held[2] that an application to enforce one relief will not be a bar to a subsequent application to enforce the other relief, though both the reliefs were awarded by one and the same decree.[2] We do not think that a specific provision is necessary in this respect.

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1. W. Macpherson, New Civil Procedure for British India (1871), page 54, citing 2 Suth 148.
2. *Radha Kishan* v. *Radha Parshad*, (1891) I.L.R. 18 Cal. 515.

CHAPTER 3

RECOGNISED AGENTS AND PLEADERS

Introductory

3.1. Order 3 deals with recognised agents and pleaders. Recognised agents are persons who do not belong to the profession of lawyers, while pleaders so belong. There are rules for appearance, application and acts to be done by the recognised agents and pleaders, and for the service of process on them. Pleaders who act or plead for a party, have to file in court a document or memorandum.

There are a few points which require discussion in this Order.

Order 3, rule 4

3.2. Order 3, rule 4(1), prohibits a pleader from acting for any person in any court, unless he has been "appointed" for the purpose by a document in writing. Order 3, rule 4(2) and rule 4(3) contain provisions as to the duration for which such appointment "shall be deemed to be in force". At first sight, the wording of sub-rules (2) and (3) of rule 4 may create an impression that they apply so as to regulate, as a matter of law, the duration of the professional relationship (of counsel and client), created by a contract. But on a close reading, this impression is dispelled. Sub-rule (2) is to be read as relevant only for the purpose of the prohibition in sub-rule (1).

We have examined the matter at some length, and have come to the above conclusion. But a clarification on the point is desirable.

Recommendation

3.3. Accordingly, we recommend that Order 3, rules 4(2) and 4(3) should be revised as follows:—

"(2) Every such appointment shall be filed in Court and shall, *for the purposes of sub-rule* (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

Explanation—For the purposes *of this sub-rule*, the following shall be deemed to be proceedings in the suit:—

(a) an application for review of judgment,

(b) an application under section 144 or section 152 of this Code,

(c) any appeal from any decree or order in suit, and

(d) any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit.

"(3) *Nothing in sub-rule* (2) *shall be construed*—

(a) *as extending as between the pleader and his client, the duration for which the pleader is engaged, or*

"(b) *as authorising service on the pleader of any document issued by any court other than the court for the purposes for which the pleader was engaged, except where the client has otherwise expressly agreed in the document referred to in sub-rule* (1)."

CHAPTER 4

INSTITUTION OF SUITS

Introductory

4.1. Order 4 deals with the mode of institution of a suit. A suit, it says, is to be instituted by presenting a plaint to the court or its authorised official. This Order must be read with section 26, which provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Particulars of a suit presented are to be entered in the register of suits. Detailed rules as to pleadings in general and plaints in particular are contained in Orders 6 and 7.

We do not recommend any changes in this Order.

CHAPTER 5

ISSUE AND SERVICE OF SUMMONS

Introductory

5.1. When the plaint has been registered, a summons may be issued to the defendant, or to each defendant where there are more defendants than one. It is for the court to decide whether the summons shall be for the settlement of issues only, or for the final disposal of the suit. Elaborate provisions as to the mode of service of summonses are contained in the various rules of Order 5, the object being to make sure, as far as possible, that the summons comes to the knowledge of the defendant.

5.2. Since a considerable proportion of suits are decided *ex parte* owing to the defendant's failure to appear the importance of these rules is obvious. Rules as to the effect of appearance and non-appearance of the defendant are separately provided for in Order 9 (which also deals with the consequences of non-appearance of the parties). Most of the rules in Order 5 relate to ministerial acts. We shall discuss only a few rules of importance.

Order 5, Rule 15

5.3. Where, in any suit, the defendant cannot be found, service of the summons can be made on any adult *male member* of the family of the defendant who resides with him, under Order 5, rule 15.

In the earlier Report,[1] the previous Commission noted that the word "male" had been omitted by local amendment in Kerala. The previous Commission, however, thought that the amendment may not be suitable for adoption for the whole of India.

Recommendation

5.4. We have considered the matter again, and are of the view that the word "male" should be dropped. Having regard to the increase in literacy and status of women during the last few years, this change could safely be made, for the whole of India. We, therefore, recommend that in Order 5, rule 15, the word "male" should be dropped.

Order 5, rule 20(1)

5.5. Order 5, rule 20 deals with "Substituted service". The rule provides that such service can (besides affixation of the summons) be ordered in such other manner as the Court may direct. The usual mode of service ordered is by publication in the newspaper. We considered the question whether, besides publication in the newspaper,

1. 27th Report, page 136, Note on Order 5, rule 15.

L/B(D)229Mof LJ&CA—10(a)

the court should have power to direct that the substance of the summons should be read out by means of announcement on the radio. But, on inquiry being made from the Department concerned, we understand that, that would not be feasible.

5.6. We, therefore, recommend no change in this respect.

Postal Service

5.7. A recommendation for service of summons by post along with personal service has been made in the earlier Report,[1] and we wish to record that we are in full agreement with it.

1. 27th Report, pages 136, 137, note on Order 5, rule 19.

CHAPTER 6

PLEADINGS

Introductory

6.1. The provisions in Order 6 relating to pleadings in general are taken mainly from the English rules. The fundamental rule is that only facts, and only material facts, shall be stated in the pleadings, but not the evidence, and the statement of facts should be concise. The whole purpose of the system of pleadings is to narrow down the dispute between the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.[1] From this fundamental rule follow the detailed guide-lines given in the Order; and the philosophy of the Code towards encouraging amendments which are necessary for the purpose of determining the real questions in controversy between the parties, is given expression in rule 17 of this Order.

We do not consider any changes in this Order to be necessary.

1. *Thorp* v. *Holdsworth*, (1876) 3 Ch. D. 637, 638, 639. (Jessel M.R.)

CHAPTER 7

PLAINT

Introductory

7.1. Detailed provisions as to the particulars to be contained in the plaint are dealt with in the first eight rules of Order 7. Where a plaint is presented, it may either be admitted (rule 9), returned, if the court has no jurisdiction (rule 10), or rejected for certain grounds (rules 11 to 13). Each of these three possible alternatives is of importance.

7.2. Since, usually, the plaintiff sues or relies upon a document in support of his case, rules 14 to 18 in Order 7 contain detailed provisions as to listing and production of such documents at the time when the plaint is presented.

Order 7, rule 2

7.3. Order 7, rule 2 provides that in a suit for recovery of money, the plaint shall state the precise amount claimed. Under the Punjab Amendment to Order 7, rule 2, where the suit is for movable property in the possession of the defendant or for a debt of which the value cannot be estimated, the plaint shall state approximately the amount or value.

7.4. In the earlier Report[1] it was considered unnecessary to adopt such a provision. But, we think, that it would be useful.

Recommendation

7.5. Accordingly, we recommend the following re-draft of Order 7, rule 2:—

"2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed. But where the plaintiff sues for—

(a) *Mesne* profits, or

(b) for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or

(c) *for movables in the possession of the defendant, or*

(d) *for debts of which the value he cannot, after the exercise of reasonable diligence, estimate*, the plaint shall state approximately the amount or *value* sued for."

Order 7, rule 6

7.6. Order 7, rule 6, requires that a ground of exemption from limitation should be specifically pleaded in the plaint.

1. 27th Report, page 145, note on Order 7, rule 2.

7.7. Where the ground of exemption from limitation is not stated in the plaint, the question arises whether it can be raised later (without amendment of the pleading). The earlier Report discussed the controversy,[1] on this point.

7.8. Another question is whether, when the ground of exemption from limitation is stated, the plaintiff can take another ground, which is new but is *consistent* with the allegations in the pleading. The controversy on this point was also discussed in the earlier Report.[2]

7.9. A third question is, whether a new and *inconsistent* ground can be pleaded? It was noted in the earlier Report[3] that a clerical error in a Bombay Judgment had misled some courts into thinking that even an inconsistent plea can be taken for claiming exemption from limitation.

7.10. To summarise the position, as was stated in that Report,—

(i) the strict provision embodied in Order 7, rule 6 has been administered liberally by most High Courts (excepting the Madras High Court)[4];

(ii) there is some confusion about whether the extra grounds which can be set up, should be "consistent", with the earlier ground as set out in the pleadings.

7.11. In view of the majority view, it was stated in the earlier Report, that an amendment was not necessary.

Recommendation

7.12. But we think that it is desirable that the position should be clarified. There should be no objection to the court being given a power to permit the plaintiff to rely on a new ground of exemption, so long as that ground is not inconsistent with the allegations in the plaint. The insertion of the following proviso at the end of Order 7, rule 6, is, therefore, recommended:—

> *"Provided that the court may permit the plaintiff to claim exemption from such law on any ground not shown in the plaint, if the ground is not inconsistent with the allegations in the plaint."*

Order 7, rule 10

7.13. Order 7, rule 10 provides that the plaint shall, "at any stage of the suit", be returned to the plaintiff, for presentation to the court in which the suit should have been instituted, if the court has no jurisdiction to try the suit. The words 'at any stage of the suit' have raised one question. Where the suit has been already tried and a judgment delivered, can the plaint be returned?

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1. 27th Report, pp. 145-146, Note on Order 7, rule 6.
2. 27th Report, pp. 145-146, Note on Order 7, rule 6.
3. 27th Report, pp. 145-146, Note on Order 7, rule 6.
4. The later decision in *S.M. Mirimall* v. *K. Radhakrishnan* A.I.R. 1972 Mad. 108 (D.B.) does not seem to make a difference.

Does the "stage of suit" still continue? When, for example, it is found either in appeal or in revision that the decree was without jurisdiction, can the appellate or revisional court return the plaint, on the theory that an appeal or revision is a kind of continuation of the suit? The authorities are conflicting on the point.

7.14. In a Calcutta case[1], the plaintiff sought for a return of the plaint in similiar circumstances. But, the respondent's counsel argued that where there had been a trial and a judgment on a plaint, the plaint could no longer be returned. The Court held that the plaint could no longer be returned.

7.15. In an earlier Calcutta decision[2], it had been observed that the plaint had already merged in a decree, and "it is inconceivable how it struck the munsiff that the plaint could be returned at that stage". That was a suit for partition. The property was valued at a certain figure, and a preliminary decree was passed. But, thereafter, it was found, at the time of the final decree, that the suit was undervalued. On those facts, it was held that it was not open to the Court, if the value of the property exceeded the pecuniary limits of the jurisdiction of the court, to declare the preliminary decree a nullity and to return the plaint for presentation to the competent court.

7.16. It was urged in the later Calcutta case that where the plaint (or rather, the cause of action) has merged in a judgment or decree, the appeal court (or the revisional court) can always make an order setting aside the judgment and directing the plaint to be presented to the proper court. But it was held that normally, having regard to the context and juxtaposition of Order 7, rule 10, the *question* of return of plaint *should be considered at a stage where* the judgment has not been delivered. It is at the stage where the plaint is filed, and before the summons in the suit had issued, that the plaint is normally returned. In fact, Order 7, dealing with the plaint, contextually comes before Order 8, which deals with the written statement. Sub-rule (2) of Order 7; rule 10, would also seem to indicate that it is the initial stage that is being considered under this provision, and not the stage when the suit proceeded to a trial and the judgment already delivered.

7.17. It was observed further, that the words "presentation", "return" and "endorsement" of the reasons as envisaged under Order 7, rule 10(2) seem to indicate that the legislature is contemplating the stage of such return long before the trial of the plaint and before the delivery of the judgment on such a plaint. The small causes court judge should have acted under Order 7, rule 10 on this plaint when it was presented to him, and should have returned it for presentation to the proper court. The appropriate course for the High Court should be to set aside the judgment, and not to order return of the plaint for presentation to the proper court.

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1. *Gopi Krishna* v. *Anil Bose*, A.I.R. 1965 Cal. 59.
2. *Ratikanta Myore* v. *Santan Baidya*, A.I.R. 1930 Cal. 147 (B.B. Ghosh and S.K. Ghose J).

7.18. Some other High Courts assume[1] that a wider interpretation is the correct one.

7.19. In the above state of the case-law, a clarification is desirable. Dismissal of the suit for want of jurisdiction, though an easier course, is bound to lead to hardship in respect of court-fees and limitation. It will be more convenient if a provision is added to the effect that the power under Order 7, rule 10, can be exercised by the Appellate Court or by the Revisional Court.

As regards the situation where a preliminary decree has already been passed, we do not think that it would be appropriate to provide for return of the plaint by the court of first instance.

Recommendation to amend O.7, r. 10(1)

7.20. Accordingly, we recommend that the following Explanation should be inserted below Order 7, rule 10(1):—

"Explanation—*A Court of appeal or revision may direct the return of a plaint under this rule, notwithstanding that a decree had been passed in the suit.*"

Recommendation to insert O.7, r. 10A, etc.

7.21 and 7.22. We are, further, of the view that in order to avoid delay, the court returning the plaint should fix a date for the appearance of the parties in the new court. We recommend the insertion of following rules for this purpose:—

"10-A. (1) Where, in any suit, after the defendant has appeared, the court is of the view that the plaint should be returned under rule 10, it shall, before doing so, inform the plaintiff, and the plaintiff shall thereupon be entitled to make an application to the Court—

(a) intimating that, on return of the plaint, he proposes to present it to the court in which it should have been instituted, to be specified in the application;

(b) praying that the court may fix a date for the appearance of the parties in the said court; and

(c) requesting that notice of the date so fixed may be given to him and to the defendant.

(2) Where an application is made under sub-rule (1), the court shall, before returning the plaint—

(a) fix a date for the purpose mentioned in clause (b) of that sub-rule; and

(b) give to the plaintiff and to the defendant such notice as is referred to in clause (c) of that sub-rule; and where such notice is given,

(i) it shall not be necessary for the Court specified in the application, on presentation of the plaint

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1 (a) *Straw Products Ltd.* v. *Bhopal Municipality*, A.I.R. 1959 M.P. 253, 255, para. 11
(b) *Ram Adhin* v. *Gulzari Singh* A.I.R. 1946 Oudh 116, 118.

in that Court, to serve the defendant with a summons for appearance in the suit instituted by presenting that plaint, unless that court, for reasons to be recorded, otherwise directs; and

(ii) the said notice shall be deemed to be a summons for appearance of the defendant on the date so fixed in the court mentioned in the notice.

(3) Where the plaintiff has made an application under sub-rule (1) and the application has been granted, he shall not be entitled to appeal against the order returning the plaint.

10-B. (1) Where an order directing that a plaint should be returned under rule 10 is proposed to be confirmed by a court in appeal, or where a court hearing an appeal is of the view that the plaint should be returned under rule 10, the court (hereinafter referred to as the court of appeal) shall, before passing a final order, inform the plaintiff, and the plaintiff shall thereupon be entitled to make an application to the court—

(a) requesting that instead of the plaint being returned, suit may be transferred to the court in which it should have been instituted (hereinafter referred to as "the proper court"), whether within or without the State;

(b) praying that the court may fix a date for the appearance of the parties in the said court; and

(c) requesting that notice of the date so fixed may be given to him and to the defendant.

(2) Where an application is made under sub-rule (1), the court of appeal shall, instead of returning the plaint,—

(a) transfer the suit to the proper court;

(b) fix a date for the purpose mentioned in clause (b) of that sub-rule; and

(c) give to the plaintiff and the defendant such notice as is referred to in clause (c) of that sub-rule

and where such notice is given,—

(i) it shall not be necessary for the court to which the suit is transferred to serve the defendant with a summons for appearance in the suit, unless that court, for reasons to be recorded, otherwise directs; and

(ii) the said notice shall be deemed to be a summons for appearance of the defendant in that court on the date so fixed.

7.23. Order 7, rule 11(c), provides that the plaint shall be rejected where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so. Some controversy seems[1] to exist on the question whether granting of time under this rule is mandatory. One view is, that the matter falls outside section 149, and is entirely governed by Order 7, rule 11, which is a special provision; and, therefore, the party is entitled to demand some time for making good the deficiency. Another view is, that the grant of time is discretionary, on the ground that the authority to grant time is in section 149, and not in Order 7, rule 11, which is a disabling provision.

7.24. The Madras High Court has made an express amendment to this rule which, in substance, provides that the grant of time is a matter of discretion. The question whether the Madras amendment should be adopted was considered in the earlier Report[2], but it was felt unnecessary to insert any such provision.

Recommendation

7.25. We are of the view that the Madras amendment should not be adopted, as it would be too harsh. At the same time, we are of the view *that once time is given*, it should not be extended, and section 148 should not apply to such cases.

Recommendation

7.26. Accordingly, we recommend that present Order 7, rule 11, should be re-numbered as sub-rule (1), and sub-rule (2) should be inserted in that rule as follows:—

> "(2) *Where a plaint is liable to be rejected under clause* (b)[3] *or clause* (c) *of sub-rule* (1), *the court shall grant time to the plaintiff to correct the valuation of or to supply the requisite stamp paper, as the case may be; but, notwithstanding anything contained in section* 148, *time so granted shall not be extended*".

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1. (a) *Radha Kanta* v. *Debendra Narayan*, I.L.R. 49 Cal. 880; A.I.R. 1922 Cal. 506, 508 (Mookerjee and Cuming JJ.).
   (b) *Subba Reddy* v. *Venkatanarasimha Reddy*, A.I.R. 1937 Mad. 266.
   (c) *Venkanna* v. *Achutramma*, A.I.R. 1938 Mad. 542-543, right hand (Venkatasubba Rao J.).
   (d) *Achut Ramchandra* v. *Nagappa*, A.I.R. 1914 Bom. 249, 250 (Batchelor and Shah JJ) (Traces history of the rule).
   (e) *Baijnath* v. *Umeshwar*, A.I.R. 1937, Pat. 550 (FB).
   (f) *Shiv Charan* v. *Behari Lal*, A.I.R. 1941 Oudh 30.
   (g) *Ram Kishan* v. *Nathu*, A.I.R. 1959 Bom. 96 (Mudholkar J. Reviews caselaw
2. 27th Report, page, 147, note on Order 7, rule 11.
3. Order 7, rule 11(b) stands on the same footing as Order 7, rule 11(c).

CHAPTER 8

WRITTEN STATEMENT AND SET-OFF

Introductory

8.1. The reply of the defendant, to the plaint, which is called "written statement of his defence", is dealt with in Order 8. A written statement *may* be filed; but, if the court so requires, it *must* be filed within the time permitted by the court. Order 8, rule 1 so provides.

8.2. The mode of denial of allegations in the plaint occupies rules 2 to 5 of this Order; set-off is dealt with in rules 6 and 7, and rule 8 permits the defendant to take any new ground of defence at a later stage. Ordinarily, the plaint and the statement of defence are the only pleadings allowed; but relaxation of this rule is permissible under rule 9. The procedure to be adopted when a party fails to present a written statement before the court, is dealt in rule 10,—a rule which has created some controversy.

Order 8, rule 1 and obligatory written statements

8.3. It was noted in the earlier Report[1] that a recommendation had been made in the Report on the reform of judicial administration to make the filing of the written statement obligatory. The Commission, however, thought that this might work hardship.

Recommendation

8.4. We have re-examined the matter, and are of the view that such a provision should be inserted. In the absence of a proper pleading by the defendant, it is difficult to proceed with the suit, and in fact, the whole scheme of the Code postulates that there should be a written statement which constitutes the foundation of the defence, if the defendant chooses to participate in the proceedings. The time has now come when a written statement should be obligatory, and we recommend accordingly, that Order 8, rule 1, should be revised as follows:

> "The defendant ..... shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence."

Order 8, rule 5

8.5. Under Order 8, rule 5, an allegation of a fact made in the plaint, if not denied, or not stated to be not admitted in the pleading of the defendant, is to be taken as admitted. Whether this rule applies in a case where the defendant has not filed a pleading at all

1. 27th Report, pages 147-148, not on Order 8, rule 1 and obligatory written statement.
2. 14th Report, Vol. I, page 302, para 11.

is a question that was considered in the earlier Reports[1]. No amendment to the rule was, however, proposed, as it was felt that on the language of the rule, it should not apply to such cases.

8.6. However, we are taking a different view on the subject, and are of opinion that such a provision should be made. If the defendant does not file a pleading, the court should have a discretion to treat the allegations in the plaint as admitted. This is necessary in the interests of expedition, and should not, in our view, cause any serious hardship. Since the present position[2] is that Order 8, rule 5, does not apply where there is no written statement, an amendment is necessary if effect is to be given to our view. At the same time, we would like to emphasise that the court should, in exercising its discretion, consider whether the defendant has engaged counsel or could have engaged counsel.

Recommendation

8.7. We, therefore, recommend that Order 8, rule 5, should be re-numbered as sub-rule (1), and the following sub-rules should be added in Order 8, rule 5:—

"(2) *Where the defendant has not filed a pleading, it shall be lawful for the court to pass a judgment on the basis of the allegations of fact in the plaint, except as against a person under disability; but the court may, in its discretion, require any such allegations of fact to be proved.*

(3) *In exercising its discretion under the proviso to sub-rule* (1) *or under sub-rule* (2), *the court shall have due regard to the fact whether the defendant could have or has engaged a pleader.*

(4) *Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced*".

Order 8, rule 8A (New) (Production of document)

8.8. Order 7, rule 14 provides that where a plaintiff *sues upon* a document in his possession or power, he shall produce the document in Court when the plaint is presented. Where the plaintiff *relies on* any other documents (whether in his possession or power or not), as evidence in support of his claim, he has to enter such documents in a list to be added or annexed to the plaint. The Fourteenth Report[3] recommended, that a similar provision should be made in the case of a defendant.

8.9. This recommendation, however, was not agreed in by the Commission in the Report[4] on the Code. The Commission felt that the distinction between a document upon which the plaintiff sues

1. 27th Report, page 150, Note on Order 8, rule 5.
2. *Hardayal Chaman Lal v. Union of India*, A.I.R. 1969 Punj. 329 (reviews cases).
3. 14th Report, Vol. 1, page 315, para. 32.
4. 27th Report, page 13, para. 28.

and a document upon which he relies, cannot properly be made in the case of written statement. "The only manner in which such a distinction can be made is between documents on which a defendant bases his defence and other documents on which he relies as evidence in support of his defence. In our opinion such a distinction would be unrealistic and impractical. A written statement merely answers the claim made in the plaint. In practice, it would be difficult to distinguish between documents on which the defence "is based" from other documents of purely evidentiary value. We, however, think that a defendant should enter in a list to be added or annexed to the written statement all documents on which he relies in support of his defence".

Recommendation

8.10. We have carefully examined the matter, and have come to the conclusion that the recommendation made in the 14th Report should be carried out. Barring very few cases, the distinction between the basic documents, and other documents should, we think, present no difficulty even in respect of the defence. We recommend therefore that a suitable amendment should be made as above. To achieve that object, the following rule should be inserted in Order 8—

> "8A. (1)* *Where a defendant bases his defence upon a document in his possession or power, he shall produce it in court when the written statement is presented, and shall, at the same time, deliver the document or a copy thereof to be filed with the written statement.*
>
> (2) *A document which ought to be produced in court by the defendent under this rule, but is not so produced, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.*
>
> (c) *Nothing in this rule applies to documents produced for cross-examination of the plaintiff's witnesses, or in answer to any case set up by the plaintiff subsequently to the filing of the plaint, or handed to a witness merely to refresh his memory.*"

8.11. Order 8, rule 10, deals with the procedure to be followed when a party fails to present a written statement called for by the court. This rule begins thus:

> "Where any party from whom a written statement is so required, fails to present the same .....".

Now, the word 'so' has been construed as limiting the operation of the rule to failure to file a written statement that was demanded under the preceding rule. (Order 8, rule 9), and not as covering the more frequent case of a written statement demanded under Order 8, rule 1.

8.12. In the earlier Report[1], this lacuna was discussed, and an amendment was also proposed to remove this lacuna.

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1. 27th Report, page 151, note on Order 8, rule 10.

8.13. We agree with this recommendation for amendment. We are also of the view that it should be *obligatory* on the Court to pronounce judgment when rule 10 applies, that is to say, when a party fails to file a written statement required by law.

Recommendation

8.14. Accordingly, we recommend that Order 8, rule 10 should be revised as follows:—

> "10. Where any party from whom a written statement is required under *rule* 1 or rule 9 fails to present the same within the time *permitted* or fixed by the court, *as the case may be*, the court *shall* pronounce judgment against him.....".

CHAPTER 9

APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE

Introductory

9.1. Order 9 lays down the rules of procedure applicable to various situations concerned with the appearance of parties, namely, cases where both parties attend; where the summons has not been served in consequence of the plaintiff's failure to pay the fees for serving; when neither party appears; when the plaintiff only appears; and when the defendant only appears. Failure to appear attracts certain consequences. Broadly speaking, from the point of view of the plaintiff, the most important is the provision which makes dismissal of the suit for default of the plaintiff mandatory; and, from the context of the defendant, the most important is the provision authorising the court to proceed *ex parte*, if the defendant does not appear.

If the defendant does not file a written statement, certain action can be taken against him under rule 10,—a rule which appears to have caused a considerable amount of uncertainty, owing to its somewhat ambiguous wording. Since non-appearance of a party may be involuntary or otherwise for sufficient cause, there have to be provisions for setting aside dismissal of the suit or *ex parte* order, as the case may be.

Order 9, rule 5(1)

9.2. Order 9, rule 5(1) provides that where a plaintiff fails to apply for a fresh summons (after the summons on the defendant is returned unserved), the Court shall dismiss the suit (except in certain cases). The period prescribed for the application for a fresh summons is three months under the present rule. The original period was for one year, but it was changed to three months later[1]. The period has been changed into two months by local Amendments by the High Courts of Bombay and Gujarat and one month in Kerala. The proposed amendment in the earlier Report[2] reduced it to two months. We think that it should be reduced to one month, in order to expedite progress of the case.

Recommendation

9.3. Accordingly, we recommend that Order 9, rule 5(1), should be revised as follows:—

> "(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of *one month* from the date

1. Code of Civil Procedure Amendment Act (24 of 1920).

2. 27th Report, page 152, note on O·9, r·5(i).

of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendants, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit."

Order 9, rule 6 and Order 9, rule 7

9.4. In the earlier Report[1], two points were considered with reference to Order 9, rule 6.

9.5. The first question was, whether the court should have power to pass a dercee, if it thinks fit, on the basis of a pleading without formal evidence, where the case proceeds *ex parte*. As pleadings are not required to be on oath[2], it was considered unnecessary to make such a change.

9.6. We are, however, of the view that such a provision would be useful. Having regard to the paramount need to reduce delay, it is, in our view, justified even in the absence of oath.

9.7. Secondly, the previous Commission noted that it had been held by the Supreme[3]-[4] Court, that even when the defendant against whom a case has proceeded *ex parte* does not assign good cause for his previous non-appearance, he has a right to participate from *the stage* at which he appears. The decision of Wallace, J. in a Madras case[5] on the subject was approved by the Supreme Court. The undermentioned decisions[6] were mentioned by the previous Commission as illustrating the application of the rule enunciated by the Supreme Court.

9.8. The Commission considered it unnecessary to codify the proposition laid down by the Supreme Court.

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1. 27th Report, page 152, note on Order 9, rule 6.

2. Order 6, rule 15.

3. *Sangram Singh* v. *Election Tribunal, Kotah*, (1955) 2 S.C.R. 1; A.I.R. 1955 S.C. 425, 431, para. 28.

4. This point really concerns Order 9, rule 7.

5. *Venkatasubbiah* v. *Lakshmi*, A.I.R. 1925 Mad. 1274.

6. (a) *Bindu Prasad* v. *United Bank*, A.I.R. 1959 Pat. 152.
(b) *Mahant Ramji Das* v. *Bhupinder Singh*, A.I.R. 1962 Pun. 443.
(c) *Kunara* v. *Thomas*, A.I.R. 1961 Ker. 287.

9.9. We have considered the matter, and are of the view that what the Supreme Court laid down should be codified. We appreciate the difficulty of the subject, and the desirability of balancing considerations of justice (on the one hand) against the need for expedition (on the other hand). But, in this case, there can be no other alternative.

9.10. At the same time, while inserting the rule that the defendant can join from the stage at which he appears, a clarification on one point would be desirable, namely, that past stages of the trial should not be re-opened. If the defendant, for example, has not filed a written statement, and the case has proceeded almost to the stage of judgment, the defendant cannot insist that he should be allowed to file it. It should, therefore, be ensured that the amended rule will not affect O. 8, r. 5 and O. 8, r. 10.

Recommendation

9.11. We, therefore, recommend that Order 9, rule 6, clause (a); should be revised as follows:—

Revised Order 9, rule 6, clause (a)

"(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) if it is proved that the summons was duly served, the court may make an order that the *suit be heard*[1] *ex parte; and may, if it thinks fit, give a judgment on the basis that the allegations on fact made in the pleadings are true;*

[Rest as in the present rule].

(b) Order 9, rule 7, should be replaced by the following rule:—

"7. Where the Court has adjourned the hearing of the suit after making an order that it be heard *ex parte* and—

(a) the defendant appears and assigns good cause for his previous non-appearance, the Court may, upon such terms as it directs as to costs or otherwise, set aside the order for the hearing of the suit *ex parte* and hear the defendant in answer to the suit as if he had appeared on the day fixed for his appearance.

(b) *if the defendant appears but does not assign good cause for his previous non-appearance as aforesaid, the Court shall, upon such terms as to costs or otherwise as the court directs, permit the defendant to take part in the trial of the suit from the stage at which he appears; but the proceedings already taken shall not be re-opened, and, in particular, where the defendant had failed to file a*

1. Compare O.9, r. 7.

written statement, before he appears, he shall not be allowed to do so after his appearance, and the provisions of Order 8, rule 5 and Order 8, rule 10, shall apply in relation to his failure to file it, notwithstanding the permission granted under this clause."

Order 9, rule 13 and "duly served"

9.12. Under Order 9, rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the *ex parte* decree should be set aside. The two branches of the rule are distinctive, and the defendant, whatever his position may be in respect of one branch, is entitled to benefit of the other branch, if he satisfies the court that he has made good his contention in respect of the other branch.

9.13. In the earlier Report[1], several points were considered with reference to this rule, and amendments suggested on one point,—the broad object being to ensure that a decree shall not be set aside merely on the ground of irregularity in service, if the defendant had knowledge of the decree. After consideration of the points discussed in the earlier Report, we have reached the same conclusion.

Order 9, rule 13 and Order 41, rule 11

9.14. Order 9, rule 13 empowers a court to set aside an *ex parte* decree. Whether an application for setting aside an *ex parte* decree can be entertained by the trial court, after an appeal against the *ex parte* decree has been dismissed summarily by the appellate court, is a matter on which there is difference of opinion.

9.15. The Bombay High Court[2], after stating that the majority of the High Courts[3] were of the view that as the decree of the trial court merges with the decree of dismissal of appeal, the trial court can have no jurisdiction to deal with the decree, expressed its agreement with the majority view.

9.16. It was held that an appeal was always treated as a re-hearing of the suit, and it makes no difference whether the appeal had been dismissed under Order 41, rule 11, or disposed of after issuing notice to the respondent.

9.17. The court, after referring to a Supreme Court case cited before it, said[4] that that case did not lay down that the decree of the trial court does not merge in the decree of the appellate court even for the purposes of review of the judgment of the trial court.

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1. 27th Report, pp. 153-154, note on Order 9, rule 13 and "duly served".
2. *Kantilala* v. *Chiba Bava*, A.I.R. 1967 Bom 310 (reviews cases).
3. e.g. (*a*) *Dhonai* v. *Tarakunath*, 12 Cal. L. J. 531 ;
   (*b*) *Kalaimuddin* v. *Esakakuddin*, A.I.R. 1924 Cal. 830;
   (*c*) *Alliamma* v. *Ouseph*, (1954) Ker. L. Times, 322;
   (*d*) *Gauri Shankar* v. *Jagat Narain*, A.I.R. 1934 All. 134.
4. *State of U. P.* v. *Muhammad Noor*, (1959), S.C.R. 595.

9.18. A contrary view has been taken by some High Courts[1]. Some of the decisions make a distinction between cases where the applicant was a party to the appeal and other cases.

9.19. To settle the conflict of decisions on the subject, an amendment is desirable. The Bombay view is, in our opinion, logical, and should be adopted.

Recommendation

9.20. We recommend, therefore, that the following Explanation should be added to Order 9, rule 13—

> "Explanation—*Where there has been an appeal against the decree passed in the absence of the defendant, and the appeal has been disposed of, no application under this rule shall lie in respect of that decree.*"

Order 9 and execution proceedings

9.21. The question how far Order 9 applies to execution proceedings is not free from doubt[2]. The general trend of opinion is that Order 9, rule 9 cannot be extended to execution cases with the help of section 141, and that section 151 can be and should be invoked in execution cases in appropriate cases. We are, however, dealing with the question of appearance at hearings in execution, by specific provisions[3].

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1. (*a*) *In re Venkatesubbaram*, A.I.R. 1944 Mad. 576 (Kuppuswami Ayyar J.).
   (*b*) *In re Ram Rakhan* , A.I.R. 1945 All. 352.
2. See, for example, *Nemi Chand* v. *Umed Mal*, A.I.R. 1962 Raj. 107.
3. See discussion as to O. 21 rules 104-105 (New).

CHAPTER 10

EXAMINATION OF PARTIES BY THE COURT

Introductory

10.1. Examination of parties by the court at the first hearing or at subsequent hearings is dealt with in Order 10. The main object of examination at the first hearing is to ascertain how far the allegations made in the pleadings of one party are admitted or denied by the other. The object of this examination is not to elicit admissions or to bring into being evidence, but to ascertain what is the matter in dispute between the parties. Statements made at the examination are distinct from evidence given in a trial of fact. Nevertheless, if used properly, this examination is of the greatest importance in avoiding delay at later stages.

Earlier recommendation for examination at first hearing

10.2. The earlier Report made a useful recommendation[1] as to examination at the first hearing being made compulsory. We agree, and would add that efforts at settlement should also be made at the first hearing. But only one adjournment for the purpose of effecting such settlement should be granted. No statutory provision in this respect (for encouraging settlement) is required for suits in general, but we hope that judicial officers will not lose sight of this aspect.

1. 27th Report pages 14-15 para. 29; and page 156, note on Order 10, rule 2.

CHAPTER 11

DISCOVERY AND INSPECTION

Introductory

11.1. Discovery and inspection are dealt with in Order 11, which, unfortunately, is one of the least used Orders in the Code. The object of what is called "discovery" is to secure, if possible, an admission of facts in aid of proof, to supply the want of it and to avoid expense.[1] Discovery of facts is obtained usually by interrogatories. But discovery is not confined to facts, but extends to documents, and could be supplemented by orders for the inspection and production of documents.

11.2. Non-compliance with an order to answer interrogatories or to discover facts, or an order for the discovery and inspection of documents, can be visited with fatal consequences under rule 11. If the order for discovery has been complied with, naturally answers given by the party in response to the interrogatories can be used in evidence and if the discovery relates to documents, the documents disclosed if proved, should be valuable as evidence. It may be noted, that the ultimate source of the practice of putting interrogatories is civil law[2].

Order 11, rule 14

11.3. Order 11, rule 14 provides that it shall be lawful for the court at any time during the pendency of any suit to order the production by any party, upon oath, of all documents in his possession, etc. One small question was considered in the earlier Report[3] with reference to this rule. The Commission examined the question whether an order under this rule can be passed before an application for discovery is made under Order 11, rule 12. The majority view[4-5-6], the Commission noted, was, that it can be ordered. This view is based on the words 'at any time' which occur in this rule. But a contrary view, that Commission noted, also seems to have been taken in one case[7]. In view of the majority opinion, the previous Commission thought that a change was not needed.

11.4. In this context, we have considered the question of adding an Explanation to Order 11, rule 14, as follows:—

> "*Explanation*—An order under this rule may be passed before any application fo discovery is made under rule 12 of this Order."

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1. Wigram's *Points in the Law of Discovery*, paragraph 2, cited in Stokes' *Anglo-Indian Codes*, Vol. 2. page 401.
2. Story, *Pleadings*, paragraph 39, cited in Stoke's *Anglo-Indian Codes*, Vol. 2., page 402.
3. 27th Report, page 156, note on Order 11, rule 14.
4. *Ram Hari* v. *Niranjan*, 50 C.W.N. 845.
5. *Srinivas* v. *Election Tribunal, Lucknow*. A.I.R. 1955 All. 251.
6. *P. Veralkshamamma* v. *P. Bala*, A.I.R. 1958 A.P. 157.
7. *Baidyanath* v. *Bholanath*, A.I.R. 1923 Pat. 337, 338.

11.5. However, we have ultimately come to the conclusion that no such change is needed, as the present language is sufficiently wide and clear to cover the point.

Order 11, rule 14

11.6. With reference to Order 11, rule 14, two points were considered in the earlier Report[1]; but, after an examination of the position, the Commission considered an amendment unnecessary. We agree with the view taken in the earlier Report.

Order 11, rule 21

11.7. Under Order 11, rule 21, where any party fails to comply with any order to answer interrogatories, or for discovey or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any struck out and to be placed in the same position as if he had not defended. The rule further provides that a party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made on such application accordingly.

11.8. We are of the view that a fresh suit should be barred when a suit is dismissed under this rule[2].

11.9. It is also desirable to provide that an order under this rule can be made only after hearing the other side.

Recommendation

11.10. Accordingly, we recommend that O. 11, rule 21 should be revised as follows:—

"21. (1) Where any party fails to comply with any order to answer "interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made on such application accordingly *after notice to the parties and after giving them a reasonable opportunity of being heard.*

(2) *Where an order under sub-rule* (1) *is passed dismissing the suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.*"

Order 12, rule 2A (New)

11.11. The earlier Report[3] noted that a rocemmendation had been made in the Fourteenth Report[4] to empower the Court to award *penal* costs against a party unreasonably neglecting or refusing to

1. 27th Report, page 156, note on Order 11, rule 14.
2. Compare Order 9, rule 9.
3. 27th Report, page 158, note on Order 12, rule 2.
4. 14th Report, Vol. 1, pages 316-317, para 32.

admit documents (Such costs will be in addition to the costs awarded at present under this rule). After some consideration, however, it was decided by the previous Commission not to make this change, as the Commission felt that the existing provision is adequate.

11.12. We, however, think that such a provision is desirable. Further, we think that if a document is not denied, it should be taken as admitted, unless the Court otherwise direct[1].

Recommendation

11.13. Accordingly, we recommend the insertion of the following new rule in Order 12—

"2A(1) *Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in its reply to "to the notice to admit documents, shall be taken to be admitted, except as against a person under disability.*

Provided that the Court may, in its discretion for and reasons to be recorded require any document so admitted to be proved otherwise than by such admission.

(2) *Where a party unreasonably neglects or refuses to admit a document, the Court may also award against him penal costs, to be paid to the opposite party".*

1. *Cf.* Order 8, rule 5.

CHAPTER 12

ADMISSIONS

Introductory

12.1. As an alternative to interrogatories and discovery of documents, a party can avail himself of the procedure prescribed in Order 12, of calling upon the other party by notice to admit facts or documents. Notice to admit facts would, in many cases, supersede interrogatories, and thus save expense and delay. Notice to admit documents could similarly save expense and delay of proving the documents if the documents are admitted in response to the notice.

Order 12, rule 6

12.2. Where a claim is admitted, a court has jurisdiction under Order 12, rule 6 to enter a judgment for the plaintiff, and to pass a decree on the admitted claim (with liberty to the plaintiff to proceed with the suit in the ordinary way as to the remainder of the claim).

12.3. The object of the rule is to enable a party to obtain speedy judgment, at least to the extent of the relief to which, according to the admission of the defendant, the plaintiff is entitled[1].

12.4. The rule has been held to be wide enough to cover oral admissions. The use of the words "or otherwise" in rule 6, without the words "in writing" which are used in rule 1 of Order 12, shows that a judgment may be given even on an oral admission[2]. It is desirable to codify this interpretation.

12.5. It may be noted that under the present rule, a judgment on admissions can be passed only on an application. According to a local amendment[3]; the Court may, *on the application of any party or of its own motion*, make such order or give such judgment. This is a useful amendment, and should be adopted.

12.6. In our view, it is also desirable to provide that a decree shall follow on a judgment on admissions.

Recommendation

12.7. Accordingly, we recommend that Order 12, rule 6, should be revised as follows:—

> "6. (1) ..... Where admissions of fact have been made either on the pleading or otherwise and *either orally or in* writing, the Court may, at any stage of a suit, on the application of *any party or of its own motion*, without waiting for the determination of any other question between the parties, make such order or give such judgment *as it may think just having regard to such admissions.*
>
> (2) *Wherever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced".*

1. 1970 Raj. L.W. 549, referred to in the Quinquennial Digest, (1966-1970).
2. 1970 Raj. L. W. 549, referred to in Quinquennial Digest (1966-1970).
3. See the Patna Amendment to Order 12, rule 6.

CHAPTER 13

PRODUCTION OF DOCUMENTS

Introductory

13.1. Detailed rules as to production, impounding and return of documents are contained in Order 13. These rules apply also to the material objects other than documents, by virtue of rule 11. The principal provision is in rule 1, the substance of it being that documentary evidence must be produced at the first hearing. The main object of this provision is to prevent fraud by the party relying on the document and also to prevent surprise to the opposite party and to give to the court a clear picture of the case of the party concerned with the documents. A specific provision deals with the effect of non-production of documents, and the court is empowered to reject irrelevant or inadmissible documentary evidence. The rest of the provisions in this Order really pertain to ministerial acts, such as, filing the documents, numbering them and the like.

Order 13, rule 1

13.2. Under Order 13, rule 1, the parties or their pleaders must produce "at the first hearing" the documentary evidence on which they intend to rely and which is in their possession or power and which has not already been filed in court, as also all documents which the court has ordered to be produced. The expression "first hearing" in this rule has led to some controversy. It has been held by the Calcutta High Court[1] that this does not mean the first hearing for appearance of the defendants, but it means the hearing after the pleadings are completed and before the issues are framed.

13.3. The Madras view[2] is that it means the hearing at which issues are framed. The Madras High Court[3] observed that parties are not bound to produce the documents, until the issues are framed.

13.4. The Madras case[4] of 1926 points out that the reason for having all documents produced when issues are framed is to prevent fabrication to suit the issues. It has also been pointed out that it is only after the issues are framed that the parties can decide what is essential. "Unessential documents filed in a case are a nuisance to all concerned".

13.5. It may be noted that the Patna and Orissa High Courts have added the following words after the words "at the first hearing"—

> "or where issues are framed, on the day when issues are framed, or within such further time as the Court may permit".

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1. *Ashoka Marketing* v. *Rothas Kumar*, A.I. R. 1966 Cal. 591, 594, para 18. (B.N. Bannerjee, J.).
2. *Chidambaram* v. *Parvathi*, A.I.R. 1926 Mad. 347, 348 (Jackson, J.).
3. *Lakshminarayanmoorthi* v. *Sundaram*, A.I.R. 1935 Mad. 261 (Walsh, J.) (*Obiter*).
4. *Chidambaram* v. *Parvathi*, A.I.R. 1926 Mad. 347., 348.

13.6. The Bombay High Court has substituted the following rule:

"1. *Documentary evidence to be produced at or before the settlement of issues*—(1) The parties or their pleaders shall produce *at or before the settlement of issues* all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in the Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs".

Recommendation

13.7. It appears to be desirable to adopt the Bombay Amendment, in order to make the provision more explicit[1].

1. Amendment not drafted.

CHAPTER 14

ISSUES

Introductory

14.1. In order that the material points in controversy may be rightly decided, and there may be finality in litigation, it is essential that those points should be properly formulated; and Order 14 provides all that a law can provide to ensure the "the material propositions of fact or law affirmed by one party and denied by the other" are presented to the court in a precise form; these propositions are given the name of issues. These material propositions are to be collected not merely from the pleadings but also from the examination of the parties, (for example, where the facts are not sufficiently stated in the plaint), and from answers to interrogatories, and the contents of documents produced by the parties. As has been stated[1], "in the course of administering justice between litigants, there are two successive objects,—to ascertain the subjects for decisions and to decide". It has therefore been emphasised, on several occasions, in decisions of the highest courts in India, that the duty of framing proper issues rests upon the judge himself.

Order 14, rule 2

14.2. Order 14, rule 2 is as follows:—

> "2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case of any part thereof may be "disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined".

14.3. This rule has led to one difficulty. Where a case can be disposed of on a preliminary point (issue) of law, often the courts do not inquire into the merits, with the result that when, on an appeal against the finding on the preliminary issue the decision of the court on that issue is reversed, the case has to be remanded to the court of first instance for trial on the other issues. This causes delay. It is considered that this delay should be eliminated, by providing that a Court must give judgment on all issues, excepting, of course, where the court finds that it has no *jurisdiction* or where the suit is barred by any law for the time being in force.

Recommendation

14.4. We, therefore, recommend that Order 14, rule 2 should be revised as follows:—

> "2. (1) *Nothwithstanding that a case can be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule* (2), *pronounce judgment on all issues.*

1. Stephen, *Principles of pleadings*, (7th edition), page 1.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it *may* try *that issue first if the issue relates to*—

(a) *the jurisdiction of the Court, or*

(b) *a bar to suit created by any law for the time being in force.*

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, *and may deal with the suit in accordance with the decision on that issue.*"

CHAPTER 15

DISPOSAL OF THE SUIT AT THE FIRST HEARING

Introductory

15.1. If, at the first hearing, it appears that the parties are not at issue on any question of law or fact, the court is, under Order 15, authorised to pronounce judgment at once. If any of the several defendants is not at issue, the court has a similar power, in respect of that defendant. Sometimes, it appears that an issue of fact or law is such that the evidence bearing on it can be immediately produced. The court is empowered to determine that issue, and to pronounce judgment under certain circumstances.

Order 15, rule 2

15.2. As regards Order 15, rule 2, under which judgment is pronounced if the parties are not at issue, local amendments made by Madras, Andhra Pradesh and Kerala High Courts provide that whenever a judgment is pronounced under this rule, a decree shall follow.

15.3. We consider it proper to insert such a provision. Here, we depart from the view taken in the earlier Report[1] where section 33 was regarded as adequate for the purpose.

Recommendation

15.4. Accordingly, we recommend that Order 15, rule 2 should be renumbered as sub-rule (1), and the following sub-rule should be inserted as sub-rule (2):

> "(2) *Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced.*"

1. 27th Report, page 160, note on Order 15, rule 2.

CHAPTER 16

SUMMONING AND ATTENDANCE OF WITNESSES

Introductory

16.1. After the defendant has been served, and the pleadings filed, and the issue framed, evidence will have to be led (unless the case is disposed of without issues). For that purpose, it becomes necessary to summon and compel the attendance of witnesses. This is dealt with in Order 16, the provisions whereof are ultimately derived from an Act of 1853.[1] The body of the Code[2] exempts certain persons from being summoned to attend.

16.2. As a matter of historical interest, it may be noted that a Central Act of 1855[3] provided that a person known to be of unsound mind should not be summoned as a witness without the previous consent of the court. This provision was repealed when the Evidence Act of 1872 came into force. Since such a person is not a competent witness under the Evidence Act, a party would not find it useful to summon him.

16.2A. Most of the provisions in Order 16 deal with matters of detail. We shall deal with such of them as require consideration.

Order 16, rule 1

16.3. Under Order 16, rule 1, at any time after the suit is instituted, the parties may obtain, on application to the court, or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents. The words "may obtain" seem to have led to an argument to the effect that if a party applies for a summons, the court is bound to issue it irrespective of any other considerations. The argument has not been accepted in the categorical form stated above. Since it has been stated in some suggestions made to the Commission that the court should have discretion to refuse to issue a summons, the case law on the subject has been examined.

16.4. The case law on the subject shows that the position, is broadly speaking, as follows[4]:—

(a) It is the duty of the Court[5] to summon the witnesses for whose attendance an application is made by a party, and a court cannot reject such an application on the ground that it has been made too late. It would be open to the court in such a case, if it finds that the application has been made late, not to adjourn the hearing of the case on the date fired for the hearing, even though the witnesses

1. Section 12, Act 19 of 1853.
2. Section 132 *et seq.*
3. Act 2 of 1855, section 14.
4. *Latifannisa* v. *Alimulla*, A.I.R. 1922 Pat. 622.
5. (*a*) *Saibai Govind* v. *Balakrishna*, A.I.R. 1925 Bom 368.
   (*b*) *Surdari Lal* v. *Mehar Singh*, A.I.R. 1925 Lah.9 7

may not be present in court. But it is not within the province of the court to refuse to summon the witnesses for summoning whom an application has been made before the court.

(b) But, if the application is not a *bona fide* one, the court may not issue a summons.

16.5. The position was dealt with at length in a Punjab case.[1] The High Court observed "Order 16, rule 1, Code of Civil Procedure, entitles the parties at any time after the suit is instituted to obtain on an application to the court or to such other officers at it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents. According to the proviso added by this High Court, no party who has begun to call his witnesses is entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in court on or before the date on which the hearing of evidence in this behalf commences and before the actual commencement of the hearing of such evidence, without an order of the court made in writing and stating the reasons therefor. Ignoring, for the moment, the proviso added by this court, it would seem clear that a party is, generally speaking, entitled as of right to summonses to witnesses, and if an application is made for the purpose, the court has to issue the summonses, though of course if the application is belated and the witnesses are for this reason not present, the court is fully competent to decline to adjourn the case for their attendance.[2] It may be conceded as held that if the application is not *bona fide* and is an abuse of the process of the court, then the court may be held to be possessed of inherent power to refuse to summon the witnesses.

".....if a party's case is not covered by the proviso to rule 1, Order 16 and there is no want of *bona fide* and no abuse of the process of the court, then the court would not be justified in refusing to a suitor process for his witnesses, whom otherwise the court is competent to summon: indeed, it is generally speaking a suitor's right to obtain such process and the court is expected to render in the normal course reasonable assistance in effecting service."

16.6. No amendment on this particular point is required, in view of the position stated above.

Purpose of calling witnesses to be stated

16.7. There is, however, one matter on which an amendment is needed. We think that the purpose of calling a witness should be stated in an application under Order 16, rule 1.

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1. *Jagir Singh* v. *Surjan Singh*, I.L.R. (1965) 2 Punj. 504, 509, (Dua J.).

2. Case referrences cited in the judgment are omitted here.

Recommendation

16.8. Accordingly, we recommend the insertion of the following sub-rule in Order 16, rule 1 (after renumbering rule 1 as sub-rule (1) of rule 1).

> "(2) *The purpose of summoning a witness shall be stated in the application under this rule*".

Order 16, rule 14

16.9. Order 16, rule 14 provides that where the court at any time thinks it necessary to examine *any person other than a party to the suit* and not called as a witness by a party to the suit, the Court may, on its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

There is no power under this rule to *summon a party as a witness*. No doubt, the court can always examine a party present in Court, and recall any witness already examined.[1] The Court can also, while issuing a summons, direct that the defendant shall appear personally.[2] But there is, in our view, need for a direct provision enabling the Court to summon a party for giving evidence as a witness. This will to a great extent, help in stopping the malpractice of a party not appearing as a witness and forcing the other party to call him as a witness.

Recommendation

16.10. We, therefore, recommend that in Order 16, rule 14, the words "other than a party to the suit" should be replaced by the words "*including a party to the suit*".

Order 16, Rule 19, and Order 26, Rule 4—witnesses beyond jurisdiction

16.11. Order 16, Rule 19, provides that a witness shall not be compelled to attend a court in person unless he resides—

(a) within the jurisdiction of the Court, or

(b) outside the jurisdiction but within the specified distance (roughly, less than fifty miles) or, if there is an established public conveyance for five-sixth of the distance, then less than two hundred miles from the court house.

Thus, a witness living outside the jurisdiction and beyond the specified distance cannot be compelled to attend a court in person. For the examination of such persons, the Code provides for the issue of a commission under Order 26, Rule 4. But the word used in Order 26, Rule 4, is "may".

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1. Order 10, rule 2, read with Order 10, rule 4.
2. Order 18, rule 17.
3. Order 5, rule 3.

16.12. Now, it is obvious that where the witness is beyond the specified distance, and yet is one whose evidence is essential, the only possible mode of examination is by commission, having regard to the restriction in Order 16, rule 19 against compelling him to attend in person.

The common understanding of the position is reflected in a Madras case[1]—

"A party to suit has a right to ask for the issue of a commission to examine a witness beyond the prescribed distance. The same principle applies even in the case of an expert witness. In *Sitamma* v. *Subraya*, 21 M.L.J. 889 at p. 890: (12 I.C. 74), Abdur Rahim and Sundara Aiyar JJ. recognised that principle and stated that the defendants were entitled as of right to the issue of commission apart from the question whether they would have ultimately benefited by it. The same principle is followed and applied in *Jagannadha Sastry* v. *Sarathambal Ammal*, 46 Mad. 574: [A.I.R. 10) 1923 Mad. 321]. Wallace J. after considering the various decisions cited before him expressed his conclusion as follows:

The balance of authority is in favour of the view that (1) ordinarily, in the case of a witness not under the control of the party asking for the commission who resides beyond the limit fixed under Order 16, Rule 19(b), Civil Procedure Code, a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process and (2) that it is not for the Court to decide whether the party will be benefited thereby or not, that is a matter entirely for the party".

Recommendation as to O. 26, rule 4

16.13. It would, therefore, be better if the issue of a commission under Order 26, Rule 4 is made *obligatory*[2] in such cases, i.e. in the case of a witness residing beyond the limit fixed in Order 16, rule 19, if the evidence of the witness is essential in the interest of justice. Such an amendment will give a more correct picture of what the law contemplates.

Distance mention in O. 16, r. 19

16.14. The next question is, whether the distance specified in Order 16, Rule 19, should now be increased, in view of improved facilities for transport, and, in particular, having regard to the availability of transport by air.

The existing words "established public conveyance" are, perhaps, wide enough to cover transport by air, but the question of distance applicable to air travel remains. It could be provided in Order 16, rule 19, that (i) where transport by air is available between the place of headquarters of the Court and the place where the witness resides, and (ii) the distance between the two places does not exceed, say, eight hundred miles (1200 kms.) and (iii) the witness is paid the fare by air, he may be summoned to attend personally.

1. A.I.R. 1949 Mad. 496, para 2. (Subba Rao J.).

2. Point concerning Order 26, Rule 4.

16.15. The last question concerns the distance mentioned in the rule, as applicable to journeys otherwise than by air. Some High Courts have, by local amendments, changed the provision in this respect, and some of the amendments are useful. It may be desirable, for example, to increase the distance (at present two hunderd miles) to three hundred miles.[1]

The local amendments relevant to the question of distance under Order 16, Rule 19 are quoted below:—

Allahabad:

In order 16, Rule 19(b):

(i) *insert* the words "or private conveyances run for hire" between the words "public conveyance" and "for five-sixth", and

(ii) *substitute* the word "three" for the word "two".

[4-4-1959]

Bombay: *Dadra and Nagar Haveli.*

For rule 19 *substitute* the following:—

19. *No witness to be ordered to attend in person unless resident within certain limits*—

No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or (where there is a railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situated) less than five hundred kilometres distance from the court-house.

(1-11-1966).

Gujarat

In order 16, rule 19(b), for the words "two hundred", *substitute* the words "three hundred". (17-8-1961).

Punjab, Haryana and Chandigarh

Add the following proviso to Rule 19(b):

"Provided that any Court situate in the State of Punjab may require the personal attendance of any witness residing in the Punjab or Delhi State".)

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1. *Cf.* The Allahabad and Gujarat amendments to Order 16, Rule 19 (substituting 300 miles for 200 miles).

2. *Cf.* The Bombay amendment to Order 16, rule 19.

Distance to be expressed in kilometres

16.15A. Lastly, opportunity could be taken to express the distance in terms of kilometres, instead of in miles as at present.

Commission to be issued in other cases

16.15B. No doubt, even after the above amendments, a commission will have to be issued in cases where the witness resides beyond the revised distance. Though the functions of the Commissioner are of very limited character, nevertheless, he can make observations as to the demeanour of witness.[1] Hence, where the witness to be examined is an expert or his evidence is otherwise likely to be of importance, it is desirable that the court should take care that the Commissioner to be appointed by it will be able to discharge his functions efficiently. This, of course, is a matter for the Court to consider when making the appointment of the Commissioner, and need not be dealt with by an express provision.

Recommendation as to Order 16, rule 19

16.16. In the light of the above discussion, we recommend that Order 16, Rule 19, should be re-drafted[2] as follows:—

"19. No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than *one hundred* or (where there is a railway or steamer communication or other established public conveyance for five-sixth of the distance between the place where he resides and the place where the Court is situated) less than *five hundred kilometres* distance from the court *house*.

Provided that—

(i) *where transport by air is available between the two places mentioned above, and*

(ii) *the distance between the two places does not exceed one thousand and two hundred kilometres, and*

(iii) *the witness is paid the fare by air, he may be ordered to attend in person.*

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1. *Lakshmi Amma v. Karuna Karana*, (1970), K.L.T. 867, 870, 871.
2. As to amendment of Order 26, rule 4, see para 16.13, *supra*.

CHAPTER 17

ADJOURNMENTS

Introductory

17.1. Under Order 17, rule 1, the court may, if sufficient cause be shown, at any stage of the suit, grant time to the parties or any of them, and may, from time to time, adjourn the hearing of the suit. There is a proviso, now almost a century old,[1] under which, once the hearing of witnesses commences, it should continue (except for reasons to be recorded) from day-to-day, until all the witnesses in attendance have been examined. If one object of this proviso is to avoid delay, expense and inconvenience, there is a larger object, namely, to avoid opportunities for perjury and attempts to win over witnesses.

17.2. In general, rules applicable to the first hearing apply to every adjourned hearing—though the relevant rule[2] is not well drafted, and will require detailed consideration at the appropriate place.

Order 17, rule 1

17.3. Frequent adjournments of case pose serious problems. As an ideal, the great majority of cases should be disposed of on the day originally fixed for hearing. But this ideal is rarely achieved. Several factors necessitate adjournments. It is not necessary to go into those factors here. From the legal point of view, the broad situations are the following:—

(a) Where more than the average number of cases set down for trial on a day proves to be effective and to require trial, some of them have normally to be given later trial dates. Such adjournments should not be long. The fact that on a particular day a number of cases have to be adjourned shows lack of care in the organisation of the business of the court.

(b) Sometimes, the court has time to try the case, but the parties themselves desire adjournment. Such adjournments with consent can be avoided, if the members of the Bar cooperate with the court in the efficient and expeditious disposal of business.

(c) Sometimes, a case is substantially heard, and then adjourned at the end of the day. Adjournments may be unavoidable in such situations, and all that can be suggested is that the time likely to be taken should be estimated as accurately as possible.

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1. See Section 156, Code of Civil Procedure, 1882.

2. Order 17, rule 2.

17.4. While studying the question of adjournments, a distinction should, therefore, be drawn between (i) adjournments where cases are not reached at all on the day fixed for hearing, (ii) adjournments after less than a full day's hearing, and (iii) adjournments after a substantial day's hearing. The recommendation below has been made, bearing this aspect in mind.

Order 17, rule 1(2), Proviso

17.5. Order 17, rule 1(2), proviso, enacts that when the hearing of evidence has once begun hearing of the suit shall be continued from day-to-day. In practice however, this provision is rarely observed.[1] The need for recording evidence continuously was emphasised in the earlier Report,[2] and the practice which prevails in England was referred to. It is obviously desirable as was observed in the earlier Report that evidence should be recorded continuously without any break, except in very exceptional circumstances.

17.6. We agree with the above approach. Further, we are of the view that Order 17, rule 1(2), proviso, should be made more restrictive, by *express amendment*. The time has come for enacting specific and positive restrictions in this respect; and, in particular, once the stage of evidence has been reached, an adjournment should be granted only for unavoidable reasons. That, indeed, is the spirit of the existing rule; but we would like to give it express recognition. We would, in the interest of expedition, also like to impose a few other restrictions on the grant of adjournments. The restrictions which we propose will be evident from the draft which we give below.

Recommendation

17.7. We recommend, therefore, that the existing proviso to Order 17, rule 1(2), should be revised, as follows:—

"Provided that,

(a) when the hearing of the suit has commenced, it shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing beyond the following day to be necessary for *exceptional* reasons to be recorded;

(b) *no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of the party;*

(c) *the fact that the pleader of a party is engaged in another court shall not be a ground for adjournment;*

(d) *where the illness of a pleader or his inability to conduct the case for any reason other than his being engaged in another court is put forth as a ground for adjournment, the*

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1. 14th Report, Vol. 1, page 363.
2. 27th Report, page 15, para 31.

court shall, before granting the adjournment, consider whether the party applying for adjournment could not have engaged another pleader in time;

(e) *where a witness is present but a party or his pleader is not present, or, though present, is not ready to examine or cross-examine the witness, the court may, if it thinks fit, record the statement of the witness, and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or pleader not present or ready as aforesaid."*

CHAPTER 18

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

Introductory

18.1. On the day fixed for the hearing of the suit, the party having the right to begin is to state his case and to produce his evidence in support of the issues which he wants to prove; the other party can then state his case and produce his evidence, and may then address the Court generally on the whole case. The party beginning will, then reply generally on the whole case. This topic—the statement and production of evidence—and the mode of examining witnesses and recording their evidence is the subject-matter of Order 18. Most of the questions under this Order arise not from any conflict of decisions, but from practical needs.

Order 18, rule 3A (examination of party)—[New rule]

18.2. We shall first refer to an important point regarding examination of the parties. The matter was considered in the earlier Report[1], but, as we take a different view, we propose to discuss it again.

18.3. The Fourteenth Report[2] had recommended that ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. The Commission, in its Report on the Code, however, considered it unnecessary to make any such statutory provision. It noted that this should be the ordinary rule[3], but thought that a rigid provision on the subject would not be desirable.

Recommendation

18.4. We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect—malpractice which borders on dishonesty—we think that the time has come to insert a statutory provision.

Accordingly, we recommend the insertion of the following rule in order 18:—

> *"3A. Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage."*

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1. 27th Report, page 170. Note on Order 18, rule 3.
2. Fourteenth Report, Vol. I, page 340, para 71, last sub-para.
3. *Cf. Gurdial Kaur* v. *Pyara Singh*, A.I.R. 1962 Punj. 180, 181.

Order 18, rules 5, 8, 9, 13 and 14

18.5. It was noted in the earlier report[1] that the Fourteenth Report had recommended[2] that a provision empowering the Judge to dictate the *verbatim* record of evidence should be inserted, and the Code of Civil Procedure should be brought into line with the more elaborate provisions contained in this respect in section 256 of the Code of Criminal Procedure.

The Commission, however, after some consideration, felt that the existing provisions were adequate. The present wording 'under the personal direction .....' should, in its view, cover dictation.

Point as to tape-recording

18.6. We are, however, of the view[3] that the matter should be put beyond doubt. We are, further, of the view that there should be an express provision to the effect that the evidence should be dictated directly on the type-writer. Lastly, the law should permit the evidence to be tape-recorded. We recommend an amendment of rule 5, on all these points.

18.7. Order 18, rule 8, requires that when the judge does not himself take down the evidence, he shall make a memorandum of the substance of the evidence. Such a memorandum is in addition to the *verbatim* record kept under rule 5. This 'dual record' is, in our view, not necessary where the Judge takes down or dictates the evidence, and the rule should, therefore, be modified, accordingly.

18.8. Under Order 18, rule 13, in non-appealable cases, a memorandum of the evidence is to be written by the Judge. Here also, dictation should be provided for. Rule 14 (permitting dictation of the memorandum where the Judge is unable to make the memorandum himself in appropriate cases) should, in consequence, be omitted.

Recommendation

18.9 to 18.13. In the result, the following re-drafts of Order 18, rules 5, 8, 9, 13 and 14 are suggested:—

"5. In cases in which an appeal is allowed, the evidence of each witness shall be—

(a) taken down in the language of the Court—

(i) in writing by, or in the presence and under the personal direction and superintendence of, the judge, or

(ii) *from the dictation of the Judge, dictation on the typewriter, or*

(b) *recorded mechanically in the language of the Court in the presence of the Judge.*"

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1. 27th Report, pages 170, 171, 172, note on Order 18, rule 5.

2. 14th Report, Vol. I, Pages 344, 345, para 80.

3. *Cf.* 14th Report, Vol. I, page 344, para. 80.

Revised Order 18, Rule 8

"8. Where the evidence is not taken down in writing by the judge, or *from his dictation in the open court, or recorded mechanically in his presence*, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record."

Redraft of Order 18, Rule 9

"9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such of the parties as appear by pleaders, do not object to having such evidence as is given in English being taken down in English, the judge may so take it down or cause it to be taken down."

Revised Order 18, Rule 13

"13. In cases in which an appeal is not allowed, it shall not be necessary to take down or *dictate or record* the evidence of the witness at length; but the judge, as the examination of each witness proceeds, shall make, *or dictate directly on the typewriter, or cause to be mechanically recorded*, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the Judge *or otherwise authenticated*, and shall form part of the record."

[Order 18, rule 14, to be omitted].

Order 18, Rule 17A

18.14. A situation sometimes arises where, after the close of the evidence of a party's witnesses, fresh evidence is discovered which was not within the knowledge of the party. The question may arise whether the party can produce that evidence. The answer should be 'yes'.

18.15. The Code has no specific provision on the point, and the matter is governed by practice. Under the Evidence Act, the order[1] in which witnesses are to be produced and examined, depends on the law relating to procedure, and, in the absence of a law, by the discretion of the Court. The Code of Civil Procedure also contains provisions[2] permitting the Court to call or recall witnesses. And the wide wording of the relevant rules,—e.g. the words "at any time" in Order 16, rule 14, and the words "at any stage *of the* suit" in Order 18, rule 17,—suggests that the policy of the Code is to leave a wide discretion to the Court[3].

18.16. It is felt that a specific provision dealing with the situation described above, would be useful. In the rule dealing with additional evidence in the appellate Court, we are recommending the insertion of a provision permitting the production of additional evidence which was not within the party's knowledge at the time when the decree was passed. A similar provision, covering the stage before the decree was passed, would be desirable. it would minimise the number of applications for additional evidence in the appellate Court.

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1. Section 136, Evidence Act.
2. Order 16, Rule 14; Order 18, rule 17.
3. See *Madhubai* v. *Amthalal*, A.I.R. 1947 Bom. 156 (case under Order 18, rule 17).

Recommendation

18.17. Accordingly, we recommend that the following new rule should be inserted in Order 18:—

> "17-A. *Where a party satisfies the Court that any evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit him to produce that evidence at a later stage, on such terms as may appear just.*"

CHAPTER 19

AFFIDAVITS

Introductory

19.1. While the oral examination of witnesses in Court is dealt with under Order 18, the next Order—Order 19—empowers the Court at any time, "for sufficient reason", to order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable. But, if either party *bona fide* desires to cross-examine the witness, an order authorising the witness to give evidence by affidavit cannot be made.

19.2. It is now well settled that in the absence of any agreement between the parties and in the absence of an order made by a Court under Rule 1 of Order 19 of the Code of Civil Procedure, and except in cases in which an Order is made for examination by interrogatories or before a Commissioner the witnesses at the trial should be examined *viva voce* and in open Court.[1].

This rule is modified by Order 19. There are also other provisions where, in specific instances[2], the Court is expressly permitted to act upon affidavits.

19.3. In general, the litigating public in India does not seem to have taken kindly to affidavits, and the words "for sufficient reason" in Order 19. rule 1. seem to have been construed as limiting the discretion of the Court of exceptional cases,—apart, of course, from evidence given by affidavits in support of interlocutory applications where the discretion of the Court is wider.

19.4. We do not recommend any change in this Order, as the increased use of affidavits is a matter dependant mainly on cooperation of litigants.

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1. *Cf. Warner* v. *Mosses*, (1880) 16 Ch. D. 100.

2. (*a*) Order 5, rule 19.
   (*b*) Order 11, rules 8 to 20.
   (*c*) Order 32, rule 3.
   (*d*) Order 38, rules 1 and 5.
   (*e*) Order 39, rule 1.

3. *Cf. Mani Wasappa* v. *Swamigal*, A.I.R. 1959 Mys. 139 (Soma Nath Iyer J.).

CHAPTER 20

JUDGMENT AND DECREE

Introductory

20.1. Under Order 20, after the case has been heard, the Court should pronounce juudgment, which should contain a concise statement of case, the points for determination, the decision thereon and the reasons for the decision. The Court must state its finding or decision on every issue, unless the finding upon one or more of them is sufficient for the decision of the case.

20.2. Under the scheme of the Code[1], on a judgment a decree is to follow. There are detailed provisions as to what the decree should contain in general, as well as provisions for several types of decrees. The guiding principle behind these provisions is that the decree should be self-contained and capable of execution without referring to any other document, or, as has been stated[2], the decree is the "mounthpiece of the suit in its immediate result".

Order 20, rule 2

20.3. In the earlier Report[3], a point relevant to Order 20, rule 2, was discussed.

Order 20, rule 2 provides that a Judge may pronounce a judgment, written but not pronounced by his predecessor. The Commission noted that though the word used is "may", one view is that the rule casts a duty on the succeeding Judge, and it is mandatory upon the succeeding Judge to pronounce the judgment written by his predecessor, and he cannot re-open the whole matter[4]. But a contrary view has been taken in some cases. The former view is based on the ground, that the Legislature did not intend to leave an uncontrolled and unregulated discretion to the succeeding Judge, and that a duty is cast on the Judge to pronounce a judgment in the interests of the public and to save time.

The view taken by the Commission was that the provision seems to confer a power (and not a duty) but the Code also contemplates that the power should ordiniarily be exercised. It considered it unnecessary to insert any rigid rule. No change was, therefore, suggested.

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1. *Cf.* section 2(2), definition and section 33 of "decree".
2. *Ranjit* v. *Illahi*, (1883) I.L.R. All. 520, 527 (Stuart C.J.).
3. 27th Report, note on Order 20, rule 2.
4. (*a*) *N. Venkatesu* v. *N. Suryanaryana*, A.I.R. 1959 Andhra Pradesh 16 (D.B.);
   (*b*) *Hargula* v. *Abdul Ganj*, I.L.R. 14 Rangoon 136; A.I.R. 1936 Rangoon 147, 149 (F.B.);
   (*c*) *Lachman Prasad* v. *Ram Kishan*, I.L.R. 33 All. 236 (Knox and Karamat Husain JJ.)

Recommendation

20.4. In our view, however, it should be mandatory for the succeeding judge to pronounce the judgment in such case. This will avoid unnecessary delay. We, therefore, recommend that instead of the word "may", the word "shall" should be substituted in Order 20, rule 2.

Order 20, rule 5-A (New)—judgment to inform parties of right of appeal

20.5. In order to acquaint unrepresented litigants with the right of appeal against a judgment adverse to them, it would be desirable to have a suitable provision to the effect that the judgment should indicate the Court of appeal and the time limit for appealing.

20.6. It may be of interest to note that the Fundamentals of Civil Procedure in the U.S.S.R.[1] provides—

> "The judgment of the court must be legally correct and valid. The Court shall base its judgment only on the evidence examined at the trial. In any event, the judgment must state the circumstances established by the court; the evidence on which the court's conclusions are based, and the reasons for which the court has rejected any evidence; the laws by which the court was guided; the court's decision satisfying or denying the claim in full or in part; the time limit and the manner in which appeal may be taken from the judgment. [Rest of the article in not relevant]".

20.7. A similar provision may be useful. To begin with, cases where both the parties are represented by lawyers may be excluded from the new provision for mentioning time-limit and manner of appeal.

Recommendation

20.8. Accordingly, we recommend that the following rule should be inserted as rule 5A in Order 20:—

> "5A. *Except where both the parties are represented by pleaders, the Court shall, when it pronounces judgment in a case subject to appeal, inform the parties present as to the court to which an appeal lies and the period of limitation for filing an appeal.*"

Order 20, r. 6, and registered address—Recommendation

20.9. The question whether a provision should be inserted to the effect that the decree should mention the address for service (consequential on the proposed addition of a rule requiring a pleading to be accompanied by the registered address), was considered in the 27th Report[2], but no amendment was regarded as necessary. We think that the decree should contain it. We, therefore, recommend that Order 20, rule 6(1) should be revised as follows:—

> "(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and *their registered address* and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."

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1. Article 37, Fundamentals of Civil Procedure of the U.S.S.R. and the Union Republic 1961.
2. 27th Report, page 171, note on O. 20, r. 6, and registered address.

Order 20, r. 6A [new]—(Last paragraph of the judgment)

20.10. Under Order 20, rule 6, a judgment has to be followed by a decree, which is the "formal expression" of the adjudication of the Court. The Code does not contemplate a long interval between the judgment and decree. But, in practice, the interval turns out to be long, with the result that the filing of an appeal against the decree is delayed, because an appeal has to be accompanied by a copy of the decree[1]. We think that this delay could be avoided if a provision is inserted to the effect that the last paragraph of the judgment should be framed as precisely as a decree, so that it can be used for the purposes of appeal. We had, in our Questionnaire[2], inserted a question on the subject, and the suggestion has been generally favoured.

20.11. This last paragraph of the judgment could, we think, be used also for the purpose of execution, (though this aspect was not mentioned in our Questionnaire).

Recommendation

20.12. Accordingly, we recommend that a new rule should be inserted in Order 41, as follows:—

"6A. (1) *The last paragraph of the judgment shall in precise terms indicate the relief granted.*

(2) *Where a decree is not drawn up within one month of the date on which the judgment is pronounced—*

(a) *a party desirous of appealing may appeal without filing a copy of the decree, and the last paragraph of the judgment shall, for the purpose of rule 1 of this, order be treated as the decree*; and

(b) *the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution, until a decree is drawn up, and a party interested shall be entitled to a copy of that paragraph without being required to apply for a copy of the judgment.*"

20.13. We now turn to a minor matter concerning the copies of judgments. Where the judgment is typed, it would be desirable if carbon or xerox copies of the judgment are made available on payment of prescribed charges. We recommend, accordingly, that the following rule should be inserted as Order 20, rule 6B:—

"6B. *Where the judgment is typewritten, copies of the judgment, typewritten or xerox, shall be made available to the parties immediately after the pronouncing of the judgment, on payment of such charges as may be laid down by the High Court, where the supply of such copies is practicable.*"

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1. Order 41, rule 1.

2. Question 20.

Order 20, Rule 11

20.14. Order 20, rule 11, which deals with instalments in case of money decrees, consists of two parts. Under sub-rule (1), the Court can, for sufficient reason, order that the money be paid by instalments, or may order postponement of recovery. This power is to be exercised by passing a separate order[1], unless it is incorporated in the decree.

We think, that is more convenient if it is laid down that—

(i) the order should be incorporated in the decree[2];

(ii) the power is exercised after hearing the parties who have appeared personally or by pleader at the last hearing before the judgment.

Sub-rule (2) of this rule authorises the court to make an order for payment by instalments *after* the decree. But this requires consent of the decree-holder. With reference to this sub-rule, it may be noted that some local amendments[3] provide, that where the court proposes to pass an order for payment by instalments, the decree-holder shall be given an opportunity of being heard, but his consent should not be required. One result of such an amendment would be, that the court has to exercise a judicial discretion, and the order would be appealable under section 47, as has been held in cases under the similar Madras Amendment[4].

20.15. The Commission, in its earlier Report[5] considered the question, whether such a change need be made. It took the view that the present provision is a good and just one. We agree with this view.

Recommendation

20.16. In the result, the only amendment required is in sub-rule (1) of Order 20, Rule 11. It should be revised as follows:—

"(1) Where and in so far as a decree is for the payment of money, the Court may, for any sufficient reason, and *after hearing such of the parties as were present at the last hearing, direct by its decree* that payment of the amount decreed shall be postponed, or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable."

Order 20, rule 12

20.17. It has been suggested by a High Court Judge[6] that clause (c) of Order 20, rule 12, should be removed. This suggestion has been made as a measure likely to reduce delay.

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1. *Premnath* v. *Bonn Mal*, A.I.R. 1928 Lah. 931.
2. This will make it appealable as part of decree.
3. See Madras and Nagpur Amendments.
4. 27th Report, page 172, Note on Order 20, Rule 11.
5. 27th Report page 172.
6. S. No. 28 (in answer to Question 29).

20.18. It should, however, be pointed out that the power to pass a preliminary decree directing an inquiry as to mesne profits—which is the procedure laid down in Order 20, rule 12(c)—is a useful one. Of course, it is not obligatory in law—see the word 'may' in Order 20, rule 12. But as possession will be delivered *after the decree*, the profits for the interval have naturally to be provided for; and since the parties do not furnish the material for calculating the profits, it becomes necessary to grant time. Acceptance of the suggestion, therefore, is not recommended, as it will not be of much practical utility.

Order 20, Rule 12B (New)—Execution of document or endorsement of a negotiable instrument

21.19. Under Order 21, rule 34, where a decree is for the execution of a document or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree, and deliver the same to the court. The court shall, thereupon, cause the draft to be served on the judgment-debtor, together with a notice requiring his objections (if any) to be made within such time as the court fixes in this behalf. Where the judgment-debtor objects to the draft, his objections are to be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit. The rule, then contains elaborate provisions as to further action.

20.20. Further, as regards suits for specific performance of contracts for the sale or lease of immovable property, the Specific Relief Act provides[1]—

> "(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely;—
>
> (a) the execution of a proper conveyance or lease by the vendor or lessor;
>
> (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease."

20.21. An elaborate provision regarding the decrees for specific performance of contracts for sale or lease of immovable property was suggested in an earlier Report[2] of the Law Commission. The recommendation there was to the effect, that complete relief (such as, possession, etc., rescission, refund of earnest money, etc.) in such a suit should be available by application in the *suit itself* (instead of in execution as at present), and that appropriate provision should be made in the Civil Procedure Code enabling such applications to be made and orders thereon and also for appeals.

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1. Section 28(3), Specific Relief Act, 1963.

2. 9th Report (Specific Relief Act), pages 40-41, 42, para 81, read with pages 6—17, para 35.

20.22. The matter was considered in the 27th Report, where it was noted[1]—

> "It is considered, that so far as a provision authorising the making of an *application* and orders thereon is concerned, section 28 of the Specific Relief Act, 1963 (read with section 22) would be adequate. So far as appeals from such orders are concerned, the orders, it is considered, would fall within the definition of "decree" given in section 2(2) of the Civil Procedure Code. It is thought, that the only specific provision which is required is to the effect that the decree should specify the period for payment of the purchase-money or other amount due under the decree."

Order 20, Rule 12B, (New)

20.23. We are of the view that where the decree orders the execution of a document or for the endorsement of a negotiable instrument, the proceedings for signing the document etc., should be completed in the very suit in which the decree is passed[2].

Recommendation

20.24. Accordingly, we recommend that the following rule should be added in Order 20 as[3] rule 12B.

[*Cf.* O. 21, R. 34(1)]

"12-B. (1) Where the Court passes a decree for the execution of a document or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to obey the decree, *all subsequent proceedings provided for in this rule shall take place in the suit.*

[*Cf.* O. 21, R. 34(2)]

(2) The decree-holder may, on *such neglect or failure by the judgment-debtor*, prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

[*Cf.* O. 21, R. 34(3)]

(3) The Court shall thereupon cause the draft to be served on the judgment-debtor, together with a notice requiring his objections (if any) to be made within time as the Court fixes in this behalf.

[*Cf.* O. 21, R. 34(4)]

(4) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

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1. 27th Report, page 172, note on Order 20, rule 12.
2. Consequently, Order 21, rule 34 should be deleted.
3. As to Order 20, rule 12A, see 27th Report, page 58 and page 172.

[*Cf.* O. 21, R. 34(4)]

(5) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the judge or such officer as may be appointed in this behalf shall execute the document so delivered.

[*Cf.* O. 21, R. 34(5)]

(6) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

"C.D., Judge of the Court of

(or as the case may be) for A.B., in a suit by E.F. against A.B.", and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

[*Cf.* O. 21, R. 34(6)]

(7) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

CHAPTER 21

EXECUTION

Introduction

21.1 Order 21 contains detailed rule as to the execution of decrees.

The body of the Code itself deals with certain matters relating to execution[1]. But the detailed procedure is dealt with in Order 21. Payments and adjustments of amounts due under a decree must be certified to the Court to avoid controversies later on. Various modes of execution are provided for. In practice, attachment and sale are the most common.

The rules require an application for execution to be in writing, and in the prescribed form. Most movables are attached by seizure effected by a process-server under the authority of a warrant; immovables are attached by an order served on the judgment-debtor, forbidding him to deal with them. If the property is not susceptible of actual seizure from the possession of the judgment debtor—if, for instance, it is a debt payable to the judgment debtor—a prohibitory order is served on the person in possession or control.

21.2. Attachment may be followed by an application for its removal by a third party, and the present rules require a summary inquiry and order, which may be followed by a suit to establish the right denied in the summary proceedings.

Before attached property is sold, notice must be given to the parties, and a proclamation issued containing the particulars prescribed. The proclamation must be posted on the court house, proclaimed by beat of drum near the property, and the court may require publication in a newspaper. The proclamation gives the date of sale, which must be at least fifteen days in the case of movables, and thirty in the case of immovables after the proclamation has been published. The sale is usually an auction conducted by the bailiff, an officer of the court in charge of property under the control of the court, and of the process serving staff. The bailiff has a discretion to refuse the highest bid or postpone the sale. In the case of movables, the property passes at the fall of the hammer, but the rules governing the sale of immovables are more elaborate. The judgment-debtor may secure postponement of the sale if he can satisfy the court that he may be able to raise the money to satisfy the decree by sale, lease, or mortgage of the attached property, or otherwise. If the property is knocked down, the successful bidder is required to deposit only one-fourth of the sale price and has fifteen days in which to pay the balance. The judgment-debtor may still save his property if within thirty days he satisfies the decree and pays the successful bidder

1. Section 37, *et seq.*

one-twentieth of the sale price. Any person interested may move to set aside the sale for material irregularity or fraud in publishing or conducting the sale, and the successful bidder may apply to set aside the sale because the judgment-debtor had no saleable interest in the property, but, failing a successful application of the kind indicated, the sale is confirmed by the court, which may order the purchaser to be put in possession. Resistance by the judgment-debtor or any other person acting on his behalf may be punished by civil imprisonment, but a person unconnected with the judgment-debtor and in possession on his own account who has been evicted may apply to be reinstated.

Order 21, rule 2, and limitation

21.3. A point relating to limitation for applications under Order 23, rule 2, was discussed in the earlier Report[1], and should be mentioned here.

The period of limitation for an application for certification of payment or adjustment is 30 days under the Limitation Act, 1963, article 125. Since the provision in the Civil Procedure Code regarding certification is now proposed to be made more stringent than at present (by requiring[2] that the payment should be in the manner provided in Order 21, rule 1 as proposed to be amended or that the adjustment should be proved by documentary evidence), it was considered that a longer period should be allowed. It was, accordingly, recommended that the period should be increased to 90 days[3]. The 14th Report[4] recommended that the period should be deleted, but it was not considered necessary to go so far.

While we agree that the period should be longer, we think that 60 days should suffice, and we recommend[5] that the Limitation Act should be amended accordingly.

Order 21, rule 2(2) and sureties

21.4. In the earlier Report[6], it was noted that under the Madras amendment to Order 21, rule 2, *any party to the suit* can certify and get recorded a payment or adjustment. Besides this, by the Madras amendment, a person who has become a surety as well as legal representatives of the judgment-debtor are also brought under this rule. These amendments were considered in the earlier Report, but it was felt that it was unnecessary to adopt them.

21.5. The Commission stated that so far as sureties are concerned, even now, they fall under the rule[7]. So far as legal representatives are concerned, section 146 was adequate, in its opinion. No change was, therefore, proposed, on these points.

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1. 27th Report, page 177, note on Order 21, rule 2 and limitation.
2. See 27th Report, amendment proposed in Order 21, rule 2.
3. *Cf.* Limitation Act, 1908, article 174.
4. 14th Report, Vol. I, page 444, para 28.
5. This will necessitate amendment of article 125, Limitation Act 1963.
6. 27th Report, pages 174-175, Note on Order 21, rule 2.
7. (*a*) *Tamil* v. *Devi*, I.L.R. 49 Mad. 325.
   (*b*) *Onkarmal* v. *Nritya*, A.I.R. 1923, Cal. 313.

We are, however, of the view that so far as *sureties* are concerned, the Madras amendment should be adopted, so as to make the position explicit.

Recommendation

Accordingly, we recommend that in Order 21, rule 2(2), after the words "*The judgment-debtor*", the words "*or any person who has become surety for the judgment-debtor*" should be added.

Order 21, rule 5, Mode of transfer

21.6. Under the earlier half of Order 21, rule 5, where the Court to which a decree is to be sent for execution is situated within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court.

But under the latter half of the rule, where the Court to which a decree is to be sent for execution is situated in another district, the decree is to be sent *through the distinct court*. It was noted in the earlier Report[1], under local amendments[2] in case where the courts are situated within the same State, the decree can be sent for execution to the transferee court directly, instead of through the District Court as is required by the present rule. The previous Commission, however, considered that the District Judge would be in a position to know and check up if the court mentioned is the proper court, and did not, therefore, favour an amendment.

21.7. We are of the view that the local amendments referred to above are useful, and we do not think that direct transmission of papers should, ordinarily, cause any difficulty. We are also of the view that in every case of *transfer* of a decree for *execution* (whether within or without the State), the decree should be sent to the transferee court directly. But the court to which it is sent should, if it has no jurisdiction, send the papers to the proper court.

Recommendation

21.7A. Accordingly we recommend that Order 21, rule 5, should be revised as follows:—

> "5. ..... Where a decree is to be sent for execution to another court, the court which passed such decree shall send the same *directly to the former Court, whether or not the former court is situated in the same State, but the court to which it is sent shall, if it has no jurisdiction to execute the decree, send it to the court having such jurisdiction.*"

Order 21, rule 11(2)

21.8. Order 21, rule 11(2)(j)(ii) provides for mentioning "attachment and sale" or "sale without attachment" in the application for execution. It does not expressly mention simple attachment. The local amendment made by the Bombay High Court adds the words "by the

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1. 27th Report, page 179, note on O. 21, r. 5.
2. See amendments made by the Allahabad and Bombay High Courts.

attachment". Cases of simple attachment may arise when a decree or debt or money in the custody of a public officer, etc., is to be attached. It may also be noted, that section 51(b) covers attachment *simpliciter*[1].

21.9. The earlier Report[2] considered it unnecessary to adopt the Bombay amendment, as the residuary clause in rule 11 would suffice. We think, however, that the Bombay amendment could be usefully adopted.

Recommendation

21.9A. Accordingly, we recommend that Order 21, rule 11(2)(j)(ii) should be revised as follows:—

> "(ii) *by the attachment,* or by the attachment and sale, or by sale without attachment, of any property."

Order 21, rule 16

21.9B. As recommended under[3] section 146, it is desirable to amend Order 21, rule 16, to make it clear that it does not affect the provisions of section 146, and a transferee of rights in the subject-matter of the suit can obtain execution of the decree without a separate assignment of the decree.

Recommendation

21.9.C. Accordingly, the insertion of the following Explanation below Order 21, rule 16, is recommended:—

> "Explanation—*Nothing in this rule shall affect the provisions of section 146, and a transferee of rights in the property which is the subject-matter of the suit may apply for execution of the decree without a separate assignment of the decree, as required by this rule.*"

Order 21 rule 22A

21.10. With reference to execution of decrees, a point concerning the effect of death of the judgment-debtor was discussed in the earlier Report[4]. The ordinary rule is, that the sale of a judgment-debtor's property after his death, and without bringing his representatives on record, does not bind his representatives. The Patna High Court has added rule 22A, to the effect that where property is sold in execution, the sale shall not be set aside by reason only of the death of the judgment-debtor *between the date of issue of the sale proclamation and the date of sale,* notwithstanding the failure to substitute legal representatives. But, if the legal representative is prejudiced, the Court may set aside the sale. The earlier Commission noted the above position, but considered it unnecessary to adopt the Patna Amendment.

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1. *Amulya* v. *Pashupati*, A.I.R. 1951 Cal, 48, 50, para 7.
2. 27th Report, page 180, note on O. 21, r. 11(2) and Bombay Amendment.
3. See discussion as to section 146.
4. 27th Report, page 184, note on Order 21, rule 22A Patna.

Recommendation

21.11. It appears to us, however, that such an amendment would be unobjectionable in principle, and would also reduce delay, and we recommend insertion of the following as Order 21, rule 22-A:—

> "22-A. *Where any property is sold in execution of a decree, the sale shall not be set aside by reason only of the death of the judgment-debtor between the date of issue of the proclamation of sale and the date of sale, notwithstanding the failure to substitute his legal representative in his place; but, in case of such failure, the Court may set aside the sale if satisfied that the legal representative of the judgment-debtor has been prejudiced thereby.*"

Order 21, rule 24(3)

21.12. Under Order 21, rule 24(3), a process issued by a court (in execution) should specify the day on or before which it shall be executed. After the date fixed for return, execution is not valid[1].

With reference to this rule, a short point was discussed in the earlier Report[2]. The Commission noted that some High Courts had made local amendments[3], which require that the day on or before which the process should be returned, should also be specified in the process. The Commission considered it unnecessary to adopt this amendment, being of a minor character.

Recommendation

21.14. Accordingly, we recommend that Order 21, rule 24(3), should be revised as follows:—

> "(3) In every such process, a day shall be specified on or before which it shall be executed, *and a day shall also be specified on or before which it shall be returned to the court but no process shall be deemed to be void if a day for its return is not specified as required by this rule.*"

Order 21, rule 26

21.15. Under Order 21, rule 26(1), the Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto. Under sub-rule (3) of this rule, the court *may* require security from the judgment-debtor, or impose other conditions, before granting stay.

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1. See *Gurdial* v. *Emp.*, I.L.R. 55 All. 119; A.I.R. 1933 All. 46 (Pullan J.).
2. 27th Report, page 185, note on O. 21, rule 24(3).
3. See also Civil Justice Committees Report, (1925); page 406, paragraph 13, to the same effect.

21.16. In the earlier Report, the following observations[1] were made with reference to stay (under this rule):—

> "A recommendation has been made in the Fourteenth Report[2] [3] to the effect that where a judgement-debtor applies for stay of execution under this rule, the court shall require him to furnish security or impose conditions under the rule, before granting stay. This recommendation was made in view of the feeling that the courts failed to discriminate between honest and dishonest judgment-debtors and thus failed to exercise properly the discretion left to them. It is, however, considered that the existing provision should continue, and that making it mandatory would cause hardship.
>
> Hence, no change is suggested".

We are, however, of the view that the change proposed by the 14th Report is a salutary one, and should be carried out.

Recommendation

21.17. Accordingly, we recommend that Order 21, rule 26(3) should be revised as follows:—

> "(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the court *shall* require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit."

Order 21, rule 29

21.18. Order 21, rule 29, runs as follows:—

> "29. Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

21.19. At present, there is a conflict of decisions on the question whether the decree must be of that court which is required to act under this rule. One view is that a court to which the decree of any other court is transferred, can act under this rule. But another line of cases takes a narrower view[4].

The wider view bases itself on the principle that the transferee court becomes the "court" which passed the decree, (section 37), and would under section 42, become clothed with the same powers. The narrower view justifies itself on the language of the section, which requires identity of the court passing the decree and the court in which the suit is pending.

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1. 27th Report, page 185, Note on O. 21, r. 26.
2. 14th Report Vol. I page 449, para 43.
3. See also Civil Justice Committee (1925), Report, page 406, para 14.
4. See cases cited in 27th Report, page 185, 186, note on Order 21, rule 29.

To clarify the position, necessary change was proposed in the earlier Report[1] on the Code, adopting the wider view.

21.20. With this change, we agree. But there are a few other points which require consideration.

It has been stated in one of the replies[2] to our Questionnaire that this rule is not needed, as the purpose can be served by obtaining a temporary injunction. We have examined the matter, but it appears to us that the scope of temporary injunctions is different. A temporary injunction is not directed to a court, but to an individual[3]. Apart from that, the rule which relates to temporary injunctions[4], speaks of property being "wrongfully" sold in execution of a decree, while an applicant under Order 21, rule 29 does not necessarily assert that the execution is wrongful. One of the objects of the rule is to prevent multiplicity of execution proceedings, and this object may be of importance even if property of the person who is now the plaintiff is, (in his capacity as a judgment-debtor), being *lawfully* sold in execution.

21-20A. Another point made in the same reply is, that the rule is being abused; but we do not think that deletion of the rule would be justified merely on the ground of occasional abuse. Situations that have figured in reported decisions[5] show that the rule does perform a useful role.

21-20B. For example, in a Madras case[6], the respondent was the assignee-decree-holder, and the petitioner was a woman. She was the plaintiff in a suit, and her suit was for damages against the assignee-decree-holder, for having broken his agreement with her whereby he agreed to receive, in satisfaction of the assigned decree, certain bonds and to get satisfaction entered up. She desired stay under rule 29. The lower courts took the view that rule 29 did not apply to the facts. The view was set aside in revision. No opinion was expressed on the merits, but the facts illustrate how rule 29 could prove useful.

21.21.In another Madras case[7], a proceedings before the single judge was by the appellant bank for an interim order of stay pending the appeal, with regard to the decree obtained by the respondent (widow of the deceased employee of the bank), embodying the liability of the bank to pay certain provident fund amounts to the credit of that employee. The bank claimed that the deceased employee was guilty of malversation of the funds of the institution to a *far greater extent than the claim*; and that, therefore, the widow could not obtain such a decree, or at least that she should not be permitted to

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1. 27th Report, page 185-186, note on Order 21, rule 29.
2. Question 29.
3. A.I.R. 1938 Lah. 220, 221.
4. Order 39, rule 1.
5. (*a*) *Mahesh Chandra* v. *Jogendra*, A.I.R. 1928 Cal. 222.
   (*b*) *Merchants Bank* v. *D. Ammal*, A.I.R. 1963 Mad. 143, 144.
6. *Konnammal* v. *Muttirukumaraswami*, A.I.R. 1936 Mad. 102, 103.
7. *Merchants' Bank Ltd.* v. *D. Ammal*, A.I.R. 1963 Mad. 143.

enforce the decree and take away the monies pending the appeal by the bank against the decree in the widow's suit. No cross-claim by the Bank was pending, and rule 29 did not apply. But the facts illustrate how, if the situation was under rule 29, it would have been useful.

21.22. Security also cannot be required in every case.

As was laid down in a Rajasthan case[1]—

> "While granting stay of execution under Order 21, rule 29, the court should consider various circumstances before deciding that security should be furnished up-to the entire decretal amount of the former suit. Where the former decree is passed on a mortgage, some security is already there. The court should enquire whether that security is sufficient or not. If it appears that the security is not sufficient, such further amount as might be necessary to make up the deffiiciency may be asked. Further, it should also enquire whether it is possible in the earlier suit for the decree-holder to ask for a personal decree."

However, it can be provided that ordinarily, before granting stay of a money decree, the court shall consider if security ought not be demanded.

Recommendation

21.23. to 21.25. In the light of the above discussion, we recommend the following change in Order 21, Rule 29:—

(i) After the words "a decree of such court", the words "*or a decree which is being executed by such court*" should be inserted[2].

(ii) The following proviso should be inserted at the end:—

"*Provided that if the decree is one for payment of money, the court shall, if it grants stay without requiring security, record its reasons for doing so.*"

Order 21, rule 34

21.26. Order 21, rule 34 should be deleted, in view of our recommendation[3] to insert in Order 20 a rule dealing with proceedings for the execution of a document or for the endorsement of a negotiable instrument.

Order 21, rule 41

21.27. Order 21, rule 41, provides for oral examination of the judgment-debtor in order to find out his assets. The Commission in the earlier Report made a recommendation for the filing of an affidavit by the judgment-debtor[4].

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1. *Hansraj* v. *Subnarain*, A.I.R. 1957 Raj. 219, (Wanchoo C.J. and Dave J.).
2. *Cf.* the recommendations in the 27th Report.
3. See discussion as to Order 20, rule 12B (Proposed).
4. 27th Report, pages, 188-189, note on Order 21, rule 41.

The Commission recommended that where a judgment-debt remained unpaid for 30 days, the decree-holder should be entitled to call upon the judgment-debtor to make an affidavit of his assets. The filing of such an affidavit was, in the opinion of the Commission, much more effective than the examination now in vogue, as the decree-holder (at present) attended the examination without any prior knowledge of the debtor's assets and liabilities.

21.28. The following sub-rule was accordingly recommended to be added:—

> "(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the court may, on the application of the decree-holder, order that the judgment-debtor, or in the case of a corporation, any officer thereof, shall make an affidavit stating particulars of his assets; and the power of the Court to make any such order shall be without prejudice to its power under sub-rule (1)".

It was however, considered unnecessary to make any specific provision as to the penalty for failure to make the affidavit in such cases. The Commission noted that the Evershed Committee had suggested[1] that the notice should be endorsed with a "penalty notice" under Order 41, rule 5, Rules of the Supreme Court. Neglect to make the affidavit would, thus, render the judgment-debtor liable to a process of execution for compelling him to obey it. This would attract the provisions of Order, 42, rule 7, R.S.C., providing for writ of attachment, or committal.

Recommendation

21.29. We agree with the earlier Commission's recommendation regarding the duty to file an affidavit. Further, we are of the view that a penal provision is necessary, in order to secure compliance with the new duty.

Accordingly, we recommend that the following should be added[2] as sub-rule (3), in Order 21, rule 41:—

> "(3) *In case of disobedience to any order under sub-rule* (2), *the Court making the order, or any court to which the proceeding is transferred, may order the person disobeying it to be detained in the civil prison for a term not exceeding six months, unless in the meantime the court directs his release.*"

Order 21, rule 57

21.30. With reference to Order 21, rule 57, the earlier Report[3] considered one point. It was noted, that where an application for execution is dismissed either by reason of the decree-holder's default or otherwise, the question arises whether an attachment already

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1. Final Report of the Committee on Supreme Court Practice and Procedure, (1953), Cmd. paper 8878, pages 145-146, paras. 453-454 and form of affidavit at page 376.

2. This is in addition to the amendment suggested by 27th Report in Order 21, rule 41.

3. 27th Report, pages 106-107, note on Order 21, rule 57.

effected ceases or not. At present, the case where the decree-holder's *default* entails dismissal of the application is covered, but other cases are not. (In the former case, the cessation of the attachment is, at present, compulsory). Local Amendments[1] to the rule seek to impose an obligation on the court to direct, in each case of dismissal, whether the attachment is to be regarded as continuing or not.

21.31. In some of the local amendments (e.g. Bombay and Madhya Pradesh), it is further provided that, in the absence of an order to the contrary, the attachment shall cease. This is intended to avoid doubts which are felt sometimes as to whether the dismissal was in fact, for "fault"[2].

The earlier Commission, however, considered it necessary to adopt these amendments, as it was felt that where the execution application is dismissed (for default), *the attachment must cease.*

It appears to us that there is need for a clarification; and we are further of the view that cessation of the attachment should not be automatic. It is more convenient if the provision is to the effect that the attachment should continue unless otherwise ordered.

Recommendation

21.32. Accordingly, we recommend that Order 21, rule 57, should be revised as follows:—

> "57. (1) Where any property has been attached in execution of a decree, and the Court, for any reason, passes an order dismissing the application, the court shall direct whether the attachment shall continue or cease.
>
> (2) *If the court omits to give such direction, the attachment shall be deemed to continue.*"

Order 21, rule 58

21.33. With reference to Order 21, rule 58, the earlier Report[3] discusssed a number of points. Of these, the position regarding one of them has been further examined. The Report considered the question of making an express provision as to whether the proceedings under rule 58 *et seq* and the decisions given thereon will be binding as *between the judgment-debtor and a third party claimant.* The answer to that question, it was stated, would depend on the question,—who are the parties to suit, and what are the matters raised therein?[4]

We have examined the position and, it appears to us that the view taken in the earlier Report[5] needs no change.

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1. *Cf.* the Amendments made by the High Courts of Calcutta, Madras, Nagpur, Patna etc.
2. See Civil Justice Committee (1925). Report, page 409, para 22.
3. 27th Report, page 198.
4. Reference was made to A.I.R. 1957 A.P. 61.
5. For a recent decision, see I.L.R. (1966) 1 All 101, 106.

Order 21, rule 66

21.34. A point concerning Order 21, rule 66, which was discussed in the earlier Report[1] requires consideration.

A recommendation had been made in the 14th Report[2] to the effect that to avoid the difficulties caused by mistakes in the estimated value of the property as stated in the proclamation of sale, rule 66 should be amended on the lines of the Patna Amendment, so as to provide (in effect) that the court should state merely the estimated value of the property, if any, as given by the parties, and insert a statement that it does not vouch for the accuracy of either. It was considered by the Commission in the Report on the Code that it would be sufficient to adopt a simpler amendment, namely, that the proclamation should merely contain a statement that the estimated value is stated.

Recommendation

21.35. We agree with the view taken in the earlier Report on the Code, but we would suggest a small drafting change in the draft amendment suggested in that Report.

Accordingly, we recommend that the following proviso should be added below Order 21, rule 66(2)(e):—

> "*Provided further that nothing in this rule shall be construed as requiring the court to enter in the proclamation its own estimate of the value of the property, but the proclamation shall include the estimates, if any, given by either or both of the parties*"[3].

Order 21, rule 72

21.36. With reference to Order 21, rule 72, a point was considered in the earlier Report. A recommendation had been made in the Fourteenth Report[5] to the effect, that a decree-holder should be allowed to purchase property unless the court has prohibited him from doing so.[6] The object of the recommendation was to avoid the delay that is frequently caused when the warrant of sale is returned unexecuted in the absence of bidders. An amendment carrying out this recommendation was proposed in the draft Report on the Code which had been circulated. Comments received thereon, however, emphasised the need for the court being aware of any proposal by the decree-holder to bid. The earlier Commission thought, that there was force in this approach, and a decision was taken not to disturb the existing rule.

We have considered this matter further, and have come to the conclusion that the approach in the earlier Report on the Code was correct. Hence, no change is recommended.

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1. 27th Report, page 200, Note on Order 21, rule 66 and draft rule, page 69.
2. 14th Report, Vol. I, page 454, para 50.
3. The first proviso to be added as recommended in the 27th Report, page 69, will stand.
4. 27th Report, page 202, note on O. 21, r. 72.
5. 14th Report, Vol. I, pages 456, 457, para 57.
6. See also Civil Justice Committee (1925), Report, page 410, para. 24.

Order 21, rule 72

21.36-A. We have considered the more fundamental question it rule 72 should be retained at all. The object behind this provision is to ensure fairness in the auction. The decree-holder, if interested in purchasing the property himself, can, conceivably, keep back or discourage (or even mislead) prospective purchasers. Ordinarily, the fetching of a higher purchase price would be in his interest (as likely to satisfy his claim without further execution). But, it should not be forgotten that when he is the purchaser, this consideration takes leave, and he—like every purchaser—would like the price to be low. To a certain extent, he has a hand in initiating the sale, though not so in theory. It is he who obtains the proclamation of sale; and, though the rule in Order 21 do not so require, it is he who is expected to assist, and even to guide, the process-serving staff in various matters concerning execution—e.g. affixation of the proclamation etc. He also estimates the price. For these reasons, it is better to keep the existing safeguard.

Order 21, rule 72A (New)

21.37. A new rule discussed but not recommended in the earlier Report[1] may be usefully considered at this stage. The Commission, in that Report, noted that Order 21, rule 72A, had been added by the High Court of Bombay, to provide that if leave to bid is granted to a mortgagee, then, as regards him, a reserve price shall be fixed, (unless the Court shall otherwise think fit), which shall not be less than the amount due on principal, interest and costs in case the property is sold.

The history of the Bombay rule is interesting. The Subordinate Judge of Haveli wrote a letter to the High Court of Bombay in 1913, stating that this was the practice followed in the mufassil, and as the rule could not now be made under section 104, Transfer of Property Act, it should be made under Order 34. The Rule Committee recommended that the old rule 20 of the Supplementary Civil Circular No. 11 should be restored.[2] In the absence of such a rule, the mortgagee can (under a general permission to bid) recover in execution the balance from the mortgagor or from his estate, if the amount for which the property is sold is less than the principal, etc. due to him.

21.38. The question whether this amendment should be adopted was considered by the earlier Commission, but it felt that a rigid provision of such a nature was not necessary. It apprehended that to a certain extent, such a provision may detract from the remedy of the mortgagee under Order 34, rule 6 also.

We have carefully considered the matter, and have come to the conclusion that the Bombay Amendment is a healthy one. We do not think that it will detract from Order 34, Rule 6, because the decree-holder can, before seeking permission, consider whether the property is likely to fetch the total amount due to him.

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1. 27th Report, page 202, note on Order 2, rule 72A (Bombay).

2. See discussion in *Vrajlal* v. *Venkataswami*, I.L.R. 52 Bom. 459; A.I.R. 1928 Bom. 122, 125 (Marten, C.J. and Blackwell, J.).

Recommendation

21.39. We, therefore, recommend that the principle of Order 21, Rule 72A, as inserted by the Bombay Amendment, should be adopted. Apart from the general rule[1] requiring the decree-holder to obtain leave to bid, it is our intention that for the special case of mortgagee, leave should be required as above.

The following new rule is, accordingly, recommended—

"72A. (1) *A mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on the mortgage, unless the Court grants him leave to bid for or purchase the property.*

(2) *If leave to bid is granted to such mortgagee, then the Court shall fix a reserve price as regards the mortgagee, and, unless the Court otherwise directs, the reserve price shall be—*

(a) *not less than the amount then due for principal, interest and costs, in respect of the mortgage if the property is sold in one lot; and*

(b) *not less in respect of each lot (in case the property is sold in lots) than such sum as shall appeal to the court to be properly attributable to that lot in relation to the amount then due for principal, interest and costs on the mortgage.*

(3) *In other respects, the provisions of sub-rules* (2) *and* (3) *of rule* 72 *shall apply in* relation to purchase by the decree-holder under that rule." —

Order 21, rule 89—period of limitation

21.40. An application to set aside a sale on deposit under Order 21, rule 89, has to be made within thirty days of the date of sale.[2] It has been stated that this period proves to be too short in practice, and often causes hardship inasmuch as the judgment debtor cannot arrange for moneys within that time. Banks take a far longer period than one month in sanctioning advances, and it has been suggested that the period should, therefore, be increased. We find some force in this suggestion, and are inclined to accept it. No doubt, the law should take into account the position of the purchaser also; but, since five per cent of the purchase money has to be paid to him under the rule, no serious prejudice is likely to be caused to him by an increase in the waiting period.

21.41. Since section 5, of the Limitation Act does not apply to applications in execution, a change in the law is needed if the above hardship is to be removed.

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1. Order 21, Rule 72.

2. Limitation Act, 1963, article 127.

As to the direction in which the law should be amended, there are two alternatives. One alternative is to give the court a power to extend the period of limitation, subject, of course to some maximum. The second alternative would be to increase the period—30 days—to, say, sixty days. The first alternative could be achieved by inserting a proviso somewhat on the following lines—

> "Provided that, where the Court is satisfied that the application could not, for reasons beyond the control of the judgment debtor, be made within the period prescribed in that behalf by the Limitation Act, 1963, the Court may, by order and for reasons to be recorded, extend the said period by such further period as may be specified by it, so however, that the prescribed period and the extended period shall not exceed sixty days in the aggregate."

The second alternative could be achieved by amending article 127 of the Limitation Act. We prefer the second alternative, which is simpler.

21.42. Although the problem has arisen with reference to applications by the judgment-debtor, the amended period has to cover all applications, (i.e. those under Order 21, rule 90-91 also), because after the proposed amendment, the court will have to wait in every case for the increased period before confirming the sale.

Recommendation

21.42A. Accordingly, we recommend that in the Limitation Act, 1963, in the Schedule, in the second column, against entry 127, for the words "thirty days", the words "sixty days" should be substituted.[1]

Order 21, rule 90, and deposit

21.43. With reference to Order 21, rule 90, the earlier Report discussed[2] one point. A recommendation had been made in the Fourteenth Report[3] to the effect, that a person applying to set aside the sale under rule 90 should be required to deposit an amount not exceeding 12½ per cent of the purchase price, which amount can be utilised for awarding costs if the application fails. But the Commission (in its Report on the Code) stated that as the amount of such costs would not be very large, it was unnecessary to carry out this recommendation.

Recommendation

21.43A. We have examined the matter further, and have come to the conclusion that the recommendation made in the 14th Report need not be carried out. We agree with the view taken in the Report on the Code.

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1. To be carried out in the Limitation Act, 1963.
2. 27th Report, page 205. Note on Order 21, rule 90 and deposit.
3. 14th Report, Vol. I, pages 454, 455, para 51.

Order 21, rule 90, and absence of attachment

21.44. Another point concerning Order 21, rule 90, which was discussed in the earlier Report may be noted.[1]

The Commission noted[2] that the question whether absence of, or irregularity in, attachment is, a defect in the 'publication or conduct of the sale' within Order 21, rule 90, had been discussed in several decisions. At one extreme was the view that attachment is not necessary at all, before sale. At the other extreme stood the view that sale without attachment is void. A third view was that want of attachment is an "irregularity" but it is not an illegality in publishing or conducting the sale. According to the fourth view, a sale is not a nullity merely because of a defect in the attachment or want thereof, but, if it causes 'substantial injury', it can be set aside under rule 90.

The Commission thought that the last view was the correct one. The object of attachment (it stated) is to bring the property under the control of the court, and, in the case of immovable property, one of the requirements is that the order of attachment should be publicly proclaimed. The main object of the proclamation is to give puglicity to the fact that the sale of the proclaimed property is in contemplation. The publication of the attachment, is, thus a step leading up to the proclamation of the sale.

The Commission also considered the question whether it was necessary to insert a provision to clarify the position on the subject. In fact, in the draft Report which had been circulated, an Explanation had been proposed to rule 90 to the effect that absence of or defect of an attachment shall be regarded as an irregularity under this Rule. After some consideration however, it was decided that no such provision need be inserted.

21.45. It appears to us that to put the matter beyond doubt, it may be advisable to insert a specific provision on the subject and the provision should be to the effect that mere absence of or irregularity *in attachment shall not be a ground for setting aside* the sale.

Recommendation

21.46. Accordingly, we recommend that the following Explanation should be inserted below Order 21, rule 90—

> "Explanation—*The mere absence of or defect in attachment of the property sold shall not of itself be a ground for setting aside a sale under this rule.*"

Order 21, Rule 92(3)

21.47. The question whether an auction purchaser at a court auction, on finding that the judgment debtor has no saleable interest in the property sold, has a right *to sue for* a refund of the purchase money on the ground of failure of consideration, has proved to be a controversial one.

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1. 27th Report, page 206, note on Order 21.
2. *Cf.* Order 21, rule 64.

Three different shades of view prevail on the subject—

(1) No such right is available.

(2) Such right is available.

(3) Such right is available, but only on limited grounds.

21.48. The first shade of view is represented by a full Bench decision of the Andhra Pradesh High Court,[1] which holds that the auction-purchaser cannot, after the confirmation of the sale, maintain an application for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold.[2]

Referring to Order 21, rule 92, the Court held that after the sale is confirmed, and had become absolute, the auction-purchaser is precluded from bringing a suit to set aside the order confirming the sale. It was also held that Order 21, rule 93 empowers the purchaser to apply for payment only in cases where the sales are set aside under rule 92. Here the rule differs from section 315 of the Code of 1882 (its predecessor), which contained the provision that even when it was found that the judgment-debtor had no saleable interest in the property sold, the purchaser could receive back his purchase money. This was omitted in rule 93.

The Court held that—

(a) There is no scope for invoking the doctrine of "money had and received" since it could not be postulated that the executing creditor received money which he had no right to do, and, by a legal fiction, the receipt by him was for the use of the plaintiff.

(b) If no one had guaranteed the title of the Judgment-debtor to the property sold under a legal process and the purcaser had purchased only the judgment-debtor's interest therein for what it was worth it could not be predicted that there was any failure of consideration for the purchase of that, or that the judgment-creditor either unjustly or inequitably had withdrawn the amount deposited by the purchaser. The question of failure of consideration would arise only if there was a convenant of title. In the absence of it, the principle of money had and received would be inapplicable, and the suit for return of money cannot be sustained on that ground.

(c) "Sales in invitum" do not involve a covenant of title.

(d) The purchaser accepts the property with its risks, and the rule of "caveat emptor" applies to these cases.

(e) As a necessary corollary, he has no right of recovery of the purchase price, except as contemplated by the provisions of Order 21, Rule 91 read with rule 93.

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1. *Suryakanthamma* v. *Dorayya*, A.I.R. 1965 A.P. 239 (F.B.).

2. To the same effect is *Narayan Pillai* v. *Gopalan*, A.I.R. 1967 Ker. 145.

21.48A. The Court thought that perhaps the reason why the legislature (in enacting the Code of 1908) thought it fit to take away the remedy of suit and to limit the scope of the relief envisaged was that the right of suit involves delay, uncertainty and often hardships to execution creditors, and that the quick and inexpensive remedy provided by the said rules afford adequate and equitable relief to the purchaser, by allowing him to get out of the difficulty before the confirmation of sale.

But the right to recover the auction price increase of fraud and misrepresentation which had induced the purchaser to buy the property, stands on a different footing. Such sales were held to fall outside Order 21, and would be within the provisions of the Indian Contract Act.

21.48B. As regards the second shade of view, reference may be made to a Madras Full Bench case,[1] which strikes a divergent note, Ramesam J., (who delivered the judgment of the Full Bench), observed:

> "Taking the first question, viz., whether the respondent is entitled to a refund at all event by way of a suit, the question depends upon the right of the parties as they flow out of the circumstances of the case, and not upon whether a provision for such a suit is made in the Civil Procedure Code. The Civil Procedure Code is a Code of objective law, and cannot create rights of action, though it may recognise them or take them away. Forgetting for a moment all technicalities and the Codes of Procedure, one would think on the facts that the auction purchaser should have a right of action for money had and received."

21.48C. A Calcutta case[2] contains discussion which represents both the second and the third shades of view. The Court, while referring to the situation of the auction-purchaser, and the argument that he should have a right of suit, observed—

> "If he did not possess such a right, he might be exposed to loss resulting from *fraud or collusion* at the sale between an execution creditor and the judgment debtor, and yet remain without redress. But, against loss sustained in such circumstances, the law does not leave him defenceless, and the auction-purchaser may recover the purchase price which he had paid if he can bring himself within the equitable principles which justify a suit for money had and received upon the ground that, *it is unconsciousable that the defendant should* retain the money as against the plaintiff. That, I think, is the true position of the auction-purchaser under the law upon principle and apart from any statutory right which he may possess.[3] There is authority also for the view that where an auction-purchaser

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1. *Macha Koundan* v. *Kolara Kundan*, A.I.R. 1936 Mad. 50 (F.B.).
2. *Rishee case*, v. ***Manik Molla***, A.I.R. 1926 Cal. 971, 973.
3. *See Dorab Ally Khan* v. *Abdool Azeez*, (1887) 3 Cal. 806, 5 I.A. 16 (P.C.).

at a Court sale has suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which thereby he has sustained."[1-2-3].

Recommendation

21.48D. Whatever be the correct view on the existing language, it appears to us that something should be done to improve the position. No doubt, to permit the auction-purchaser to sue for refund from the *decree-holder*, is to add to the troubles of the decree-holder, and thus to delay execution. But that seems to be the only possible alternative. As between the decree-holder and the auction-purchaser, if some one has to suffer, the former should suffer.

It may not be feasible for the court to inquire into the title of the judgment-debtor (at the time of the proclamation), in an elaborate manner; but that does not answer the basic question, namely, when a sale held by a Court and culminating in a certificate issued by the court is held to be a nullity for want of title, by reason of a defect discovered after expiry of the period for making objections under rule 91 etc., is it justice to dispose of the purchaser's grievance by saying that the puurchaser purchased the property at his peril? The decree-holder should re-imburse him for the loss suffered by him, because it is the decree-holder at whose instance the sale was held. The abstract principle that there is no warranty at court sales fails to yield a just result in this case.

The auction-purchaser should have a right to sue the decree-holder. Where a third party challenges the judgment-debtor's title by filing a suit against the auction purchaser the decree holder and judgment-debtor should be necessary parties, and in that suit the court shall direct the decree-holder to refund the money to the auction-purchaser.

If such a decree is passed, the original execution proceedings shall be revived at the stage where the sale was ordered, unless the court otherwise directs, This provision is necessary to avoid complications as to limitation.

Recommendation

21.49. We, therefore, recommend that the following sub-rules should be added to Order 21, rule 92:—

"(5) *Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit;*

(6) *If the suit referred to in sub-rule 5 is decreed, the court shall, direct the decree-holder to refund the money to the auction-purchaser, and, where such an order is passed, the execution proceedings in which the sale had been held shall, unless the court otherwise directs, be revived at the stage at which the sale was ordered.*"

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1. See *Dugal Krishna Naskar* v. *Amirta Lal Das*, (1902) I.L.R. 29 Cal. 370.
2. *Parvathi Ammal* v. *Govindasami Pillai*, (1916) I.L.R. 39 Mad. 803.
3. *Balvant Beghunath* v. *Bala*, A.I.R. 1922 Bom. 205.

Order 21, Rule 102

21.50. With reference to Order 21, Rule 102, the earlier Report[1] discussed one point. Order 21, Rule 102 provides that nothing in rules 99 and 101 shall apply to resistance or obstruction, etc. by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. The earlier Commission noted that the words "a person to whom the judgment-debtor has transferred the property" had created a conflict as to whether an involuntary sale is caught by these words. One view is that they are caught.[2-3]

It has also been held that the proper remedy of such a person is to raise the matter under section 47, and that he has no *locus standi* to maintain an application under rule 100 or to sue under rule 103.[4-5]

A contrary view, however, has been taken by the Patna High Court,[6] on the ground that since old section 333 of the Code of 1882 was adopted at a time when the doctrine of *lite pendente* had not been extended to a transfer in execution, rule 102 cannot be given the extended interpretation which section 52 of the Transfer of Property Act had received.

21.51. The previous Commission, however, did not suggest a change, as it was of the opinion that the former view could prevail.

Recommendation

21.51A. We agree with the previous Commission that the wider view will prevail, but we would like to codify the view. Accordingly, we recommend that the following explanation should be inserted below Order 21, Rule 102—

> "Explanation—*In this rule, 'transfer' includes a transfer by operation of law*".

Order 21, Rule 103

21.52. Under Order 21, rule 103, a party (not being a judgment-debtor) against whom an order is made under rule 98, rule 99, or rule 101, may institute a suit to establish the right which he claims to the possession of the property; but, subject to the result of such suit, if any, the order shall be conclusive. The period of limitation for such suit is one year[7]. Now, the question to be considered is, whether it is necessary to institute a suit within one year, or whether a decision in a pending suit can be availed of, if it involves the same question.

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1. 27th Report, page 209, note on Order 21, Rule 102.
2. *Nagendra Nath* v. *Ram Krishana*, A.I.R. 1960 Cal. 209.
3. *Bepin Chandra* v. *Hem Chandra*, A.I.R. 1939, Cal. 709.
4. *Khem Chand* v. *Mool Chand*, A.I.R. 1934 Lah. 457.
5. *Rajaratnam* v. *Sheikh Hasan Bi*, A.I.R. 1926 Mad. 968.
6. (a) *Hariher Prasad* v. *Lakhandai*, A.I.R. 1935 Pat. 230.
   (b) *Guna Durga Prasad Rao* v. *Krishna Rao*, I.L.R. 24 Pat. 695; A.I.R. 1946 Pat. 134.
7. Article 11, Limitation Act, 1908 and corresponding article in the 1963 Act.

According to one view, the policy underlying Order 21, rule 103, Civil Procedure Code is to have speedy settlement of the question of title raised in execution—sales, and what makes the order conclusive under Order 21, rule 103, is not the failure to institute a suit, but the failure to have the right established. Where a suit or an appeal already filed by the claimant is pending at the time when an order under Order 21, rule 98, C.P.C. dismissing his claim is made, it is not, according to this view, obligatory to file a suit under Order 21, rule 103.

Two single Judges' decisions of the Madras High Court[1-2] took this view, holding that the institution of a suit under Order 21, rule 103, is not the only remedy against the Order under Order 21, rule 98, and that the rule only contemplates the establishment of a right to the property to supersede the order. But these decisions, it has been stated[3] should be deemed to have been over-ruled by the Full Bench decision of the Madras High Court,[4] which has held that the provisions of Order 21, rule 103, are mandatory, and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit.

21.53. In a Calcutta case[5] the Court stated that Order 21, rule 103, does not at all refer to the necessity of obtaining a decree of a court within one year, and all it requires is the filing of a suit within one year. It was held in the Calcutta decision that the summary order was superseded by the decree passed by the trial court in a pending suit within a year.

In the Madras case of 1969[6], it has been observed that the Calcutta decision would lead to an anomalous result. If the passing of the decree is delayed beyond one year by one day, the party would suffer through no fault of his own.

21.54. In this state of the case-law, it is necessary to make a clarification. The Madras view and the Calcutta view represent partial truths. On the one hand, the Calcutta view may, it is true, lead to difficulties where the judgment of the court of first instance is given within a year, but the proceedings are prolonged by reason of appeal and the appellate judgment is pronounced beyond the period of one year. But, on the other hand, the Calcutta view has the merit of avoiding duplication of proceedings, because it is illogical to expect a person to file another suit when he has already filed a suit for the very relief contemplated by the rules. The whole difficulty is caused by the rigidity of the present provisions, whose language leaves out of consideration a situation where a suit is already instituted and pending. That lacuna should be remedied[7] by providing that where the person affected has already instituted a suit to establish his right, the order shall be subject to the result of any such suit.

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1. *Palanippa* v. *Ramaswamy*, A.I.R. 1937 Mad. 582.
2. *Umanath* v. *Pedru Souza*, A.I.R. 1950 Mad. 19; (1949) M.L.J. 286.
3. *Sivaraman* v. *P.M.S. Mudaliar*, A.I.R. 1969 Mad. 166.
4. *Seethamma* v. *Kotareddi*, A.I.R. 1969 Mad. 586 (F.B.)
5. *Gopiram* v. *Sewantilal*, A.I.R. 1960 Cal. 580.
6. *Supra* n. 4
7. Similar amendment may be desirable in Order 21, rule 63, which contains an analogruous provision.

Recommendation

21.55. We recommend that Order 21, rule 103, should be revised so as to read as follows:—

> "103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of property; but, subject to such suit (if any), *and subject to the result of any suit which may be pending on the date on which the order is made and in which* such right is in issue, the order shall be conclusive"[1].

0.21, Rules 104.105 (New)—Hearing of execution Proceedings

21.56. It is now well settled that owing to the non-applicability of the provisions of section 141 to execution proceedings, Order 9, also does not apply to execution proceedings. The result has been that the courts have found it difficult to decide the circumstances in which an application for execution can be dismissed for non-appearance, or if a court has dismissed an application for non-appearance whether the court, in the absence of any specific provision regarding the restoration in the C.P.C., *restore* such application. They cannot be restored under O. R. 9, as that rule does not apply to execution proceedings.

The situation has been proposed to be dealt with by the earlier Report[2] where two new rules were inserted to deal with the hearing of applications for execution. We agree with this recommendation. No other amendments are necessary in this regard.

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1. Similar amendment be made in Order 21, Rule 63.
2. 27th Report, page 72, draft 0·21, R. 104-105 (New), and discussion at page 210.

CHAPTER 22

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

Introductory

22.1 Various "incidental proceedings" are dealt with in Orders 22 to 26. The first is dealt with in Order 22, relating to procedure in suits when a party dies, marries or becomes insolvent, or where otherwise there is an assignment of the interest of a party in the subject-matter of the suit. These rules were originally taken from the Common Law Procedure Act[1] and from the relevant Rules of Courts in England.

Scheme of Order 22

22.1A. Very briefly stated, the scheme of Order 22 is as follows so far as the effect of death is concerned: The mere death of a party does not cause the suit to abate, if the right to sue survives. But, if the right to sue survives and a party dies during the pendency of the suit, an application must be made within the prescribed period[2] to the court, to make the legal representative of the deceased person a party to the suit. If this is not done, the suit abates,—not by reason of death only, but by reason of death of the party followed by non-substitution of his legal representative. Primarily, the suit abates "so far as the deceased plaintiff is concerned" or "as against the deceased defendant, as the case may be"—Order 22, rule 3(2) and rule 4(2). But, if the nature of the cause of action is such that the suit cannot proceed by or against the surviving plaintiffs or defendants, the whole suit may abate. Even after abatement, the suit can be revived by making an application to the court to set aside the abatement for sufficient cause. The application for the purpose must be made within the prescribed period; the court has, however, power to condone delay in making the application.

This Order also deals with the effect of marriage and insolvency on pending suits. But these provisions do not cause much difficulty in practice. It is the provisions as to the effect of death which are important, and we shall deal with a few of them which have caused difficulty.

Order 22, rule 4—power to relax—whether should be given

22.2. The first point concerns Order 22, rule 4, under which non-substitution of a legal representative leads to abatement of the suit. The question whether the Court should, in a proper case, have power to grant exemption in respect of the requirement of substitution of the legal representative was considered in the earlier Report[3]. The Commission noted that local amendments giving such power had been made by the High Courts of Calcutta, Madras,

1. Common Law Procedure Act, 1854 (15 & 16 Vic/c. 6).

2. Questions as to limitation are governed by the Limitation Act, 1963. See paragraph 22.5, *infra*.

3. 27th Report, pages 210-211, Note on Order 22, rule 4- Relaxation of.

Orissa, etc. in respect of a defendant who has failed to appear and contest the suit. It however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments were not therefore, adopted.

22.3. We considered the matter further. At one stage we were inclined to add sub-rule (4) in Order 22, rule 4 as follows:—

> "(4) The Court, whenever it seems fit, may exempt the plaintiff from the necessity to substitute the legal representative of any defendant against whom the case has been allowed to proceed *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing, and the judgment in such a case may be pronounced against such defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it had been pronounced before the death took place."

22.4. We have however, come to the conclusion that any such amendment would amount to passing a decree against a dead man and would be wrong in principle. Hence no change is recommended.

Order 22, rule 4 and ignorance of death

22.5. On the death of a party, the plaintiff is, under the rules, required to move for the substitution of his legal representatives. The application for substitution has to be made within the time prescribed by the Limitation Act[1]. On failure to do so, the suit abates. Now, when the plaintiff is ignorant of the defendant's death, there may be delay in making the application for substitution of his legal representative. and the question whether the delay due to such ignorance should be excused for the purpose of limitation has arisen in several cases, it being competent to the court to excuse delay under section 5, Limitation Act, 1963, provided there is sufficient reason.

How far ignorance of the death of the party concerned is a sufficient ground, would depend on the facts of each case[2-3].

22.6. It was for the last-mentioned reason that the earlier Commission, in its Report on the Code,[4] after discussing the position as above, considered it unnecessary to make an express provision as to ignorance of death as a sufficient ground. At one stage we were inclined to think of a solution whereunder due regard could be had to the fact of ignorance of death, while considering an application under section 5, Limitation Act, for condonation of delay in respect of an application for setting aside the abatement. This could be achieved by the insertion of the following sub-rule in Order 22, rule 4—

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1. The period for substitution is 90 days (article 120, Limitation Act, 1963), and the period for application for setting aside the abatement is 60 days (article 121) Limitation Act, 1963.

2. (*a*) *Union of India* v. *Ram Charan* A.I.R. 1964 S.C. 215, 220;

(*b*) A.I.R. 1951 Sim. 257.

3. Also (1969) 69 Punj. L.R. 956, cited in the Yearly Digest.

4. 27th Report, page 210, Note on Order 22, rule 4, and ignorance of death.

"*Where*—

(a) *the plaintiff was ignorant of the death of a defendant, and, could not, for that reason, make an application for substitution of the legal representative under this rule within the prescribed period as provided in the Limitation Act,* 1963;

(b) *the suit has, in consequences, abated; and*

(c) *the plaintiff applies for setting aside the abatement and also for admission of that application after the prescribed period under section* 5 *of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within such period;*

the Court shall, in considering the application under the said section, have due regard to the fact of such ignorance, if proved".

Recommendation

22.7. But we are separately recommending a new rule[1] which imposes a duty on the pleader to inform the court about the death of a party. Hence a provision as to the effect of ignorance is needed.

Order 22, rule 4-A (New) (Appointment of person to represent the estate)

22.8. In the earlier Report[2], a suggestion received from the Calcutta High Court for the insertion of a provision to deal with cases where the legal representative of a deceased party was *not traceable*, was also considered. Reference was, in this connection, made to Order 16, rule 46 of the Rules of the Supreme Court,— now Order 15, rule 15 of the R.S.C. Revision (1962). The adoption of a somewhat similar provision was suggested in a judgment of the Calcutta High Court[3] also, and the suggestion was repeated in another case[4].

22.9. The English rule on the subject is intended to cover two cases; first, where litigation is intended to be started but there is no "personal representative", and secondly, where litigation has already started, and then a party dies and there is no personal representative. History of the English rule is discussed in a judgment of the Court of Appeal[5], and the undermentioned authorities[6, 7] discuss the practice under the English rule.

22.10. The earlier Commission, after considering the above material, came to the conclusion that such cases would not be many, and, therefore, the provision suggested by the Calcutta High Court need not be inserted.

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1. See Order 22, rule 10-A (New) (proposed); para 22·22, *infra*.

2. 27th Report, page 211, Note on Order 22, rule 4 and legal representative not traceable.

3. *William Harold Gibbs* v. *Deba Prasad Roy*, (decided on 17-3-1950), 85 Calcutta Law Journal 280.

4. *In the Goods of Golam Nabi Maggo* dated 15-5-1961.

5. *Purdil* v. *London Passenger Transport Board* (1937) 1 All E.R. 473, 478 (Court of Appeal)

6. *Lean* v. *Alston* (1947) 1 All E.R. 261.

7. Halsbury, 3rd Edn., Vol. 16, pp. 121, 134, 292, (and Vol. 9, page 176 for County Courts).

22.11. But it apears to us that such a provision would be useful. With increasing urbanisation and growing complexity of society, cases where the legal representative cannot be ascertained, are likely to increase; and a specific provision to meet such situation would be desirable.

22.12. The English provision is wide enough to cover death before the litigation; but we are concerned only with death during the pendency of the litigation. We also consider it useful to give some indication of the persons who could be appointed.

Recommendation

22.13. We, therefore, recommend that the following rule should be inserted as Order 22, rule 4A:

> "4A. (1) *If, in any suit, it shall appear to the court that any party who has died during the pendency of the suit has no legal representative, the court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, an officer of the court or some other person to represent his estate for the purpose of the suit; and the judgment or order subsequently given or made in the suit shall, bind the estate of the deceased person to the same extent as it would have been bound if a personal representative of the person had been a party to the suit.*
>
> (2) *Before making an order under this rule, the Court—*
>
> (a) *may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate as it thinks fit; and*
>
> (b) *shall ascertain that the person proposed to be appointed to represent the estate is willing to be so appointed*".

Order 22, Rule 9(1)

22.14. Order 22, rule 9(1) is as follows:—

> "9.(1) Where a suit abates or is dismissed under this order, *no fresh suit shall be brought on the same* cause of action".

22.15. The rule is silent on the question whether the cause of action invoked in the abated suit could be raised as a defence in a later suit.

22.16. The Madras view[1] is, that the paintiff whose suit has abated, is not only barred from a fresh suit on the same cause of action, but he cannot get rid of the effect of the earlier decision by pleading the same matter as a defence in the subsequent suit. The contrary view taken in a Bombay case[2] was dissented from.

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1. *Kamatchi Ammal* v. *Athigarjudaya*, A.I.R. 1959 Mad. 426.
2. *Jayasing* v. *Gopal*, (1904), 6 Bom. L.R. 638 (D.B.) *infra*.

22.17. The Lahore High Court [1] has taken the same view as the Madras High Court.

22.18. In the Madras case, it was observed that the decision of the Lahore High Court is more in accordance with the principle embodied in Order 22, Rule 9. The earlier determination should be deemed to be, a *decision against him*, and he cannot get rid of the effect of the earlier determination just because he happens to be a defendant in a subsequent suit.

22.19. On the other hand, the Bombay High Court has held[2] that where the legal representatives of the plaintiff, on whose death the suit abated, get into possession of the property, they are entitled to resist the suit brought to oust them from possession, and that the previous order of abatement did not preclude them from setting up their title by way of defence. This is also the Allahabad view.[3]

Recommendation

22.20. Logically, it would appear that the Bombay view is preferable. After all, the law should not multiply impediments to just pleas or defences. Order 22, rule 9, prohibits a fresh suit in order to avoid undue harassment to the opposite party. But, where the opposite party himself takes the initiative, and files a suit, there is no reason why the person whose suit has abated (or his representative) should be debarred from asserting his rights *as a* shield. Procedure should not stand in the way of assertion of lawful claims or defences, except where such a bar is absolutely necessary. No great consideration of public interest appears to justify the exclusion of such defence. The rule is a disabling rule[4], and should be strictly construed. It does not create *res judicata*[5]. It should not, therefore, be given a wider effect than is absolutely necessary.

Recommendation

22.21. We, therefore, recommend that a suitable Explanation should be inserted in Order 22, rule 9(1), to give effect to the Bombay view. The Explanation could be on the following lines:—

> "Explanation—*Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.*"

Order 22, Rule 10 (New)

22.22. A new rule is proposed to be inserted to the effect that where a pleader comes to know of the death of a party to the suit, he shall inform the court, and the Court, in its turn, shall give

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1. *Raja* v. *Ram Chand*, A.I.R. 1933 Lah. 752, 753 (D.B.).
2. *Jayasing* v. *Gopal*, (1904) 6 Bom. L.R. 638 (D.B.).
3. *Bejai Raghi* v. *Tej Narain* A.I.R. 1943 All. 99 (Mathur J.).
4. *Lachhman* v. *Bansi Lal*, A.I.R. 1931 Lah. 79, 80.
5. *Sheikh Habibulla* v. *Jammuna Singh*, A.I.R. 1958 Pat. 95, 96, para 7.

notice to the plaintiff of the death. Such a provision will, to some extent, reduce the complications that arise by reason of the plaintiff's ignorance of the death of a defendant. The new rule will be as follows:—

"10A.(1) *When a pleader appearing for a party to the suit comes to know of the death of that party he shall inform the court about it: and the Court shall thereupon give notice to the plaintiff of the death.*

(2) *Where the pleader of a party, on coming to know of his death, does not, within a reasonable time, communicate the fact of such death to the opposite party, the court may order him to pay the costs occasioned by his failure to communicate the fact.*".

CHAPTER 23

WITHDRAWAL AND ADJUSTMENT OF SUITS

Introductory

23.1. Rules as to withdrawal and compromise of suits are contained in Order 23. These rules roughly correspond with the Rules of Court in England as to the discontinuance of suits.

23.2. Slade J. has dealt with the mode of dealing with compromises in England[1]. According to him there are various ways in which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial or in the course of the hearing.

(1) The first one is very useful where the terms of compromise consist of an agreement by the defendant to pay a specified sum of money by specified instalments on specified dates. Here the court gives judgment for the total amount agreed to be paid, coupled with a stay of execution so long as the instalments are paid in accordance with the terms agreed.

(2) The second way, which is no doubt, more appropriate when the terms of settlement are not so straightforward as the mere payment of an agreed sum of money by specified instalments, is to secure an Order of the Court, made by consent, that the defendant, and, it may be, also the plaintiff,—shall do the things which they have respectively engaged themselves to do by the terms of settlement. In such a case the order would take this form. There would be the title and the preamble and then the order would recite, the terms having been agreed between the parties: It is ordered that "(a) the defendant do", etc., "(b) the plaintiff do", etc. making each of the agreed terms an order of the court that it should be carried out.

(3) The third method is what has become known as "the TOMLIN form of order".

Dashwood v. *Dashwood*[2] is cited as the authority for that statement of practice. The ANNUAL PRACTICE, 1955, P. 2007, goes on to say:

> "After this decision TOMLIN, J., stated that in future when an action was proposed to be stayed on agreed terms to be scheduled to the order, the order should be as follows: and the plaintiff and defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceeding in this action be stayed except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect."

1. *Green* v. *Rozen*, (1955) 2 All E.R. 797.
2. *Dashwood* v. *Dashwood* (1927) W.N. 8, 276.

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1. *Green* v. *Rozen*, (1955) 2 All E.R. 797.
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(4) The fourth method is an order of the court made by consent staying all further proceedings in the action on the terms agreed on.

(5) The fifth method, which was followed in the present case, is where there is no order of the court at all, the court merely being told by counsel that the case has been settled on the terms endorsed on counsels' briefs.

23.3. Such a variety of methods of *recording* or *acting* on compromises is not met with in Indian practice. But there does exist a variety of methods of *consensual dealings* in connection with litigation—e.g. by making the Judge an arbitrator, by agreeing not to appeal, by stating a special case under Order 36, and the like. Some, but not all of these, fit in with the procedure given in Order 23, rule 3, under which the court is empowered to record a settlement or compromise. The most important rules in Order 23, are rule 1 (withdrawal), and rule 3 (recording of compromise), and most of the problems that arise revolves around these rules.

Order 23, rule 1

23.4. Order 23, rule 1, speaks of two kinds of "withdrawals" of suits, namely:—

(1) Withdrawal without permission of the Court to file a fresh suit, and

(2) Withdrawal with such permission.

The first is governed by sub-rule (1). The second is governed by sub-rules (2) and (3). For convenience, the first kind of withdrawal may be described as "absolute" withdrawal [1], while the second may be described as "qualified" withdrawal. The differences in the legal incidents of the two types of withdrawal are well-known. The point which is proposed to be raised here is one of terminology,—and the point is, that the use of the same expression to denote both the types of action is confusing. An ordinary litigant would certainly get confused, and sometimes even lawyers do not fully realise the difference between the two. The position would be improved by using the expression "abandonment" (of suit), where *absolute withdrawal* is intended.

Recommendation

23.5. Accordingly, we recommend an amendment of Order 23, rule 1, so as to substitute the expression "abandonment". The following re-drafts are suggested for the purpose:—

Re-draft of Order 23, rule 1(1)—

"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, *abandon his suit* or abandon part of his claim."

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1. *Cf. Amalgamated Electricals Co.* v. *Kululreddy*, A.I.R. 1970 Mys. 155, 157, para 12.

Order 23, *rule* 1(2)—

Re-draft of Order 23, *rule* 1(2), 1(3) *and* 1(4)—

Substitute the word 'withdraw' for the word 'abandon'.

Re-draft of Order 23, *rule* 1(3)—

(3) "Where the plaintiff *abandons* a suit, or abandons part of a claim, *under* sub-rule (1), he shall be liable for such costs as the court may award, and shall be precluded from instituting any fresh suit in respect of the subject-matter of such suit or such part of the claim."

Re-draft of Order 23, *rule* 1(4)

(4) "Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to *abandon a suit or part of a claim under sub-rule* (1), *or to withdraw under sub-rule* (2) *without the consent of the others.*"

Order 23, rule 1 and execution proceedings

23.5A. The question how far Order 23, rule 1 applies to execution proceedings has sometimes arisen. For example, in an Allahabad case[1], the decree-holder filed an application on August 29, 1885 before the Subordinate Judge requesting that his case may be struck off for a short time. The Court granted the application, and recorded an order striking off the case "for the present". On August 28, 1888, the decree-holder filed another application for execution, to which the judgment debtors objected. The Subordinate Judge disallowed the objections. The judgment-debtors filed an appeal before the Allahabad High Court. The High Court allowed the appeal, and set aside the Order of the Subordinate Judge. Hence, aggrieved from this decision of the High Court, the decree-holder filed an appeal before their Lordships of the Privy Council which held that Order 23, rule 1 did not apply. The Privy Council observed[2]—

> "After hearing the appellant *ex-parte* the Court came to the conclusion that "It is not suggested that section 373 (now order 23, Rule 1) of the Civil Procedure Code would of its own force apply to execution proceedings.
>
> The suggestion is that it is applied by force of section 647 (now section 141). But the whole of Chapter XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to *apply another procedure mostly unsuitable* by saying in general terms that the procedure for suits should be followed as far as applicable .....".

Having taken all aspects into consideration, we are of the view that it would not be convenient to extend order 23, rule 1 to execution proceedings.

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1. *Thakur Prasad* v. *Fakir Ullah* (1894), I.L.R. 17 All. 601 (P.C.) followed in *Ram Prasad Rai* v. *Mahesh Kaur*, A.I.R. 1922 Pat. 525.

2. *Thakur Prasad* v. *Fakir Ullah*, I.L.R. 17 All. 601 (P.C.).

Order 23, rule 1A (New)

23.6 We now proceed to deal with a situation not expressly provided for in Order 23. Where a suit is withdrawn by a plaintiff under Order 23, rule 1, one of the opposite parties sometimes finds it necessary to be transposed as a plaintiff, so that he can pursue whatever claims he may have made against a co-defendant. The Court has, under Order 1, rule 10, already a power to order transposition of parties[1]. But it appears to be desirable to provide that where there is a request by the defendant for transposition (as plaintiff) in view of withdrawal or abandonment of the suit by the plaintiff, the court should have due regard to this consideration.

Recommendation

23.7. The insertion of the following rule in Order 23, is, therefore, recommended:—

> "1A. *Where a suit is withdrawn or abandoned by a plaintiff under rule 1 of this Order, and a defendant applies to be transposed as a plaintiff under Order 1, rule 10, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants*".

Order 23, Rule 3—Lawful

23.8. Order 23, rule 3 deals with compromises. One of the important conditions precedent to the applicability of this rule is that the compromise must be 'lawful'. Now, where a decree is passed on compromise and it is alleged that it embodies terms which are not lawful, can the validity of the decree be challenged? On this question, there seems to be a conflict of decisions. We proceed to examine the case-law on the subject.

23.9. In a Bombay case[2], it was held that a consent decree passed by a Court of competent jurisdiction cannot be treated on the same footing as a contract between the parties. It is true that before a Court passes a consent decree, it can, and should, examine the lawfulness and validity of the terms of the proposed compromise. But once that stage is passed and a decree follows, different considerations arise.

23.10. Thus, as were the facts in that case, where the compromise decree contained a term against alienating certain property, and gave the other party a right to its possession on such alienation, the decree was held not to be a nullity, in spite of the fact that the term was opposed to section 10, Transfer of Property Act. The decree was merely contrary to law, and bound the parties thereto, unless it was set aside by taking proper proceedings.

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1. (*a*) *Eduljee* v. *Vullebhoy*, I.L.R. 7 Bom. 167;
   (*b*) *Bhismadev* v. *Radhakishan*, A.I.R. 1968 Orissa 230 (reviews cases).

2. *Govind Waman* v. *Murlidhar Shrinivas*, A.I.R. 1953 Bom. 412 (Gajendragadkar and *Vyas*, *JJ.*).

23.11. Same is the Andhra view[1].

23.12. In a recent Mysore case[2], it was held that where a compromise decree passed by a court of competent jurisdiction contains a term which is opposed to law or public policy and the decree has not been set aside in proper proceedings, it is *res judicata*. The Mysore High Court, following the Bombay case, said that though the court should examine the lawfulness and validity of the terms of the proposed compromise, once that stage is passed and the court has put its seal of approval to a compromise and made it a decree of the court, then that decree is binding between the parties and must be enforced, unless it is set aside in a proper proceeding. It was also held that "finality of decision is an important principle of law based on public policy. If a compromise decree of competent Court, which has not been set aside, can be ignored on the ground of it embodying an illegal term, there will be confusion and uncertainty."

23.13. The Madras High Court[3] and the Patna High Court[4] have taken a different view. In the Patna case, a compromise decree providing for recovery of pension contrary to section 12, Pensions Act, 1871, was held to be void. (The Bombay case is not referred to in the Patna judgment).

23.14. In the Patna case[5], it was observed—

> "It is a settled principle of law that a contract is not less a contract and subject to the incident of a contract because there is superadded the command of the judge. If any authority is indeed in support of this proposition, reference may be made to *Wentworth* v. *Bullen*[6]. The compromise is received under the provisions of Order 23, rule 3 of the Code of Civil Procedure, which states that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall order such agreement compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

23.15. The House of Lords[7] has decided that a consent decree beyond the contractual powers of the corporation is void—

> "It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done."

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1. *Venkateshlayya* v. *Viraya*, A.I.R. 1958 AP. 1 (F.B.)

2. *Bhima Rama* v. *Abdul Rashid*, A.I.R. 1968 Mys. 184 (D.B.).

3. (*a*) *Lakshmanaswamy Naidu* v. *Rangamma*, (1930) I.L.R. 26 Mad. 31;
   (*b*) *Ramachandra* v. *Venkatalakshminarayanna*, A.I.R. 1919 Mad. 429.

4. *Baldeo Jha* v. *Ganga Prasad*, A.I.R. 1959 Pat. 17 (Ramaswami, CJ and R.K. Chowdhri J.).

5. *Baldeo Jha* v. *Ganga Prasad*, A.I.R. 1959 Pat. 17, 20. para. 9.

6. *Wentworth* v. *Bullen*, 109 E.R. 313, 316 (This case, however, does not relate to an *illegal* contract).

7. *Great North-West Central Railway* v. *Charbkois*, (1899) A.C. 114, 124.

L/B(D)229MofLJ&CA—15(a)

That case however, is distinguishable from a case of having an illegal object.

23.16. In the above state of the case-law, it is desirable to make a clarification. In the interests of finality of litigation, it may be better to provide that a decree shall not be set aside on the ground of illegality[1] of the compromise on which it is based.

Recommendation to insert Order 23, Rule 3A

23.16A. Accordingly, we recommend the insertion of the following rule as Order 23, Rule 3A—

> "3A. *No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.*"

Order 23, rule 3—the words "so far as relates to"

23.17. Order 23, rule 3, authorises the court to pass a decree on a compromise in so far as the compromise relates to the subject matter of the suit. The controversy on one point under this rule was noted in the earlier Report[2]. That controversy[3] related to the interpretation of the words "so far as relates to the suit" used in Order 23, rule 3.

The question that arose in practice was, whether a decree which records the terms of a compromise in respect of matters beyond the scope of the suit is *executable*, or whether the terms of the decree relating to matters outside the suit can be enforced (as a contract) *only by* a separate suit. It was not, however, (in the Commission's view) possible to resolve the conflict of decisions by verbal changes, since the application of the rule may vary according to the facts of each case. As a general amendment was not thus possible, no change was considered necessary.

23.18. We have given some thought to the matter and come to the conclusion that—

(i) the controversy should be put an end to, and

(ii) the only way to put an end to it is to widen the provision, by requiring the court to *pass a decree covering the whole compromise, so far as it relates to the parties to the suit*, whether or not the subject matter of the compromise is confined to the subject of the suit. This will avoid the unnecessary controversy that arises under the present wording, namely, how much of the compromise has attained the force of a decree, and how much is to be left to be enforced by separate agreements, and so on. No doubt, such a widening can, theoretically, raise questions of jurdisdiction and court fees. In most cases, however, the wide power will not affect jurisdiction and court fee. In any case, the proposed simplification is needed, and should override any such objections.

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1. Actual amendment not drafted.

2. 27th Report, page 213, Note on Order 23, rule 3 and the words "so far as relates to".

3. See case-law discussed in *Ram Juwaa* v. *Davindra Nekha*, A.I.R. 1960 M.P. 280, 282 paras 17 and 18.

Recommendation

23.19. Accordingly, we recommend that in Order 23, rule 3, for the words "so far as relates to the suit", the words "*so far as relates to the parties to the suit, whether or not the subject-matter of the agreement compromise or satisfaction is the same as the subject-matter of the suit*", should be substituted.

Order 23, rule 3-A (New)

23.20. In a representative suit, leave of the court should be required before a compromise is recorded. Before such leave is given, notice to interested persons could be provided for. We have in mind those suits where a decree passed in the suit can bind persons not formally on the record. Such a provision is, in our view, required in order to safeguard the interests of persons so bound.

Recommendation

23.21. A new rule is proposed accordingly, as follows:—

Cf. Order 32, Rule 7 (1).

"3-A. (1) *No agreement or compromise in a representative suit shall be entered into without the leave of the court expressly recorded in the proceedings; and any such agreement or compromise entered into without the leave of the court so recorded shall be void.*

Contrast Order 32, Rule 7(2).

(2) *Before granting such leave, the court shall give notice to such persons as may appear to be interested in the suit, in such manner as it thinks fit.*

Explanation—*In this rule, the expression "representative suit" means—*

(a) *a suit under section* 91 *or section* 92;

(b) *a suit under Order* 1, *rule* 8;

(c) *a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family;*

(d) *any other suit in which the decree passed, may by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit.*"

Order 23, rule 3, and the word "proved"

23.22. There is another point concerning rule 3. According to this rule, if it is "proved" to the satisfaction of the Court that a suit has been lawfully compromised or settled, it is bound to pass a decree accordingly. Now, the expression "proved" has raised an interesting question as to how far is the court bound to hold an inquiry as to the *factum* of the compromise. The matter was discussed at length in a recent Mysore case. The facts were as follows:—

The respondent filed a suit for cancellation of a registered deed of sale against the petitioner. The petitioner, during the

course of the suit, filed an application under Order 23, rule 3 (read with section 151) saying that a decree be drawn up in the terms of the compromise. The respondent contended that there was no agreement, and that he had not received any money as mentioned in the endorsement, and that the document had been brought about fraudulently. The Munsiff came to the conclusion on the evidence that the suit had been settled out of court. An appeal to the Civil Judge by the respondent was allowed, and the decree of the Munsiff set aside. On revision before the High Court, it was contended that the Civil Judge had exceeded his jurisdiction in examining the allegations of fraud and misrepresentation'.

23.23. The High Court held that Order 23, rule 3, requires that there should be proof to the satisfaction of the Court that the suit has been adjusted wholly or in part by an agreement; and, further, such agreement should be lawful. The words "where it is proved to the satisfaction of the court" with which the rule opens impose ..... an obligation on the court to be satisfied that the suit has been genuinely adjusted in whole or in part ..... that the words "proved to the satisfaction of the court" are comprehensive enough, indeed seem to have been intended to empower the Court to go into the merits of the allegations "set up by the party denying or disagreeing with the terms of compromise or agreement and decide them, so that the parties get full justice in the suit in which a decree in terms of the compromise is to be passed under the rule. Where the Court finds during the course of the enquiry that the alleged agreement or compromise is vitiated by fraud, misrepresentation etc. it cannot be said legally that an agreement has been arrived at. The agreement contemplated under the rule envisages the two parties coming to certain terms voluntarily and of a free will, so as to put an end to the litigation pending between them in the Court ..... If (the Court) decides that the agreement or compromise is vitiated, it can reject it and proceed to dispose of the suit on merits."

23.24. The High Court, after reference to the order of the Civil Judge and to the depositions of the parties, also came to the conclusion that there was no agreement as alleged by the defendant, and the order of the Civil Judge (for the remand of the suit for disposal according to law) was therefore affirmed.

23.25. The decision is correct on the present language. But it now requires to be considered whether some modification in the existing position is not called for, in the interest of speed. Reference may be made to the Punjab Amendment.

In the Punjab, the *following provisos* have been added to the existing rule:—

> "Provided that the hearing of a suit shall proceed and no adjournment shall be granted in it for the purposes of deciding whether there has been any adjustment or satisfaction, unless the court for reasons to be recorded in writing, thinks

1. *Shetty* v. *Sasani*, A.I.R. 1970 Mys. 209 (Tukol J.).

fit to grant such adjournment, and provided further that the judgment in the suit shall not be announced until the question of adjustment or satisfaction has been decided:

Provided further that when an application is made by all the parties to the suit, either in writing or in open court through their counsel, that they wish to compromise the suit, the court may fix a date on which the parties or their counsel should appear and the compromise be recorded, but shall proceed to hear those witnesses in the suit who are already in attendance unless for any other reason to be recorded in writing, it considers it impossible or undesirable to do so. If, upon the date fixed, no compromise has been recorded, no further adjournment shall be granted for this purpose, unless the court, for reasons to be recorded in writing, considers it highly probable that the suit will be compromised on or before the date to which the court proposes to adjourn the hearing."

23.26. A similar provision would be useful. It could, however be made simpler.

Recommendation

23.27. We therefore, recommend that the following proviso should be inserted below Order 23, rule 3—

"*Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question whether there has been any adjustment or satisfaction, unless the court, for reasons to be recorded in writing, thinks fit to grant such adjournment.*"

CHAPTER 24

PAYMENT INTO COURT

Introductory

24.1. In Order 24, there are provisions as to payment into Court, which apply to every suit for debt or damages. The payment amounts to an admission of the claim in respect of which it is made. There is no power to pay money into Court *with a defence denying liability.* Provision is made for the two cases,—

(a) Where the plaintiff accepts the deposit as satisfaction in part, and

(b) where he accepts it as satisfaction in full.

No changes are recommended in this Order.

CHAPTER 25

SECURITY FOR COSTS

Introductory

25.1. One of the incidental proceedings dealt with in the Code concerns orders requiring security for costs where the plaintiff resides out of or leave India and does not possess sufficient immovable property in India. This is in Order 25. No changes are needed in this Order.

CHAPTER 26

COMMISSIONS

Introductory

26.1. Order 26 deals with commissions issued by Courts. Commissions are of four kinds—to examine witnesses, to make local investigations, to examine accounts and to make partition of immoveable property.

Most of the provisions for commissions to examine absent witnesses were adapted by the framers of the first Code (of 1859) from an Act of 1841[1].

The rules as to commissions for local investigations are ultimately derived from three old regulations.

Order 26, rule 1

26.2. Order 26, rule 1 provides as follows:—

> "Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it."

Order 26, rule 1, and medical certificate

26.3. A suggestion was made to us, that for proving the sickness or infirmity of the witness, a certificate signed by a qualified medical practitioner should be accepted. Even now, we were told, it is being done in some courts: but the practice on the subject is not uniform, and in some places affidavits[2] about illness are usually required.

We have considered the matter, and see no objection to a provision permitting the use of such certificate in evidence, at the discretion of the court, for the purposes of Order 26, rule 1.

26.4. The examination, under the rule is "on interrogatories or otherwise". It is understood that an order for examination on interrogatories is sometimes issued when the examination should really be comprehensive.

26.5. It is, in our view, against the intendment of the rule to issue an order for examination *on interrogatories* except in special cases, and we think it desirable to so provide by amending the rule.

Recommendation

26.6. Accordingly, we recommend that Order 26, rule 1, should be revised as follows:—

> "1. Any Court may, in any suit, issue a commission for the examination on interrogatories or otherwise of any person

1. Act 7 of 1841.
2. *Cf.* Order 19, rule 1.

resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Provided that commission for examination on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary to do so.

"Explanation—*The Court may, for the purposes of this rule, accept a certificate purporting to be signed by a registered medical practitioner*[1] *as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.*"

Order 26, rule 4(1)

26.7. Under Order 26, rule 4(1), any Court may, in any suit, issue a commission for the examination of—

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) any person in the service of the Government, who cannot, in the opinion of the Court, attend without detriment to the public service.

26.8. The rule does not provide for issuing a commission for examination on interrogatories. We think that such a provision would be useful[2], although examination on interrogatories should be resorted to only in special cases[3].

26.9. There is another point arising out of Order 16, Rule 19.

Order 16, Rule 19, provides that a witness shall not be compelled to attend a Court in person unless he resides—

(a) within the jurisdiction of the Court, or

(b) outside the jurisdiction but within the specified distance (roughly, less than fifty miles, or, if there is an established public conveyance for five-sixth of the distance, then less than two hundred miles).

26.10. Thus, a witness living outside the jurisdiction and beyond the specified distance cannot be compelled to attend a court in person. For the examination of such person, the Code provides for the issue of a commission under Order 26, Rule 4. But the word used in Order 26, rule 4, is "may". Now, it is obvious that where the witness is beyond the jurisdiction and beyond the specified distance, and yet is one whose evidence is essential, the only mode of examination is by commission.

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1. If necessary, the expression "registered medical practitioner" may be defined.
2. *Cf.* Order 26, rule 1.
3. *Cf.* amendment proposed to Order 26, rule 1.

It would, therefore, be better if the issue of a commission under Order 26, rule 4 is made obligatory in such cases, if the evidence of the witness is essential in the interest of justice. Such an amendment will give a more correct picture of what the law contemplates.

Recommendation

26.11. Accordingly, we recommend that Order 26, rule 4(1) be revised as follows:—

"4.(1) Any Court may, in any suit, issue a commission for the examination on *interrogatories or otherwise of*—

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) any person in the service of the Government, who cannot, in the opinion of the Court, attend without detriment to the public service;

Provided that where, under Order 16, rule 19, a person cannot be compelled to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice:

Provided further that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary to do so."

Order 26, Rule 10A—10-B

26.11A. As already recommended[2], new rules 10A to 10C should be added in Order 26 to provide for scientific investigation etc.

Order 26, Rule 17

26.12. The Kerala Amendment to Order 26, rule 17 provides, that where the Commissioner is not a Judge of the civil court, he shall not be competent to impose a penalty, but such penalty may be imposed on the application of the Commissioner by the court which issued the Commission.

In the Report[3] of the earlier Commission on the Code, this was noted. It was, however, considered unnecessary to adopt this minor amendment.

23.13. But we think that the amendment could be usefully adopted, though there may be not many occasions in practice where it would make much difference.

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1. See discussion as to Order 16, Rule 19.
2. See discussion relating to section 75.
3. 27th Report, page 215, Note on Order 26, Rule 17.

Recommendation

26.14. We, therefore, recommend that the following proviso should be inserted below Order 26, Rule 17—

> *"Provided that when the Commissioner is not a Judge of a Civil Court, he shall not be competent to impose penalties; but such penalties may be imposed on the application of such Commissioner by the Court which issued the commission."*

Order 26 and execution proceedings

26.15A. The Madras High Court[1] has held that the provisions of Order 26, rule 4 are not applicable to execution proceedings, and have not been made so by reason of the provisions of section 141.

1. *Venkayya* v. *Ratlayya* A.I.R. 1939 Mad. 578.

CHAPTER 27

SUITS BY OR AGAINST GOVERNMENT

Introductory

27.1. Order 27 deals with suits by or against the Government or public officers in their official capacity. Except as provided by special Acts, suits against the Government or public officers may be instituted in any Court, however inferior. But there are certain special provisions applicable to such suits. The procedural provisions in this respect are contained in Order 27.

27.1A. Most of the matters dealt with in the Order relate to minor details such as, signing of pleadings, persons authorised to act, description of the plaintiff or defendant, service of process, fixing a day for appearance, exemption from security and the like. We shall now discuss such of the rules as require amendment.

Order 27, rule 5

27.2. We first take up Order 27, rule 5, which is as follows:—

> "5. The Court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the Government, and may extend the time at its discretion."

27.3. In the Report on the Code,[1] the question of a time-limit for filing a written statement by the Government was considered. The Fourteenth Report[2] had recommended an amendment to give the Government *a minimum* period of three months for filing a written statement. But it was, in the Report on the Code, considered unnecessary to lay down any such *rigid minimum period* applicable to all cases.

27.4. We agree that such a long minimum period is not needed. We, on the other hand, think that a period of two months should normally suffice, and in the interest of expedition, we recommend an amendment substituting such fixed period. Government, with its resources, should not find this period too short.

Recommendation

27.5. Accordingly, we recommend that Order 27, Rule 5, should be revised as follows:—

> "5. The Court, in fixing the day for the Government to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Gov-

1. 27th Report, page 216, note on Order 27, rule 5.
2. 14th Report, Vol. 1, page 303, para 13.

ernment pleader to appear and answer on behalf of the Government, and may extend the time at its discretion, *but the time so allowed and the time so extended shall not exceed two months in the aggregate*".

Order 27A, Rule 5-B (New)

27.6. It is the unfortunate experience of many judicial officers to deal with litigation between the Government and the citizen which could have been avoided if the Government had been urged to go into the merits, and if positive attempts at a settlement had been made at early stages of the litigation. This, in fact, was one of the objects behind the provision for notice under section 80 of the Code. but the object was seldom achieved.

27.7. In our view, the time has come to insert provisions that would impress upon all concerned the need for such an approach, in litigation in which Government is concerned.

27.8. The Kerala High Court was constrained to make these observations[1]—

> "The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or over reach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic success so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lessor motivations which move private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf."

27.9. We are of the view that there should be some provision emphasing the need for positive efforts at settlement, in suits to which the Government is a party.

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1. *Abubarker v. Union of India*, A.I.R.,1972 Ker. 103, 107, para 5 (Iyer J.).

Recommendation

27.10. With the above end in view, we recommend the insertion of the following rule—

"5-B (1) *In every suit or proceeding to which the Government is a party or a public officer acting in his official capacity is a party, it shall be the duty of the Court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.*

(2) *If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement.*

(3) *The power conferred by sub-rule (2) is in addition to any other power of the court to adjourn proceedings.*"

Order 27, Rule 5A (New)

27.11. Order 27 deals with suits against the Government and public officers.

In the Report of the Law Commission[1] dealing with State liability, a recommendation had been made to the effect that when a suit for damages is filed against the Government in respect of any act of its employee, agent or independent contractor, the employees, etc. should be impleaded as a party to the suit. It was also stated, that any claim based on indemnity or contribution by the State may well be settled in such proceedings, as all the parties will be before the court. An amendment of the Civil Procedure Code was recommended on these lines.

27.12. The recommendation was not carried out in the Report of the Commission on the Code[2], (27th Report), as it was felt that a mandatory provision of the nature suggested was not needed.

27.13. We agree with the view taken in the 27th Report, as a mandatory provision of the nature suggested in the 14th Report will unnecessarily cause inconvenience to individual officers. But, we would like to make a provision for the *converse situation*, namely, where a suit is filed against *the employee* for official acts. In such cases, the Government should, we think, be made a party, so that the question of State liability is decided in that very suit. Here, a mandatory provision would not cause hardship to individual officers.

Recommendation

27.14. The following rule is, therefore, recommended:—

"5A. *Where a suit is instituted against a public officer for damages or other relief in respect of any act, alleged to be done by him in his official capacity, the Government shall be joined as a party to the suit.*"

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1. First Report (Liability of the State in Tort), page 40, para IV (*iii*).

2. 27th Report, page 216, note on Order 27, and suits against the Government.

CHAPTER 27A

SUITS INVOLVING SUBSTANTIAL QUESTIONS OF LAW AS TO THE INTERPRETATION OF THE CONSTITUTION

Introductory

27-A.1. Order 27-A, which deals with suits involving constitutional questions, was inserted in 1942 by amending Act 23 of 1942. As originally enacted, it was intended to provide for suits involving substantial questions of law as to the interpretation of the Government of India Act[1]. After the Constitution, it has been adapted, so as to deal with suits involving substantial questions of law as to the interpretation of the Constitution.

27-A.2. Its genesis is of interest. In a case which was decided by the Federal Court[2], the question arose whether, during the hearing of an appeal in which the constitutional validity of an Act of the Provincial Legislature was impugned, the High Court had the power to make the Province of U.P. a party, under the provisions of the Code of Civil Procedure, 1908 as it then stood. While the Federal Court answered this question in the affirmative, the Chief Justice expressed certain doubts and suggested that the matter "might well engage the attention of the Central Legislature"; for, if those doubts were justified, "private persons could, by a private settlement of their dispute, or even by collusion, prevent a Provincial Government from obtaining a decision of the Federal Court on issues of the highest importance."[3]

27-A.3. The Amendment Act accordingly sought to provide that in any suit or appeal in which it appears to the Court that a substantial question of law as to the interpretation of the Government of India Act or an Order-in-Council made thereunder is involved, the Court shall first give notice to the Advocate-General of India or of the Province as the case may require, and may, if satisfied that it is necessary or desirable for the satisfactory determination of the question so to do, order that the Government concerned shall be added as a party.

27-A.4. One object of Order 27-A, was, thus, obviously to prevent collusion between private parties who conspire to obtain a a ruling about a constitutional question without the court having an opportunity to hear the Government.

27-A.5. The provision that the Court must give notice to the Advocate-General has been adopted in substance from a Canadian Statute[4]. As to the provision in Order 27-A, rule 3, barring costs, the

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1. Compare section 205 of the Government of India Act, 1935.

2. *U.P.* v. *Atiq[Begum*, (1940) F.C.R. 110; A.I.R. 1941 F.C. 16.

3. Statement of Objects and Reasons, dated 26th August, 1942 to the Amendment Bill of 1942.

4. See the section in the Judicature Act, Ontario, *infra*.

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reason seems to be this. A question may arise as to the Government's right to, or liability for, costs in proceedings in which the Advocate-General may appear or in which the Government may be impleaded as a party in accordance with these provisions. As the Advocate-General or the Government would, in such cases, come in more to *protect their own interests than for the purpose of making the action effective* between the original parties, it seems to have been considered reasonable that ordinarily the Government should have no right to, or liability for, costs in the first instance. If, after the Government is added as a party, the case is decided one way or the other, further proceedings by way of appeal by the Government or any of the original parties will, of course, be governed as to costs by the general principles governing all actions. In some cases, however, special considerations may arise, either because of the manner in which the Government or one or other of the parties conducts the case, or because of the special nature of the case. In this special class of cases, the Court can depart from the general principle above indicated, and make special order as to costs.

27-A.6. In Canada, there are similar provisions. The Judicature Act[1] in Ontario, for example, provides as follows[2]:—

"20. (1) In any action in which the Attorney-General for Canada or the Attorney-General for Ontario is a party plaintiff and the other Attorney-General is a party defendant, the Court has jurisdiction to make a declaration as to the validity in whole or in party of "any statute of the Legislature or any statute of the Parliament of Canada that by its terms purports to have force in Ontario, though no further relief be prayed or sought.

(2) The judgement in any such action is subject to appeal as in ordinary cases.

"33. (1) Where in an action or other proceeding the constitutional validity of any Act or enactment of the Parliament of Canada or of the Legislature is brought in question, it shall not be adjusted to be invalid until after notice has been given to the Attorney-General for Canada and to the Attorney-General for Ontario.

(2) The notice shall state what Act or part of an Act is in question and the day on which the question is to be argued, and shall give such other particulars as are necessary to show the constitutional point proposed to be argued.

(3) Subject to the rules, the notice shall be served six days before the day named for the argument.

(4) The Attorney-General for Canada and the Attorney-General for Ontario are entitled as of right to be heard either in person or by counsel notwithstanding that the Crown is not a party to the action or proceedings.

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1. The Judicature Act, R.S.O. 1960 C. 197 (Ontario, Canada).
2. Laskin Canadian Constitutional Law (1960), page 147.

(5) Where in an action or proceeding to which this section applies the Attorney-General for Canada or the Attorney-General for Ontario appears in person or by counsel, each shall be deemed to be a party to the action or proceeding for the purpose of an appeal from any adjudication as to the constitutional validity of any Act or enactment in question in the action or proceeding."

27-A.7. For comparable legislation see the Constitutional Questions Act, R.S.A. 1955, c. 55; The Judicature Act, R.S.A. 1955, c. 164, s. 31; Constitutional Questions Determination Act, R.S.B.C. 1948, c. 66, am. 1953, c. 11; An Act for Expediting the Decision of Constitutional and Other Provincial Questions, R.S.M. 1954, c. 44; The Queen's Bench Act, R.S.M. 1954, c. 52, s. 72; Judicature Act, R.S.N.B. 1952, c. 120, ss. 24 and 24A; The Judicature Act, R.S.M.S. 1952, c. 114, s. 84 (enacted by 1953, No. 33); Constitutional Questions Act, R.S.N.S. 1954, c. 50. The Judicature Act, R.S.P.E.I. 1951, c. 79, s. 39; Constitutional Questions Act, R.S.S. 1953, c. 78.

Order 27A, Rule 1

27-A.8. On the question whether in a case which involves a question referred to in Order 27-A, rule 1, notice must be given to the Advocate-General or the Attorney-General, as the case may be, irrespective of the considerations whether the State is already a party to the suit, there are three reported cases from Bombay, Allahabad and Patna.

27-A.9. In the Bombay case,[1] section 6(4)(a) of the Bombay Land Requisition Act, 1948 was challenged as contravening the provisions of the Constitution. The petition, the Court held, involved a substantial question of law as to the interpretation of the Constitution, and Order 27-A, Rule 1 made it mandatory for the Court to give notice to the Advocate-General or the Attorney-General as the case may be. The Court observed—

> "As the rule stands, it is clear and explicit and, as I said before, mandatory and it makes it incumbent upon the Court in every suit where such a question arises to give notice to the Advocate-General or the Attorney-General as the case may be."

27-A.10. It was urged that if the State or Union was already a party to the suit or proceeding, then no object could be served by giving notice to the Advocate-General or Attorney-General. The Court did not agree with this view. The court referred to such instances as, where the Advocate-General represents a charity or where, apart from being the legal adviser of the State, the Advocate-General not only represents the State but also the bar as its leader. The Court held that "The Advocate-Generals and the Attorney-General have independent rights and independent function to discharge, and an occasion may arise when the presence of either one or the other may be necessary irrespective of whether the State or the Union is a party to that litigation."

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1. *Hemaji* v. *State of Bombay*, A.I.R. 1951 Bom. 121, 124 (D.B.) (Chagla C.J. and Gajendragadkar J.).

27-A.11. Referring to Order 27A, rule 2, the Court said :-

> "This seems to suggest that the draftsman of the rule contemplated that even where the State or the Union was added as a party to the suit, the Advocate General may still appear and, therefore, the question of costs had to be dealt with both with regard to the State and the Advocate-General."

27-A.12. In the Allahabad case,[1] one of the issues involved was whether the dismissal of a Government employee had been ordered by a competent authority, and whether sufficient opportunity had been given to him to defend. In the High Court, after the hearing of the case had almost concluded, counsel for the State requested that notice of the appeal should be sent to the Advocate-General of the State, inasmuch as according to him, (Counsel for the State) the case involved a substantial question of law as to the interpretation of the Constitution referred to Order 27A, rule 1, Civil Procedure Code. The Court held that these two points at issue did not involve any substantial question of law as to the interpretation of the Constitution, and observed: —

> "The State is party to this appeal, and the case on behalf of the State had been argued by the learned standing Counsel. We, therefore, find ourselves unable to accede to the request made by the learned counsel for the respondent."

27-A.13. In one Patna case[2], the *vires* of the Suits Valuation Act was challenged in a suit between private parties. Government was not a party. For the appellant, it was urged that certain sections of the Act were *ultra vires* the provisions of article 14 of the Constitution. But it was conceded that this point could not be decided in second appeal, because no notice of this particular ground had been given to the Attorney-General, as required under Order 27-A.

Recommendation

27-A.14. we have examined the question whether the present position in respect of the point discussed above should be allowed to continue. Having regard to what was said in the Bombay case, we would not disturb the present provision.

27-A.15 We now proceed to discuss one point which concerns the scope of Order 27-A as a whole. It may be noted that Order 27-A is confined to situations where the validity *of an Act is* challenged, and does not deal with questions relating to validity of *statutory rules and orders* (and other statutory instruments).

We have considered this question, having regard to the increasing importance of statutory instruments We are of the view that when the *vires* of a statutory instrument is challenged in a suit, the authority which issued the instrument should be made a party to the suit. Even now, the promulgating authority would appear to be

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1. *Om Prakash* v. *State of U.P.* (1968) Lab. I.C. 302, 319, para 90 (D.B.).
2. *Tata Iron and Steel Co.* v. *Arun Chandra*, A.I.R. 1967 Pat. 246 (D.B.).

a proper party,[1] in such cases. But our intention is to make the position more explicit in this respect. It is desirable that the Government or other authority issuing the instrument is given an opportunity to join as a party, in such cases. The amendments which we recommend in this regard will be substantially on the same pattern as the present provisions in Order 27-A, which govern cases involving substantial questions of law as to the interpretation of the Constitution.

Recommendation

27-A-16. Accordingly, we make the following recommendations for amendment of Order 27A:—

(i) The heading of Order 27-A should be revised, so as to read as follows:—

"Suits involving a substantial question of law as to the interpretation of the Constitution *or as to the validity of any statutory instrument.*"

[Order 27-A, rule 1 will remain unchanged].

(ii) The following new rule should be added as rule 1-A:—

"1-A. *In any suit in which it appears to the court that any question as to the validity of any statutory instrument, not being a question of the nature mentioned in rule 1, is involved, the court shall not proceed to determine that question until after notice has been given—*

"(a) *to the Government Pleader, if the question concerns the Government, or*

(b) *to the authority which issued the statutory instrument, if the question concerns an authority other than the Government.*

Explanation—*In this rule, 'statutory instrument' means a rule, notification, bye-law, order, scheme or form made under an enactment.*"[2]

[Order 27-A, rule 2, will remain unchanged].

(iii) The following new rule should be added as rule 2-A:—

"2-A. *The Court may, at any stage of the proceedings, in any suit involving any such question as is referred to in rule 1-A, order that the Government or other authority shall be added as a defendant—*

"(a) *if the Government pleader or the pleader appearing in the case for the authority which issued the instrument, as the case may be, whether upon receipt of notice under rule 1-A or otherwise, applies for such addition, and*

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1. Order 1, Rule 10.

2. In the alternative, the definition could be placed at the end of the Order.

(b) *the court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question.*"

(iv) Order 27-A, rule 3, should be revised as follows:—

"3. Where, under *rule* 2 *or rule* 2-*A* the Government or *any other authority* is added as a defendant in a suit, the Attorney-General, the Advocate-General or the *Government Pleader*, or the Government *or other authority*, shall not be entitled to or liable for costs in the court which ordered the addition, unless the Court, having regard to all the circumstances of the case, for any special reason otherwise orders."

CHAPTER 28

SUITS BY OR AGAINST SOLDIERS ETC.

Introductory

28.1. Order 28 deals with suits by or against members of the armed forces. The provisions of the Order are mainly designed to avoid the inconvenience that may be caused to a member of the armed forces who has to appear as a party to a suit, but cannot obtain leave of absence. Mainly, the rules empower him to appoint some other person for the purpose. No changes are recommended in this Order.

CHAPTER 29

SUITS BY AND AGAINST CORPORATIONS

Introductory

29.1. Order 29 deals with suits by and against corporations. There are provisions for the subscription and verification of the plaint, and for service of the summons on a corporation. As regards forum in the case of suits against corporations, Explanation II to section 17 is relevant. The Court may require the personal appearance of any principal officer of a corporation, able to answer material questions relating to the suit. There are not many points of controversy concerning this Order. We therefore recommend no change in this Order.

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1. See discussion relating to section 17.

CHAPTER 30

SUITS BY OR AGAINST FIRMS

Introductory

30.1. Order 30 deals with suits by or against firms.

The main provision authorises suing of partners in the name of the firm. Disclosure of partners' name is provided for, as also service. Appearance of partners is dealt with. There is no appearance except by partners. Appearance under protest is allowed. A suit against a person as carrying on business in a name other than his own is governed by similar provisions.

Order 30, rule 2

30.2. An amendment has been made to Order 30, rule 2(3) by the High Court of Orissa, under which the names of the partners disclosed in the manner stated in Order 30, rule 2(1) "shall appear in the decree". The question whether this amendment should be adopted for facilitating the execution of the decree against individual partners was considered in the earlier Report,[1] but it was felt that there was no need for any such provision.

30.3. We are, however, of the view that the Orissa amendment is a useful one, and the particulars proposed to be added may come in handy at the stage of execution.

Recommendation

30.4. Accordingly, we recommend that the proviso to *Order* 30, *rule* 2 should be revised as follows:—

> "Provided that all proceedings shall nevertheless continue in the name of the firm, *but the name of the partners disclosed in the manner stated in sub-rule* (1) *shall be entered in the decree.*"

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1. 27th Report, page 216, note on Order 30, Rule 2.

SUITS BY AND AGAINST TRUSTEES AND EXECUTORS

Introductory

31.1. In the Order relating to suits by and against trustees, executors and administrators, Order 31—the Code first provides that in suits concerning trust-property, the trustee shall represent the beneficiaries, and that, unless the Court otherwise directs the beneficiaries need not be made parties. The Court will order the beneficiaries to be made parties, when the trustees etc. are wholly uninterested in the matter, or have an adverse interest therein. No changes are recommended in this Order.

CHAPTER 32

SUITS BY AND AGAINST MINORS

Introductory

32.1. Order 32 relating to suits by and against minors is substantially taken from the rules of the High Court at Fort William, dated 10th June, 1874. In the case of a minor plaintiff, the provision is that he should be represented through a next friend. In the case of a minor defendant, the provision is that he should be represented by a guardian for the suit, to be appointed by the Court.

32.2. There are provisions as to who may act as next friend or be appointed guardian for the suit, the main object being to protect the interests of the minor. With the same end in view, the Order imposes restrictions on—

(a) receipt by the next friend or guardian for the suit, of property under a decree for minor;

(b) agreement or compromise by the next friend or guardian for the suit.

Retirement of next friend, removal of the next friend, and retirement, removal or death of the guardian for the suit, are provided for. The course to be followed by a minor on attaining majority, is also dealt with. Unreasonable or improper suits by the next friend are also dealt with. Application of these rules to persons of unsound mind is provided for.

We shall now deal with such points as require amendments.

Order 32, Rule 3(4)

32.3. Under Order 32, rule 3(4), notice of an application for appointment of a guardian *ad litem* is to be given to the father or other natural guardian of the minor. It appears to us that the notice should be given to the mother also, even where she is not the natural guardian. We also concur with certain other amendments recommended in the earlier Report.[1]

Re-draft of Order 32, Rule 3

32.4. Accordingly, we recommend as follows:—

In rule 3 of Order 32, or sub-rule (4), the following sub-rules should be substituted:—

"(4) No order shall be made on any application under this rule except—

(a) upon notice to—

(i) the guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, ... the father or other natural

[1] 27th Report, note on Order 32, rule 3(4).

guardian of the minor, or where there is no father or other natural guardian, the person in whose care the minor is,

(ii) *the mother of the minor also, and*

(b) after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4A) *The Court may, in any case, if it thinks fit, issue notice under sub-rule* (4) *to the minor also.*"

Order 32, Rule 3A (New) (Effect of adverse interest)

32.5. Where a guardian or next friend has conducted the suit with care and honesty, can the decree be set aside on the ground that he had an adverse interest? Of course, the objections which the minor (or other persons looking after his welfare) may like to urge as to the partiality of any person, can always be taken when notice is issued under Order 32, rule 4. But, if the notice does not reach the minor or the person looking after his welfare, then difficulty may arise. On the one hand, it is desirable that a decree of a court should not be liable to be set aside except for strong reasons. On the other hand, justice requires that a minor should not be bound by the acts of a guardian adverse to the minor's interests.

32.6. Discussion of the case-law on the subject must start with a Privy Council decision.[1] In that case, the suit was filed on behalf of the minor for a declaration that certain decrees and sales were invalid because the minor had not been properly represented in the proceedings from which they resulted. It was held that the decrees and proceedings were invalid, because the sister of the minor, being a married woman, was not the proper person to be appointed as guardian *ad litem*, and, as regards the other guardian, who was the minor's uncle, his interest was obviously adverse, as he had purchased in the name of his sons the decree passed against the minor's father, and was thus personally interested in the minor's estate adversely to her. All this was proved in the suit to set aside the decrees and sales, and it was therefore held that the minor was never a party to any of the suits in the proper sense of the term.

32.7. The learned Subordinate Judge had found that[2] the proceedings impeached in the plaint failed as against the plaintiff (appellant), because she was not properly repersented in them. He held that Ulfat-un-nisa, as a married woman, could not have been appointed guardian *ad litem*, and that Mauladad, whose sons were merely *benami* purchasers on his behalf, and had an interest adverse to that of the minor, and was therefore disqualified. The High Court on appeal set aside his decree, and dismissed the suit upon the ground that—

"the decrees upon which the execution proceedings were founded are not in any way impeached in the suit, not could they be. The impeached transactions were proceedings on those decrees in execution, and, this being so, it was the

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1. *Rashid un Nissa* v. *Muhammad Ismail*, (1909) I.L.R. 31 All 572 (P.C.).

2. *Rashid un Nissa* v. *Muhammad Ismail*, (1909) I.L.R. 31 All. 572-582 (P.C.).

proper course for the plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of section 244 of the Code of Civil Procedure, and not by a separate suit."

32.8. The Privy Council observed—

"With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. "Her sister, Ulfat-un-nisa, was a married woman, and therefore was disqualified under section 457 of the Code from being appointed guardian for the suit, *and Mauladad's interest was obviously adverse to that of the minor.*"

32.9. This decision was followed by the High Court of Madras, and it was held that where the interest of a guardian *ad litem* is obviously adverse, the decree is a nullity.[1] The High Court of Travancore-Cochin also seems[2] to have held that the decree is a nullity.

32.10. In an Allahabad case,[3] it was observed—

"It is now settled law that where a guardian *ad litem* has an interest adverse to the minors, they are to be considered as not having been properly represented in the suit, and the decree is not binding on them."

32.11. In a later Madras case,[4] the question whether the notice given to the father was sufficient notice, was considered in the context of a suit on a mortgage where the executant of the mortgage was appointed guardian *ad litem* of his minor son. The court, referring to the above question, observed—

"This again depends on whether the appointment of the father as guardian *ad litem* is absolutely void, or is only voidable. We think that in cases where a person contests the validity of the appointment of a guardian *ad litem* on the ground that his interests are adverse, and where there is no express prohibition in law as to the appointment of a person except on the ground that his interests are adverse, the party must prove that the facts do show that the interests of the guardian *ad litem* are adverse, and that owing to that fact the guardian did not act in the interest of the minor and did not conduct the defence with proper diligence or raise proper defences to *the* suit and that the minor has been prejudiced."

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1. *Sellappa Goundan* v. *Masa Naiken* (1924) I.L.R. 47 Mad. 79, A.I.R. 1924 Mad. 297.
2. *Ismail Ibrahim* v. *Mathaicherian*, A.I.R. 1956 Tr. Co. 701.
3. *Chiranjilal* v. *Syed Ilyas Ali*, A.I.R. 1924 All. 751 (Domilo and Dalal JJ.).
4. *Maruti Swamuar* v. *Subramania*, A.I.R. 1929 Mad. 393, 394.

32.12. In a Calcutta case,[1] Rankin, C. J. doubted whether the Privy Council case[2] went so far as to hold that the appointment of a guardian *ad litem* whose interest was adverse rendered the decree a nullity in every case.

32.13. The Bombay High Court has observed[3] that where a minor plaintiff is not properly represented in a suit, he is not entitled to ignore the decree passed therein and to file a fresh suit to have the issues tried on the merits. He should sue to set aside the decree in the prior suit, and to revive that suit.

32.14. In a Patna case,[4] the suit was filed to set aside the mortgage decree on the ground that the minors were not properly represented by their father, as his interest was adverse. It was held on the evidence that as the *defences open to the minors were not put forward by the guardian*, the decree was not binding on them, but that it cannot be said without going into the merits that the decree was bad simply because the father's interest conflicted with that of the sons.

32.15. In a Bombay case[5], the position in the case of members of a Hindu joint family was thus summarised—

> "In the case of a Hindu joint family where the manager has the power to bind the minor members of the coparcenary by an alienation for legal necessity, it is open to the son to challenge it in a suit brought to enforce the alienation on the ground that although it may be binding on the manager, it is not binding on the minor. His interest may, therefore, conflict with that of the manager, as the defences of both may be separate debt on the family. In such a case it would not be desirable to appoint the manager as the guardian *ad litem* for the minor in the suit, but if he is so appointed and a decree is passed against the minor's interest in the property, it cannot be said, in absence of fraud or collusion on the party of the manager, that the decree is a nullity merely because the manager ought not to have been appointed as his guardian. If the minor subsequently sues to set aside the decree, he must show that the alienation was not, in fact, binding on him. This would be especially so where the manager is the father who is the natural guardian of the minor and whose personal debts also are binding on the son if they are antecedent to the alienation and are not illegal or immoral. In the present case, there is no proof of fraud or collusion on the part of the father, and the debts for which the mortgage and the sale were made are not shown as not binding on the son. The interests of the father and the son are not thus conflicting. We are of opinion, therefore, that the mortgage decree is not proved to be not binding on the son on this ground."

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1. *Saikh Abdul Karim* v. *Thakurdas* (1928) 55 Cal. 55, Cal. 124; A.I.R. 1928 Cal. 844.
2. *Rashid un* v. *Muhammad Ismail*, (1909) I.L.R. 31 All. 572 (P.C.).
3. *Laxman* v. *Saraswati*, A.I.R. 1959 Bom. 125.
4. *Chitradhar Narain Das* v. *Khidar Thakur*, A.I.R. 1938 Pat. 437.
5. *Mahadev* v. *Shankar*, A.I.R. 1943 Bom. 387, 390 (Davatia & Lokur JJ).

32.16. We are of the view that the position should be settled in this respect. Mere adverse interest is not, according to the view of most High Courts, a ground for setting aside the decree. But, where the minor is prejudiced by reason of such adverse interest, the decree can be set aside. These propositions should be enacted into law. At the same time, the ordinary rule that the decree can be set aside on the ground of gross negligence or misconduct on the part of the guardian leading to prejudice, should remain unaffected, since it is independent of any question of adverse interest.

32.17. It was suggested to us that it would be better to consider this point under the Evidence Act, but since it also concerns the Code, we are dealing with it here.

32.18. No doubt, theoretically, an adverse interest should be sufficient for setting aside the decree, because the minor is not represented. But, such a provision would create practical complications, and affect the finality of decrees in numerous suits to which minors are parties. The question is of choice between the abstract pristine view of mere adverse interest (on the one hand), and adverse interest leading to prejudice to the minor (on the other hand). The latter seems to be the present position, and is the only practical view.

Recommendation

32.19. We, therefore, recommend that the following rule should be added in Order 32:—

"3A. (1) *No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor; but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree.*

(2) *Nothing in this rule shall preclude the minor from obtaining any relief available under law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit, resulting in prejudice to the interests of the minor.*"

Order 32, rule 15

32.20. In the earlier Report,[1] a recommendation was made for the insertion of a new rule—2A—in Order 32, in the following terms:

"2A. (1) Where a suit has been instituted on behalf of the minor by his next friend, the Court may, at any stage of the suit, either of its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant.

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1. 27th Report, Note on Order 32, Rule 2-A, (New), and draft at page 76.

(2) Where such a suit is instituted in forma pauperis, the security shall include the court-fees payable to the Government.

(3) The provisions of rule 2 of Order 25 shall, so far as may be, apply to a suit where the Court makes an order under this rule directing security to be furnished."

32.21. This followed broadly the Madras amendment on the subject.

Question of security

32.22. We agree with this recommendation. The reason why we refer to it here is, however, connected with another provision, namely Order 32, rule 15.

Under Order 32, rule 15, the provisions contained in Rules 1 to 14 of the Orders, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be capable of protecting their interests when suing or being sued. Now, the Madras amendment to Order 32, rule 15 excludes the operation of rule 2A (security demanded from next friend or guardian) i.e. the newly inserted rule in relation to persons of unsound mind etc. The previous Commission noted this, but considered it unnecessary to have any such provision.[1]

Supervening insanity

32.23. Another question relevant to Order 32, rule 15 is of supervening insanity. This had also been considered by the previous Commission[1] in the earlier Report. (at present, rule 2 does not apply in such case).[2] It would appear that in England[3], in case of supervening insanity, the action must be carried on by the next friend (who will, usually, be the receiver in lunacy). The previous Commission took note of this position. However, it thought that as such cases are not frequent, no amendment was required in the earlier Report.

32.24. We think that although both these points are minor, they should be suitably dealt with.

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1. 27th Report, page 224, Note on Order 32, Rule 15.

2. *Firm Deokaran Das* v. *Debi Sahai*, A.I.R., 1936 Lah. 7, 8 (Beckett J.).

3. See Order 16, rule 17 and Order 17, rule 4, R.S.C. (Eng.) and commentary thereon in the Annual Practice.

Recommendation

32.25. Accordingly, we recommend that Order 32, rule 15, should be revised as follows:—

"15. The provisions contained in Rules 1 to 14, *other than rule 2A*, so far as they are applicable, shall extend to persons adjudged to be of unsound mind *before or during the pendency of the suit*, and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protection their interests when suing or being sued."

CHAPTER 32A

SUITS CONCERNING THE FAMILY

Introductory

32A.1. We propose to add a new Order, intended to deal with suits relating to matters concerning the family. We explain below the reasons for adding it.

Peculiarity of disputes concerning the family

32A.2. In the administration of justice, in disputes relating to the family, one has to keep in mind the human relationships with which one is dealing. The objective of family counselling, as a method of achieving the ultimate object of preservation of the family, is to be kept in the forefront.

32A.3. Litigation concerning or involving affairs of the family, therefore, requires a special approach, in view of the serious emotional aspects involved. For this sensitive area of personal relationship, our ordinary judicial procedure is not ideally suited. As Sir Garfield Barwick (then Attorney-General of Australia), said[1] in the debates on the Matrimonial Clauses Bill, 1959, the Judge not unnaturally feels reticent about intruding into the human relationship of those who come before him; and the parties themselves so often enter into a conspiracy of silence, where their innermost secrets are concerned.

32A.4. It is now being increasingly realised that—

(a) as far as possible, an integrated broad based service to families in trouble, should become a part of the Court system;

(b) the existing court structure should be so organised that one single court should deal with the problem of preserving the families; and

(c) the conventional procedure dominated by the adversary system may not be appropriate for disputes concerning the family.

32A.5. Many of these matters are outside the scope of this Report; moreover, it will require considerable time and effort to re-mould the legal system to make it an effective instrument for dealing with them. Nevertheless, it is felt that so far as the Code of Civil Procedure is concerned, it may be desirable to have special provisions on some matters,—provisions which highlight the need for adopting a different approach, where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement.

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1. Australia, H. Parl. Deb. (New Series), 2222, 2226, 2227 (Eliz. 2, 1959)

Recommendation

32A.6. With the above object in view, a few provisions relating to suits concerning the family are proposed in the form of a new Order, which will be as follows:—

"*Order 32A—Suits relating to matters concerning the family—*

1. *Application of the Order* (1) The provisions of this Order apply to suits or proceedings relating to matters concerning the family.

(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order apply to the following suits or proceedings, namely,—

(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for a declaration as to the validity of a marriage, or as to the matrimonial status of any person;

(b) a suit or proceeding for a declaration as to the legitimacy of any person;

(c) a suit or proceeding in relation to guardianship of the person or custody of any minor or other person under disability;

(d) a suit or proceeding for maintenance.

(e) a suit or proceeding as to the validity or effect of an adoption;

(f) a suit or proceeding relating to wills, intestacy and succession;

(g) a suit or proceeding relating to any other matter in respect of which the parties are subject to their personal law.

"(3) So much of any rule contained in this Order, as relates to a matter provided for by a special law in respect of any suit or proceeding, shall not apply to that suit or proceeding.

2. *Proceedings to be held in camera*—In every suit or proceeding to which this Order applies, the proceedings may be held *in camera*, if the court so desires and shall be so held if either party so desires.

3. *Duty of court to make efforts for settlement*—(1) In every suit or proceeding to which this Order applies, it shall be the duty of the Court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceedings for such period as it thinks fit, to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) is in addition to any other power of the court to adjourn proceedings.

4. *Assistance of welfare expert*—In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person,[1] whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family, as the court thinks fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 of this Order.

5. *Duty to inquire into facts*—In every suit or proceeding to which this Order applies, it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant."

6. For the purposes of this Order, each of the following shall be treated as constituting a family, that is to say—

"(a) a man and his wife living together, any child or children being issue of theirs, his or hers, and any child or children being maintained by them;

(b) a man not having a wife or not living together with his wife, any child or children being issue of his, and any child or children being maintained by him;

(c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her;

(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him; and

(e) any combination of one or more of the groups specified in clauses (a), (b), (c) and (d) of this rule."

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1. The person should preferably be a woman, wherever available.

CHAPTER 33

SUITS BY INDIGENT PERSONS

Introductory

33.1. Order 33 deals with suits by indigent persons. The Code does not deal with the subject of legal aid, but provides for exemption from Court fees, in respect of persons who are indigent, called by the inappropriate name of "paupers".

33.2. The object is to enable persons who are too poor to pay court fee to institute a suit without payment of it.[1] The exemption does not extend to process-fee (rule 8).

33.3. This Order has a long history.

In the reign of Henry VII, an Act was passed by the English Parliament as "a Mean to help and speed poor Persons in their suit[2]". This Act, which permitted the destitute to appear in court without paying the usual court fees at the discretion of the Chancellor, was in force in England, with modification, until 1949.

33.4. It enabled him to obtain writs original and writs of subpoena free of charges. The Indian Legislature first dealt with the subject[3] in 1939; and the provisions have, with necessary additions and modifications, found a place in successive Codes of Civil Procedure.

Order 33 and expression "pauper"—Recommendation

33.5. With reference to indigent persons, we have a general recommendation to make on a question of terminology. We recommend that the expression "indigent person" should be used throughout the Code, in place of the present expression "pauper", which is not in harmony with modern attitudes.

Order 33, Rule 1—Point not discussed in August & September, 1972).

33.6. In Order 33, rule 1, which deals with eligibility to sue, certain modifications, which are summarised below, were proposed by the earlier Report[4]—

(i) The amount of rupees one hundred was proposed to be raised to rupees one thousand;

(ii) In considering the question of sufficient means, the subject matter of the suit (case Bombay Amendment) and necessary wearing-apparel were proposed to be excluded;

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1. *Jatindra* v. *Dwarka* (1893) I.L.R. 20 Cal. 111, 115.

2. 11 Henry VII, c. 12.

3. Act 9 of 1839.

4. 27th Report, page 225, note on Order 33, Rule 1.

(iii) The question whether the date of presentation of the application or the date of its hearing should be the relevant date for considering pauperism, was dealt with. The decision on the subject revealed a conflict of views. A provision had, therefore, been recommended to the effect that property acquired by the applicant after presentation of the petition and before decision of the application should be taken into consideration.

We agree with these recommendations. We are also of the view that certain other points require to be considered and we proceed to discuss them below.

Order 33, Rule 1, Explanation

33.7. The question whether a person suing in a representative capacity, who has no property in his hands in that capacity, can sue as a pauper, has been the subject matter of debate, as is shown by judicial decisions.[1]

33.8. Here, reference may be made to the earlier Report[2] which has taken a similar view, while referring to the Madras Amendment to Order 33, Rule 1, Explanation (iii), which provides that where a plaintiff sues in a representative capacity, the question of pauperism shall be considered with reference to the means possessed by him, in such capacity. It was, however, considered unnecessary to make such an express provision, though the Commission agreed with the view incorporated in the Madras Amendment.

33.9. We now refer to another point, namely, suits in representative capacity.

In a Gujarat[3] case, the question arose, whether a trustee who has not no trust property in his hands could sue as a pauper on behalf of the trust, even if he is possessed of sufficient means in his individual capacity.

The High Court held—

"The word 'person' in the Explanation to Order 33, Rule 1 being capable of both a wide and a narrow meaning, we should give that construction which would advance this salutary remedy and achieve the purpose underlying enactment, so that the facility for institution of a suit without payment of the requisite court-fees can be properly availed of by all persons, who would be otherwise denied the remedy merely because the person had no funds to pay the requisite fees.....(The) other[4] construction would lead to anomalous results. The pauper(s), minors and lunatics, who on account of their legal disabilities,

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1. Decisions cited in the 27th Report are not repeated here.

2. 27th Report, page 225.

3. *Chiman Lal* v. *Chandaben*, A.I.R. 1965 Guj. 207, 210.

4. *Manaj Rajoji* v. *Khandoo Baloo*, I.L.R. 1936 Bom. 279, 281; *Bharat Abhyodoy Cotton Mills Ltd.* v. *Kameshwar Singh*, A.I.R. 1938 Cal. 745.

could not act except through someone else on their behalf, could not sue at all unless the next friend or guardian was a pauper, because they could not present the application in person.

Similarly, the trustee of an executor or a Mutavalli could not sue or appeal against a decree against a trust estate unless they were themselves paupers or they choose to put in their own moneys to finance the litigation[1].

33.10. Further, in the Gujarat case, it was held that "merely because the test of a wearing apparel could not be fulfilled and no deduction of its value could be claimed by persons possessing no wearing apparel, it could not justify a construction that the word 'person' in the clause refers only to natural persons who can possess wearing apparel. So also, there is no difficulty in complying with Rule 2, as regards the presentation of the application by the person himself. "In such cases of trustees and executors, if the suit is brought in a representative capacity, they could present the application in that capacity, and they could remain present as such before the court to answer any question relating to the trust".

33.11. The proper test in such cases is to see in what capacity a person sues and whether in that capacity he is a pauper. The trustees could therefore, sue on behalf of the trust, provided they had no *sufficient trust moneys in their hand to pay the necessary court fees, even though in their individual capacity they may not be paupers.* Resources of the trustees in their individual capacity would be irrelevant. The question whether the word "person" in Order 33, Rule 1, Explanation should be taken to include a limited company incorporated under the Companies Act, was left open.

33.12. It is in our opinion desirable to make the position clear on this point.

33.13. It is, in our opinion, also desirable to exclude not only the necessary wearing apparel while calculating the means of plaintiff desirous of suing as a pauper, but all property exempt from attachment.

33.14. The basis on which property is exempted from attachment by the law[1] is the assumption that the property is necessary for livelihood or that the exemtion is otherwise necessary encourage thrift,—all of which can be subsumed under the general rule that the law does not favour proporty (of the particular kind) being disposed or dissipated or spent away for any purpose. It follows, that the person to whom such property belongs should ot only assign it,[2] but be discouraged from selling it in order to provide himself with the means for fighting litigation.

Recommendation—Order 33, Rule 1.

33.14. Accordingly, we recommend that for Order 33, rule 1, the following rule should be substituted:—

"1. Subject to the following provisions, any suit may be instituted by *an indigent person.*

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1. See discussion as to section 60(1), Proviso.
2. *Cf.* section 6, Transfer of Property Act.

Explanation 1.—A person is an *indigent* person—

(a) when he is not possessed of sufficient means, other than *property exempt from attachment in execution of a decree* and the subject-matter of the suit, to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, when he is not entitled to property worth *one thousand rupees* other than *the property exempt as aforesaid* and the subject-matter of the suit.

Explanation 2.—*Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person and before the decision of the application, shall be taken into account in considering the question whether he is an indigent person.*

Explanation 3.—*When the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity*".

Order 33, rule 1A (New)

33.15. We are of the view that inquiry into pauperism should ordinarily be made by the Chief Ministerial Officer[1] of the Court.

Accordingly, we recommend that the following rule should be added in Order 33:—

"1A. Inquiry into the question whether a person is an indigent person shall ordinarily be made by the Chief Ministerial Officer of the Court, unless the Court otherwise directs; and the decision of that officer shall, unless the court otherwise direct, be deemed to be the decision of the Court".

Order 33, rule 5(c).

33.16. There is a minor point to be considered concerning Order 33, rule 5(c).

The rule is as follows:—

"5. The Court shall reject an application for permission to sue as a pauper—

(a).....

(b).....

(c) where he has, within two months next before the presentation of the application, disposal of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(d) .....

1. *Cf.* Section 126 (1) (j).

33.17. It may be noted, that under clause (c), the application is rejected on the ground of fraudulent disposition of property or disposition of property in order to be able to apply for permission to sue as a pauper. The assumption behind this rule is, that if the property had not been disposed of (within the specified period), then the applicant would have had sufficient means to pay the court fees. This, however, is not sufficiently brought out in the clause, because under the present wording, even where the property disposed of and the property still in possession of the applicant, taken together, is not sufficient for paying court fees, the application can be rejected. We think that this is rather harsh, and should be set right.

Recommendation

33.18. We, accordingly, recommend the insertion of the following proviso below rule 5—

> *"Provided that no application shall be rejected under clause (c) if, even after the value of the property disposed of is taken into account, the applicant would be entitled to sue as an indigent person within the meaning of rule 1 of this Order."*

Order 33, Rule 5(d)

33.19. Amongst the grounds on which an application for permission to sue as a pauper may be rejected, is the ground mentioned in Order 33, Rule 5(d), namely, absence of a cause of action.

33.20. In the earlier Report,[1] it was noted that the existing wording of Order 33, Rule 5(d)—"where his allegations do not show a cause of action"—had been interpreted widely by the courts.[2] The Commission considered it unnecessary to disturb the language of the rule, although it referred to the local amendments relevant to the rule.

33.21. Since then, the Gujarat High Court has held[3] that Order 7, rule 11 makes a distinction between failure to show a cause of action (on the one hand), and bar of limitation or of any other law (on the other hand). It was pointed out that the two ideas are quite distinct. "The bar of limitation does not destroy the cause of action, if any, but only bars the remedy." Therefore, it was held that the lower court was wrong in holding that the suit does not show a cause of action because it is time-barred.

33.22. This judgment makes it necessary to clarify the position. It may be noted that the Madras High Court[4] has added a clause (d-1), under which the Court shall reject the application for permission to sue as a pauper where the suit appears to be barred by any law. As contrasted with this, the Allahabad High Court has inserted an Explanation to rule 5, to the effect that an application *shall not* be rejected under this clause (d) merely on the ground that the proposed suit appears to be barred by any law.

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1. 27th Report, pages 225, 226.
2. (*a*) See *Baba Pawar* v. *Government*, A.I.R. 1955 All. 415;
   (*b*) *Peramal*, A.I.R. 1941 Mad. 398.
3. *Ramniklal* v. *Mathuralal*, A.I.R. 1965 Guj. 214 (Raju, J.).
4. As to the effect of the Madras amendment, see *In re Annamalai*, A.I.R. 1956 Mad. 677.

Recommendation to insert Order 33, rule 5(dd)

33.23. The Madras amendment is, in our view, preferable. If a suit is barred by any law, there is no point in granting permission to sue as a pauper. Of course, border-line cases could occur; but the power to reject could be confined to cases where it is clear from the allegation in the application that the suit is barred. We therefore, recommend, therefore, that the following should be added as clause (dd), in Order 33, rule 55—

> "(dd) *where his allegations show that the suit would be barred by any law for the time being in force; or*".

Appeal against order under Order 33, Rule 5

33.23A. We are of the view that an order under Order 33, Rule 5, rejecting the application, should be made appealable,[1] since the order followed to stand, would prevent the applicant from enforcing his right to sue.

33.24. Order 33, Rule 7, prescribes the procedure to be followed at the hearing of an application for permisson to sue as an indigent person. It says—

> "7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.
>
> (2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5."

This rule, thus, turns back to rule 5.

33.25. Under Order 33, rule 5, a Court shall reject an application to sue in *forma pauperis* on any of the five grounds mentioned therein. These relate to—

(i) The form and presentation of the petition: Rule 5(a);

(ii) The pauperism of the applicant: Rule 5, clauses (b), (c) and (e).

(iii) The merits of the petitioner's claim: Rule 5, clause (d).

33.26. Now, the inter-relationship of rule 7 and rule 5 of Order 33 is of interest.

First, so far as rule 5(a) goes, a perusal of the petition is sufficient to see whether the prohibition applies, so that the examination under rule 7 will not relate to it. Secondly, as regards pauperism of the applicant, rules 6 and 7 provide for the adducing of evidence by the applicant as well as by the Government and by the opposite party. The examination under rule 7 is, therefore, certainly directed at pauperism. Clauses (b), (c) and (e) of Rule 5 broadly relate to the question of pauperism. So a full enquiry in the points mentioned in those clauses has to be held.

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1. To be carried out under Order 43, rule 1 (nn).

Thirdly, as regards cause of action, i.e. Rule 5, clause (d), there is a difference of opinion among the various High Courts as to the material that a Court has to make into account in determining whether there is a subsisting cause of action or not. The conflicting views on the subject are summarised below.

> The question which could arise in practice is[1] "Whether it is open to the Government Pleader or an opposite party duly served with a notice under O.33, R.6, or R.7 to file an objection or to adduce evidence or to present an argument that the applicant for leave to sue in forma pauperis has not complied with the provisions of O.33, R. 5(d), and/or whether at an inquiry under R.7 it is competent for the Court to determine whether the applicant has complied with the provisions of R. 5(d)."

33.27. All the High Courts seem to agree that a Court should not, under rule 7, embark upon an elaborate enquiry regarding the *merits of the petitioner's claim*. But, as to what should form the basis for a decision on the point whether the petitioner has a *cause of action or not*, at least three views can be gathered from the decisions—

(i) The first view is, that *only the* petition can be looked into for this purpose and nothing else. This view found favour in a Madras case.[2] But the difficulty with this view is, that rule 4 gives a discretion to the Court to examine the applicant as to the cause of his action. If any statement made by the applicant in the examination cannot be acted upon by the Court, then it is not easy to see why a Court should be invested at all with such a discretion.

No doubt, the word "allegations" in Rule 5(d) may seem to lend some support to this view, but the word should not be regarded as material on the above point.

(ii) The second view is, that a court can take evidence regarding the petitioners' cause of action. This view was taken by in a decision of the Patna High Court,[3] *though a later case takes* a different view. It is, however, opposed to the scheme of the Order. The evidence that can be adduced after notice to the opposite party, should relate (as laid down by Rule 6) only to the *pauperism* of the petitioner.

(iii) The third view (which is a middle between the two extremes mentioned above) is, that a Court can rely upon the allegations in the petition and the statements of the petitioner made by him during his examination under rule 4, if any, by the court. This view is shared

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1. *Cf. Uba Dier* v. *Mg. Le. Pan*, A.I.R. 1932 Rang. 107, 110 (F.B.).

2. *Ratnam Pillai* v. *Papu Pillai* (1903), 13 M.L.J. 292 (F.B.).

3. *Charu Sila* v. *H.C. Mukerji*, A.I.R. 1919 Pat. 58, 59 (D.B.).

by several High Courts.[1] But there is again a difference of opinion regarding the scope and nature of the examination of the petitioner under rule 7.

Some Courts[2] held that his examination under Rule 7 should not be related to the cause of action but only to his pauperism, while others express the opinion[3] that his examination under rule 7 may be with reference to the cause of action as well.

33.28. In the Bombay case, it was observed[4]:-

> "It follows, therefore, that the materials for forming an opinion whether the applicant has a subsisting cause of action or not, or to use the words of R. 5(d) whether "his allegations do not show cause of action" are (1) the application, and (2) the evidence of the applicant under R. 4 or r. 7. Then, under R. 7(2), the Court has to hear arguments if any offered on the face of (a) the application, and (b) the evidence (if any) taken, that the applicant is or is not subject to any of the prohibitions specified in R. 5.".

33.29. It is, of course, not open to the Court to hold an elaborate inquiry into the question whether the claim made by the petitioner is likely to succeed. In ascertaining where there exists a "cause of action", the court cannot go into complicated questions of fact or law[5].

33.30. The most sensible view (which is practically the same as the Bombay view)[6] seems to be, that (i) under rule 7, a court may examine the applicant touching the 'cause of action'; (ii) that when he is so examined, the opposite party has a right to cross-examine him under rule 7; and (iii) that a court may take the result of such examination *together with any examination* under rule 4 and the allegation in the petition in deciding whether the prohibition metioned in rule 5(d) applies or not; (iv) but the other witnesses cannot, under rule 7, testify for, or against, the existence of the cause of action; (v) however, the court can give a decision both on pauperism and on the cause of action (or any other prohibition mentioned in rule 5).

33.31. Since Order 33, rule 6, specifically mentions that the evidence to be taken should relate only to the question of pauperism of the petitioner, it is desirable, by a slight amendment of rule 7, to provide that the *examination* of the *petitioner* (as distinct from the evidence of other witnesses), can extend to the cause of action also.

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1. (a) *Jogendra* v. *Durga Charan*, A.I.R. 1919 Cal. 385;
   (b) *Bai Chandan* v. *Chotta Lal*, A.I.R. 1932 Bom. 584, 585 (Rangnekar J.);
   (c) *U Ba Dive* v. *Mg. Lu Plan*, A.I.R. 1932 Rang. 107 (F.B.).
2. (a) *Bai Chandan* v. *Chhola Lal*, A.I.R. 1932 Bom. 584;
   (b) *U Ba Dive* v. *Mg. Lu Plan*, A.I.R. 1932 Rang. 107, 112 (Majority view).
3. (a) *U Ba Dive* v. *Mg. Lu Plan*, A.I.R. 1932 Rang. 107, 111, 112 (Majority view)
   (b) *Jogendra* v. *Durga Charan*, A.I.R. 1919, Cal. 385, 388.
4. *Bai Chandan* v. *Chhole Lal*, A.I.R. 1932 Bom. 584, 585 (Rangnekar J.).
5. *Vijai Pratap* v. *Dukh Haran*, A.I.R. 1962 S.C. 941, 943, Para. 9.
6. *Bai Chandan* v. *Chhotalal*, A.I.R. 1932 Bom. 584, (Rangnekar J

It is also desirable to provide for a full record, in view of our proposal for appeal against orders rejecting the application for permission to sue as a pauper.

Recommendation

33.32. In the light of the above discussion, we recommend that Order 33, rule 7, should be revised as follows:—

"7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent and *shall make a full record* of their evidence.

(1A) *The examination of the witness under sub-rule* (1) *shall be confined to the prohibitions in clauses* (b), (c) *and* (e) *of rule* 5, *but the examination of the applicant or his agent may relate to any of the prohibitions referred to in rule* 5.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court under rule 6 or under this rule, the application is or is not subject to any of the prohibitions specified in rule 5."

Appeal against order under Order 33, rule 7—Recommendation

33.32A. We are of the view that an order under Order 33, Rule 7, rejecting the application, should be made appealable[2] since it prevents the applicant from enforcing his right to sue.[2]

Order 33, rule 8

33.33. We now come one point relevant to Order 33, rule 8. In our Questionnaire, we had included the following Question:[4]

"30. How far do you consider it the duty to the State to provide,—

(a) to a person without any means, or

(b) to a person with inadequate means, the following facilities or concessions in full or part—

(a) Legal aid;

(b) exemption from payment of process fees."

Replies to this question are generally favourable, and we think that the suggestion in part (b) of the question relating to process fees should be implemented.

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1. See discussion below.

2. *Cf.* Discussion as to Order 33, Rule 5.

3. To be carried out under Order 43, rule 1 (nn).

4. Question 30.

Recommendation

33.34. Accordingly, we recommend the following amendment in Order 33, rule 8—

> "In Order 33 rule 8, for the words and brackets "(other than fees payable for service of process)", the words "*or* fees payable for service of process" should be substituted."

Order 33, rule 9A (New)—Legal aid to paupers

33.34A. Where a person permitted to sue as an indigent person is not represented by a pleader, it is desirable that the court should assign a pleader to him at the expense of the State.

As to the mode of selecting pleaders to be so assigned, the facilities to be allowed to such pleaders by the courts and the fees payable to such pleaders by the Government and other matters, the High Court can make rules.

Recommendation

33.34B. Accordingly, we recommend insertion of the following rule—

> "9A. Where a person permitted to sue as an indigent person is not represented by a pleader, the Court shall assign a pleader to him at the expense of the State.
>
> (2) The High Court may, with the previous approval of the State Government, make rules providing for:—
>
> (a) the mode of selecting pleaders to be assigned under sub-section (1);
>
> (b) the facilities to be allowed to such pleaders by the Courts;
>
> (c) the fees payable to such pleaders by the Government, and, generally, for carrying out the purpose of sub-section (1)."

Order 33, rule 15 and costs

33.35. Order 33, rule 14, allows the filing of a second suit by a person where an application by that person to sue as a pauper is refused. But the condition for the second suit is, that the applicant "first pays the costs" of the Government and of the opposite party, incurred in opposing the earlier application. Whether this payment of costs is a condition precedent to the very institution of the second suit, is a matter on which the position is not clear from the decisions. One view[1] is, that payment of costs is not a condition precedent, but when the matter is brought to the notice of the court, the court should reject the plaint or stay the suit pending payment. The Madras view[2] is that the costs have to be paid *before* institution of the suit. In any case, if costs are paid long after the filing of the suit on insufficiently stamped paper, the suit is liable to be dismissed. It was recommended in the Report of the earlier Commission on the Code, that there should be a power in the court to give time (in suitable cases), for payment of the costs.

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1. *Abdul Rehman* v. *Amirbai*, A.I.R. 1943 Bom. 409, 411 (reviews cases).
2. (*a*) *Ram Krishna* v. *Ramajoga*, A.I.R. 1943 Mad. 547, 548.
   (*b*) *Siva Rao* v. *Ramajoga*, A.I.R. 1943 Mad. 547, 548.

33.36. We agree that the court should have power to grant time. Further, we think, that it should be made clear that where the costs are not paid within the specified time, the plaint should be rejected.

Recommendations

33.37. Accordingly, the following re-draft of Order 33, rule 15 is suggested:—

"15. (1) An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall, *subject to the provisions of sub-rule* (2), be at liberty to institute a suit in the ordinary manner in respect of such right.

(2) *No such suit shall be entertained* unless the applicant pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper: *and where such costs are not paid at the time of institution of the suit or within such period thereafter as the court may allow, the plaint, shall be rejected*".

CHAPTER 34

SUITS ON MORTGAGES

Introductory

34.1. Order 34 deals with suits on mortgages.

The scheme of the Code in relation to suits on mortgages is as follows:—

Whether the suit be one for foreclosure, sale or redemption, the preliminary decree in each case must either declare the amount due on the mortgage, or direct an account to be taken of what is due to the mortgagee for principal, interest and costs, and for other costs, charges and expenses in respect of the mortgage-security. An account is then taken of what is due on the mortgage, the sums so found due to each mortgagee are included in one report, and the sale-proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report. Where the mortgagee is in possession, an account is to be taken of what is due to the mortgagee for principal and interest, and also of the income derived by him from the property.

34.2. After this, a final decree is passed. The shape which the final decree takes depends on whether the mortgagor has or has not paid the total amount due on the mortgage. If he has not paid it, the final decree is for foreclosure or sale.

34.3. A fundamental defect in the present procedure under Order 34 is that it necessitates two decrees *in the same suit* and also the possibility of *two appeals against decrees* in the same suit.

34.4. We think that this should be avoided. The scheme which we propose is, that there should be only one decree in suits on mortgages. That decree will correspond to the present preliminary decree. All subsequent proceedings will take place in execution.

Recommendation

34.5. Accordingly, we recommend the following re-drafts of the relevant rules in Order 34:—

Re-draft of Order 34, Rule 2

2.(1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a .....decree—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required re-transfer the property to the defendant at his cost free from the mortgage and from all incumberances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the.....decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply *in execution for an order* debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before *an order* under sub-clause (ii) of clause (c) of sub-rule (1) is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees, or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the..... decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D, with such variations as the circumstances of the case may require.

Re-draft of Order 34, rule 3

3.(1). Where, before an order debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 2, the Court shall, on application made by the defendant in this behalf, *in execution pass an order*—

(a) ordering the plaintiff to deliver up the documents referred to in the decree,

and, if necessary.—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the..... decree,

and also, if necessary.—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf *in execution*, pass *an order* declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of an order under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

Re-draft of Order 34, Rule 4

4(1). In a suit for sale, if the plaintiff succeeds, the Court shall pass a.....decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of Rule 2 and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to *apply in execution for an order directing that* the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before an order for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

Re-draft of Order 34, rule 5

5.(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of an order passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 4, the Court shall, on application made by the defendant in this behalf *in execution*, pass *an order*—

(a) ordering the plaintiff to deliver up the documents referred to in the decree,

and if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the decree,

and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of *an order* passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase-money paid into court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf in execution, pass an order directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4.

Re-draft of Order 34, Rule 6—Recovery of balance due on mortgage in suit for sale.

6. Where the net proceeds of any sale held under rule 5 are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass *an order* for such balance *in execution.*

Re-draft of Order 34, Rule 7—Decree in redemption-suit.

7.(1). In a suit for redemption, if the plaintiff succeeds, the Court shall pass a.....decree—

(a) ordering that an account be taken of what was due to the defendant at the date of the decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him and,

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon, or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff, appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumberances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also if necessary put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the

amount adjudged due in respect of subsequent costs, charges expenses and interest, the defendant shall be entitled to apply in *execution for an order*—

(a) in the case of a mortgage other than usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of an order for foreclosure or sale, as the case may be extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subseqdent costs, charges, expenses and interest.

Re-draft of Order 34, rule 8—Final Order in redemption suit

8. (1) Where, before *an order* debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of *an order* passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a..... decree or, if a decree has been passed, *an order in execution*—

(a) ordering the defendant to deliver up the documents referred to in the ..... decree,

and if necessary—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in ..... decree,

and also if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of *an order* passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order *in execution* for re-payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application may by the defendant in this behalf in execution,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as it hereinbefore referred to in rule 7, pass *an order* declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a unfructuary mortgage, pass *an order* that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

Re-draft of Order 34, Rule 8A—Recovery of balance due on mortgage in suit for redemption

8A. Where the net proceeds of any sale held under rule 8 are found insufficient to pay the amount due to the defendant, the Court on application by him *in execution* may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass *an order* for such balance.

Re-draft of Order 34, Rule 9—Order where nothing is found due or where mortgagee has been over-paid—

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been over-paid, the Court shall pass *an order* directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Re-draft of Order 34, Rule 10—

10. In finally adjusting the amount to be paid to a mortgagee in case of a fore-closure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the ..... decree for fore-closure, sale or redemption up to the time of actual payment[1].

1. For further amendment see below "**Recommendation as to Order 34, Rule 10**".

Re-draft of Order 34, rule 11—Payment of interest

11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(a) interest upto the date on or before which payment of the amount found or declared due is under the ..... decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or where no such rate is fixed, at such as the Court seems reasonable;

(ii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security upto the date of the ..... decree and added to the mortgage—money,—at the rate agreed between the parties, or, failing such rate, at such rate not exceeding six per cent per annum as the Court deems reasonable;

(b) subsequent interest upto the date of realisation or actual payment on the aggregate of the principal sums specified in clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable.

Order 34, rule 10

34.6. There is another point concerning Order 34, Rule 10. The present rule says—

"10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, and to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption upto the time of actual payment."

A question which falls to be considered with reference to this rule is that of costs of the suit. The rule requires the court to award these costs to the mortgagee, "unless the conduct of the mortgagee has been such as to disentitle him thereto." We considered it desirable to examine the operation of the rule, with special reference to cases where the mortgagor has offered the amount due on the mortgage and also where improvements made by the mortgagee are involved.

34.7. A Madhya Pradesh case[1] related to a mortgage where the plaintiff-respondents were the mortgagors, and the defendant—appellant the mortgagee. The mortgagors had been awarded the costs of the suit by the District Judge, and this was contested on appeal. The High Court held:

> "The general rule is that a successful party is entitled to costs, unless he is found guilty of misconduct, negligence or omission, or unless there is some other good cause for denial of costs to him. It is true that the learned Judge came to the conclusion that the plaintiff-respondent had not proved the tender of the mortgage-money. But the plaintiff had given a timely notice expressing his offer to redeem the mortgage. Further, when the matter was taken to court, the defendant, by contesting the claim of the plaintiff with respect to possession, (after having given the mortgaged property on rent to his own relatives), tried to deprive him of the use of the property; the court could not but award the costs of the suit to the plaintiffs. It cannot be urged that the discretion has not been exercised by the Judge properly."

34.8. In the Patna case,[2] it was held by the Patna High Court that:

> "..... in a redemption suit the mortgagee is entitled to costs, unless he has been guilty of misconduct or has refused a valid tender of the amount due to him."

In the present case, the first court found that the deposit of the mortgage money under section 83 of the Transfer of Property Act was insufficient and that there was no misconduct on the part of the mortgagor in contesting the suit and that there was no mala fides on the part of the mortgagee, the mortgagee was entitled to his costs. But, where the court does not give him his costs, the appellate court would be exercising its discretion properly if it reverses the order for costs allowed to the plaintiff-mortgagor against the mortgagee.

34.9. The facts in one Madras case[3] were as follows:—

> There was a suit for redemption of a mortgage executed by defendants 2-5 in favour of defendant I under a deed executed in 1934. Defendants 2—5 executed a subsequent mortgage in favour of the plaintiffs in 1937, and the plaintiffs filed the suit out of which the appeals arose for redeeming the prior mortgage in favour of defendant I. Before filing the suit the plaintiffs deposited the amount due under the mortgage. The respondent, prior mortgagee, refused to accept the amount on the ground that the mortgagors who executed the deed in 1934 to him and the deed in 1937

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1. *Purshottam* v. *Ramacharanlal*, A.I.R. 1967 M.P. 237, 239 (D.B.).
2. *Ram Bilash* v. *Radhakrishna Prasad*, A.I.R. 1958 Pat. 557.
3. *Minakshi Ayyar* v. *Janaki Achalier* A.I.R. 1942 Mad. 592 (D.B.).

> to the plaintiff petitioners and, therefore, it would be unsafe for him to receive the amount and hand over possession in the absence of the mortgagors.

It was held that the conduct of the prior mortgagor in taking the objection was neither vexatious nor unreasonable, and that he should not be made to pay the costs of the subsequent mortgagee.

34.10. In one Patna case,[1] the mortgagor sent a telegram to the mortgagee, asking him to refrain from filing a suit, and promised to pay by a fixed date. Then he sent a subsequent telegram, expressing willingness "to pay and informing that amount was ready". This, the court held, did not of itself constitute a valid tender. But the latter was immediately followed up by the mortgagor actually going to the mortgagee's place and offering the money which the court held constituted a valid tender.

In this case where a valid tender of the entire amount due under a mortgage was made and a request was made that the mortgagee should accept what was just on accounts being taken, and the mortgagee not merely disputed the accounts but refused the settlement of accounts altogether and the mortgagee rushed to the court without justification, it was held that the conduct was such as not to entitle him to the interest accruing after the date of tender and the costs of the suit. The mortgagee was also not allowed the costs in these appeals.

34.11. One of the points raised in a Madras case in an appeal[2] against a redemption decree, by the defendants mortgagees was regarding costs, which the lower court had not awarded. The Madras High Court held:

> "Ordinarily a mortgagee would be entitled to his costs but this is subject to the discretion of the court where he raises questions which involve a denial of the mortgagor's right to redeem. Here there was a denial that a portion of the property was mortgaged: there was also an excessive claim for improvements and also a claim for enhanced revenue."

In these circumstances the High Court refused to hold that the lower court had exercised its discretion wrongly in this matter.

34.12. The facts in one Punjab case[3] were as follows: A mortgage was effected on the land in suit by the plaintiff in favour of the defendant/appellant. The lower court had passed a decree for the possession of land on deposit of the amount payable to the defendant and costs. With regard to improvements, the trial court had held that only part of the amount claimed had been proved. On appeal, counsel for appellant submitted that in order to increase the yield from the land so as to recompense himself in lieu of the interest due on

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1. *Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Pat. 397 (D.B.).
2. *Vasteva Holla* v. *Mahabala Rao*, A.I.R. 1926 Mad. 405.
3. *Rup Ram* v. *Munshi Chillu* , A.I.R. 1960, Punj. 480 (D.B.).

the principal money, the mortgagee had to effect these improvements. Dua J. held that the mortgagee in possession cannot be permitted to lay money in increasing the value of the estate except in circumstances which strictly fall within the four corners of section 63-A of the Transfer of Property Act. The Court held:

> "The interpretation of this section, as suggested on behalf of the appellant, is obviously calculated to give to the mortgagee a handle to so increase the value of the estate as to cripple the mortgagor's power of redemption. This obviously could not be the intention of the legislature."

With regard to costs, the court held:

> "The general rule is that costs follow the event. In the present case, the mortgagee resisted the claim of redemption both before the Collector and in the civil courts, and indeed it has been very seriously opposed right up to this court. The mortgagee has in fact persisted in claiming title to the land in suit. It was in these circumstances open to the court below to pass the impugned order as to costs. There is no question of principle involved in the order which must, therefore, be upheld."

34.13. In a Patna case,[1] the plaintiff had prayed for a decree for redemption of certain lands, which were the subject of usufructuary mortgage executed by one M in favour of the defendants. The plaintiff claimed to have purchased the equity of redemption. The trial court gave a decree for redemption in favour of the plaintiff, and also granted the plaintiff costs of the suit. On appeal, the Patna High Court held that "in the written statement the defendant challenged the title of the plaintiff to redeem the property, and we see no reason why the plaintiff should not be given the costs he has incurred in the suit."

34.14. In a suit for redemption which went up to the High Court of Travancore-Cochin, the trial court had granted a decree, but on terms which did not satisfy the plaintiff or the contesting defendants. The High Court held[2] that normally, in a redemption suit, the mortgagee is entitled to his costs unless he is guilty of misconduct. Putting excessive value on improvements is not misconduct so as to disentitle a mortgagee to his costs. The question involved was, whether the mortgagee could claim anything more than what he bargained for in the mortgage deed. Further, the contesting defendants also put the mortgagor to prove her title to redeem, when there was no doubt about her title. In these circumstances, the court declined to interfere with the lower court's decision awarding the mortgagee only one-fourth of the costs.

34.15. In another Travancore-Cochin case,[3] in a suit for rendemption, the defendant mortgagee raised untenable contentions regarding part of the mortgaged property, and also claimed full value of the building which had been erected by him contrary to the terms of

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1. *Rajballam* v. *Ruan Autar*, A.I.R. 1962 Pat. 203, 204 (D.B.).
2. *Pakeyathi Neelakantan* v. *Ummini Pillai*, A.I.R. 1952 Trav. Co. 295 (D.B.).
3. *Narayana Pillai* v. *G. Kesavan*, A.I.R. 1955 NUC (Trav. Co.) 3483 (D.B.).

the deed. The plaintiff offered to pay only one-fourth of the value of the improvements to the mortagee and also claimed an exaggerated amount by way of damages on account of waste. It was held that the conduct of the parties was such as to disallow them their costs, and each party was, therefore, to bear its costs.

34.16. The above examination of sample judicial decisions shows that the rule fairly well. In particular, if the mortgagor deposits the full amount, he would not be liable for costs of the suit.

34.17. It may be of interest to note the corresponding English rule quoted below:[1]

> "Where a person is or has been a party to any proceedings in the capacity of a trustee, personal representativ or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund."

34.18. It has been stated that "a mortgagee has an absolute right to costs, unless they are forfeited by misconduct; if they are forfeited by misconduct, then they are within the discretion of the Judge."[2]

34.19. The English rule was thus explained[3] by Lord Selborne L.C.:—

> "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established and does not rest upon the exercise of that discretion of the Court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortagee, as it is understood in this Court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner, the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust.

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1. Supreme Court Costs Rules (1959) Rule 6(2).

2. *Charles* v. *Jones* (1886) 33 Ch. D. 80, 84. per Lopes L.J. (Case under old O. 65, r. 1 R.S.C.).

3. *Cotterell* v. *Stratton* (1872) 8Ch. 295-302, (Lord Selborne L.C.).

> These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. "Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of trustees. In fact, such a departure, instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extra-ordinary risks by extra-ordinary exactions, and would deprive the latter class of the assistance of all who cannot afford, or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time."

34.20. Since the right of a mortgagee to his costs of a redemption or foreclosure suit is a matter of contract, and not in the discretion of the Court, costs cannot be denied except where he has "unreasonably instituted or carried on or resisted any proceedings" within the above Rule,[1] e.g., where he has declined *to hand over reconveyance in exchange for the principal and interest.*[2] Mortgagees failing on a fairly arguable point in a foreclosure suit may, however, be allowed to add their costs to suit their security.[3] Eve J. summed up the position thus:[4]

> "I think the various authorities to which my attention was called in the course of the exhaustive arguments addressed to me in this case establish three propositions: (1) that a mortgagee has an absolute right to costs unless they are forefeited by misconduct; (2) that, if the absolute right is forefeited by misconduct, the costs are in the discretion of the judge; and (3) that the raising of an utenable defence, *or a claim of a balance due after the mortgage has been fully paid off, both constitute* misconduct by which the absolute right to costs is forfeited. Authority for these propositions is to be found in the cases of *Charles* v. *Jones* (No. 2) 56 L.T.R. 848; *Hall* v. *Heward* (54 L.T.R. 810, 32 Ch. Div. 430); and *Ashworth* v. *Lord* (58 L.T.R. 18)".

34.21. It would, thus, appear, that, in substance, the position in England does not differ from that in India. Moreover, the rule gives a discretion which appears to have been soundly exercised. However, it would, in our view, be desirable to provide expressly that where the mortgagor pays or desposits the full amount before or at the time of institution of the suit, ordinarily he shall get his costs. This does not really change the law, but only makes it more explicit.

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1. (a) *Cotterell* v. *Stratton* (1872) L.R. 8 Ch. 295;
   (b) *Turner* v. *Hancock* (1882) 20 Ch. D. 303.
2. *Rourke* v. *Robinson* (1911) 1 Ch. 480.
3. *Stamford ex parte* v. *Keeble* (1913) 2 Ch., p. 102.
4. *Heath* v. *Chinn*, (1908) Law Times Reports 856-858.

Recommendation as to Order 34, rule 10

34.22. Accordingly, we recommended that to Order 34, rule 10, the following proviso should be added:—

> *"Provided that where the mortgagor, before or at the time of institution of the suit, tenders or deposits the amount due on the mortgage, or such amount as is not substantially deficient in the opinion of the court, he shall not be ordered to pay the costs of the suit to the mortgagee and the mortgagor shall be entitled to recover his own costs of the suit from the mortgagee, unless the court for reasons to be recorded, otherwise directs.*

Order 34, rule 10-A (New) (Mesne profits) to be paid by the mortgagee

34.23. Where the mortgagor has deposited the sum due on the mortgage, mesne profits should be paid by the mortgagee, if the amount tendered or deposited by the mortgagor is not substantially deficient. We are of the view that an express provision on the subject is desirable.

Recommendation

34.24. Accordingly, we recommend the insertion of the following new rule in Order 34:—

> *"10-A. Where the mortgagor has, before or at the institution of the suit, tendered or deposited the sum due on the mortgage, or such amount as is not substantially deficient in the opinion of the Court, the Court shall direct the mortgagee to pay to the mortgagor mesne profits for the period beginning with the institution of the suit."*

CHAPTER 35

INTERPLEADER SUITS

Introductory

35.1. Where the plaintiff has no claim as such against a particular defendant but is interested only for his debt, he can file an interpleader suit, under Order 35.

The Order on interpleader is derived from an Act[1] of 1841, which itself was based on an English Statute[2]. The Order provides for various matters such as when interpleader suit may be instituted; when the thing claimed must be paid into Court; the procedure at the first hearing, when agents and tenants can compel their principals or landlords to interplead; how the plaintiff's costs may be secured; and so on.

No changes are needed in this Order.

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1. Act 8 of 1841.
2. 2 and William 4 C. 58.

CHAPTER 36

STATEMENT OF CASE

Introductory

36.1. Persons claiming to be interested in the decision of any question of fact or of law may, under Order 36, enter into an agreement in writing stating the question in the form of a case for opinion, and providing that upon the finding of the court thereon, certain money shall be paid or property delivered by one of them to the other, or that one or more of them shall do or refrain from doing some other specified act.

36.2. The agreement has to be filed in the court, and is numbered and registered as a suit. Thereafter, the procedure in other respects is substantially the same as in an ordinary suit, and the scheme of the provisions contemplates a judgment as well as a decree.

The peculiarity and special merit of this procedure lies in the (i) framing by the parties before-hand of the questions involved, (ii) the submission of the case to the court by agreement of both parties,—to that extent diluting the element of contest met with in ordinary litigation, (iii) the formulation by the parties of the precise relief that is anticipated, and (iv) the acceptance by them *before-hand* of the binding character of the determination of the court.

Order 36 Rule 3—Procedure under Order 36, not often

36.3. Unfortunately, the procedure provided by Order 36 is rarely invoked, and we venture to think that one of the reasons why it has not proved popular is the absence of any apparent benefit to the litigant. The choice is always made in favour of the ordinary procedure, because, the procedure of a statement of case, even if known to the ordinary litigant, does not furnish any additional inducement. Some inducement should be offered, which may be in respect of court fees. The subject of court fees is outside the competence of the Union. But, in order to highlight the desirability of making a distinction between an ordinary suit instituted by a plaint and a special case originating in an agreement, the relevant rule of this order should expressly provide that the proceeding can be initiated by an application.

Suggestion to substitute application so as to reduce court fees

36.4. An objection was raised during our discussions that the proposed amendment would be incongruous, as it would bring in the idea of "decree" and "procedure for suit" in a proceeding instituted on an application. But we think that from the point of view of court fees, such a proceeding should not be treated as a plaint.

It is also desirable to provide that there should be no appeal from the decree passed as a result of such proceedings. Even now, that should be the position, because the decree is, in a sense, a compromise decree, against which there is no appeal[1]. But an express provision prohibiting appeal would be useful.

Recommendation to amend rule 3

36.5. Accordingly, we recommend that Order 36, rule 3, should be revised as follows:—

"3(1). The agreement, if framed in accordance with the rules hereinbefore contained, may be filed *with an application* in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The *application*, when so filed shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom *the application* was presented.

Recommendation to add rule 6

36.6. The following rule would be added as Order 36, rule 6—

"No appeal shall lie from a decree pronounced under rule 5."

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1. *Cf.* section 96.

CHAPTER 37

SUMMARY PROCEDURE

Introductory

37.1. Order 37 provides for summary procedure, in respect of certain suits. A suit under this Order is instituted in the ordinary form by presenting a plaint; but the summons is issued in a special form[1]. The essence of a summary suit under Order 37 is that the defendant is not, as in an ordinary suit, entitled as a right to defend the suit. He must apply for leave to defend within ten days from the date of service of summons upon him; and such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration, or such other facts as the court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence.

Bombay Amendment

37.2. The Order is confined to suits on negotiable instruments, but the effect of the amendments made by the Bombay High Court is practically to extend it to suits mentioned in section 128(2)(f) of the Code.

37.3. Moreover, by Bombay amendment, the procedure has, to some extent, been made less rigorous by an amendment of rule 3 of the Order 37. The Bombay amendment requires a plaintiff to serve, with the writ of summons, a copy of the plaint and the exhibits, and the defendant may at any time, within ten days of such service enter only an appearance in the first instance. Notice of the appearance must be given to the plaintiff's attorney, and thereafter the plaintiff is required to serve on the defendant a summons for judgment, returnable in less than ten days from the date of service, supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. It is only after the service of this additional service for judgment that the defendant is required within ten days thereof to apply for leave to defend.

37.4. In the 14th Report[2] of the Law Commission, a recommendation has been made for—

(a) amendment of the rules relating to summary procedure on the lines of the Bombay amendment; and

(b) extension of summary procedure to subordinate courts in important industrial and commercial towns like Ahmedabad, Asanasol, Kanpur and Jamshedpur.

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1. Appendix B, Form No. 4.

2. 14th Report, Vol. I, page 275, para. 22, read with para. 21.

37.5. The Commission, in its Report[1] on the Code examined these recommendations and expressed the view that action under (a) above could be taken by the High Courts under section 128(2)(a), and action under (b) above could be taken by the State Governments under Order 37, rule 1(b). It was, therefore, considered unnecessary to make any provision on these matters of detail in the Code.

37.6. We have considered the matter further. As we take a different view, we should deal with the matter point by point. As to extending the provisions to other cities, we note that in the 14th Report, it was observed[2]:—

> "22. A general extension of the summary procedure to all court of subordinate judges and munsifs has not been advocated nor do we recommend any such far-reaching measure. We understand that although Order 37 has been applied to the courts of all subordinate judges and munsifs in Madras, it is not in use and has virtually become a dead letter so far as subordinate courts in mofussil of that State are concerned. The High Court of Allahabad is opposed to its general extension. The Bombay High Court is in favour of extending it to the courts in such commercial towns as are recommended by the High Court. The Civil Justice Committee made a similar proposal. Order 37 was extended to certain courts in Bengal, Uttar Pradesh and the Punjab, probably on the basis of that recommendation."

"We suggest that the High Courts should extend the rules of summary procedure, *as amplified in Bombay,* to subordinate courts in important industrial and commercial towns like Ahmedabad, Asansol, Kanpur and Jamshedpur."

37.7. We have taken note of the views expressed in the 14th Report. We, however, think that the time has come for extending summary procedure to *all courts,* in the interest of expedition, and not to specified towns only.

37.8. It is, in our view, also desirable to extend summary procedure to all suits mentioned in section 128(2)(f), in the interest of expedition.[3]

37.9. In our opinion, the procedural amendments made by the Bombay High Court[4] are also useful, and should be adopted.

37.10. As has been observed, having regard to the scheme of Order 37 as amended by the Bombay High Court, it is not necessary for a defendant to obtain leave to appeal in a summary suit. He

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1. 27th Report, page 233, Note on Order 37 (Summary procedure).
2. 14th Report, Volume 1, page 275, para. 22.
3. *Cf.* Para. 37·2, *supra.*
4. *Cf.* Para. 37·3, *supra.*

Indian Express Newspaper Ltd. v. *Basumati Private Ltd.*, A.I.R. 1969 Bom. 40, 46, 47 para 14.

can also make applications which do not raise a defence to the suit without obtaining leave defend.[1]

Recommendation

37.11. In short, our recommendations as to Order 37, are as follows:—

(i) Order 37 should be extended to all courts;

(ii) Order 37 *should be amended on the lines of the Bombay amendment*, so as to extend it to certain *other suits* in accordance with the Bombay amendment;

(iii) Further, the *procedure* under Order 37, rule 3, should be amended as in Bombay.[2]

Recommendation

37.12. Accordingly, the following amendments are recommended—

(i) For the existing title of Order 37, the following title should be substituted—

Summary Procedure

(ii) For Order 37, rule 1, the following rule should be substituted—

"1. *Application of Order*—

(1) This Order shall apply to the following Courts, namely,—

(a) *High Courts, City Civil Courts, and Courts of Small Causes; and*

(b) *subject to the proviso, other Courts*:

Provided that in respect of the courts mentioned in sub-clause (b) above, the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it may deem proper, and may also subsequently by notification in the Official Gazette further restrict, enlarge, or vary from time to time the categories of suits to be brought under the operation of this Order as it may deem proper."

(2) *Subject to the provisions of sub-rule* (1), *the Order applies to the following suits, namely*:—

(a) *suits upon bills of exchange, hundies and promissory notes;*

(b) *suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—*

(i) *on a written contract or;*

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1. *Cf.* 14th Report, Vol. 1, page 274-275, para. 20·2.

2. *Cf.* 14th Report, Vol. 1, page 274-275.

(ii) *on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or*

(iii) *on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only;*

(iii) For existing Order 37, rule 2, the following rule shall be substituted:

"2(1) *A suit to which this Order applies may, if the plaintiff desires* to proceed hereunder, be instituted by presenting a plaint with a specific averment therein that the suit is filed under this Order, and that no relief not falling within the ambit of this rule has been claimed, and with the inscription within brackets "(Under Order XXXVII of the Code of Civil Procedure, 1908)" just below the number of the suit in the title of the suit, but the summons shall be in Form No. 4, Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which summons is in the prescribed form (viz. Form No. 4 in Appendix B), the defendant shall not defend the suit, unless he enters an appearance and obtains leave from the Court or Judge as hereinafter provided so to defend; and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) up to the date of the decree, and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf, and such decree may be executed forthwith."

(iv) The following shall be substituted for Order 37, Rule 3—

"3(1). In a suit to which this Order applied, the plaintiff shall, together with the writ of summons under Rule 2, serve on the defendant a copy of the plaint and exhibits thereto, and the defendant may, at any time within ten days of such service, enter an appearance. The defendant may enter an appearance either in person or by pleader. In either case an address for service shall be given in the memorandum of appearance, and unless otherwise ordered, all summonses, notices or other judicial processes required to be served on the defendant shall be deemed to have been duly served on him, if left at his address for service. On the day of entering the appearance, notice of the appearance shall be given to the plaintiff's pleader

(or, if the plaintiff sues in person, to the plaintiff himself) either by notice delivered at or sent by prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant, a summons for judgment in Form No. 4-A in Appendix B or such other form as may be prescribed from time to time returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed, and stating that in his belief there is no defence to the suit.

(3) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge of Court appear just.

(4) At the hearing of such summons for judgment,—

(a) if the defendant has not applied for leave to defend or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith, or

(b) if the defendant be permitted to defend as to the whole or any part of the claim, the Court or the judge shall direct that on failure to complete the security (if any), or to carry out such other directions as the Court or the Judge may have given within the time limit in the Order, the plaintiff shall be entitled to judgment forthwith.

(5) The Court may for sufficient cause excuse the delay in entering the appearance under sub-rule (1) or in applying for leave to defend the suit under sub-rule (3) of this rule."

CHAPTER 38

ARREST AND ATTACHMENT BEFORE JUDGMENT

Introduction

38.1. The provisional remedies which may be required to prevent the defendant from absconding, and property from disappearing or being wasted pending litigation, are also provided for in the Code. The Code here deals with the following subjects; arrest before judgment; attachment before judgment; compensation for improper arrests or attachment;[1] temporary injunctions; interlocutory orders; and, lastly, the appointment of receivers.

38.2. The rules as to arrest before judgment in England superseded the writ of *ne exeat regno*, and the Indian rules roughly correspond to the English Rules of Court.

38.3. NE EXEAT REGNO[2] (that he leave not the kingdom), was a prerogative writ whereby a person is prohibited from leaving the realm, even though his usual residence is in foreign parts. The writ is directed to the sheriff of the county in which the defendant is resident, commanding him to take bail from the defendant not to quit England without leave of the court. It is granted on motion, supported by affidavit showing that a sum of money is due from the defendant to the plaintiff, or will be due on taking accounts between them, and that the defendant intends to abscond.

38.4. The writ was formerly applied to great political purposes, but it is now applied in civil matters only, and is almost superseded in England by orders under the Debtors Act, 1869, s. 6.

Order 38, rule 1

38.5. Under Order 38, rule 1, clause (a), sub-clause (i), if a person has, with intent to delay the plaintiff or to avoid service of process etc. left the local limits of the court's jurisdiction, he can be arrested before judgment, if the other conditions mentioned in the rule are satisfied.

38.6. Similarly, under Order 38, rule 1, clause (a), sub-clause (ii), if a person is, with the above intent, likely to leave the local limits of the court's jurisdiction, he can be arrested before judgment, if the other conditions are satisfied.

38.7. We have a small suggestion to make regarding this clause. The liability to arrest should not arise for "leaving" the Court's jurisdiction on *lawful business*. In fact, the requirement of a particular intent, and the juxtaposition of these words with the world "abscond", shows that only malafide acts are covered. However, it is desirable to make the position clear.

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1. Sections 94-95.

2. Mozeley & Whiteley, Law Dictionary (1970), pages 232, 233.

Recommendation

38.8. We, therefore, recommend that—

(i) in Order 38, rule 1, clause (a), sub-clause (i), before the words "left the local limits", the words "without lawful *excuse*", should be inserted.

(ii) in Order 38, rule 1, clause (a), sub-clause (ii), before the words "leave the local limits", the words "*without lawful excuse*", should be inserted.

Order 39, Rule 5

38.9. Order 38, Rule 5(1) is as follows:—

"5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his proptry, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

38.10. The rule, it may be noted, requires that the defendant be given an opportunity to show cause. The question whether non-compliance with this requirement has the effect of making the order *ultra vires* and void, and the consequent attachment a nullity, and whether, if the Court passes such an order, there is total lack of jurisdiction, is one on which there has been some controversy.

38.11. In a Kerala case,[1] it was held that the question really was not so much whether, (as some decisions had put it), the provisions of Order 38, rule 5(1) are mandatory or merely directory. Even the breach of a mandatory provision does not necessarily make it illegal. The High Court referred to a decision of the Supreme Court,[2] where it was pointed out that the question to be considered was whether compliance with a particular provision is a condition precedent for the assumpton of jurisdiction or whether on the other hand, the provisions merely lay down the manner in which the jurisdiction is to be exercised. If it is the former, non-compliance would make the order void; but, if the latter, non-compliance would only make the order voidable. The order would be liable to be set aside, but, until that is done, it would be operative and cannot be ignored or

1. *Madhavan* v. *State*, A.I.R. 1966 Ker. 212 (F.B.)

2. *Ittyavira Mathai* v. *Varkey*, A.I.R. 1964 S.C. 907.

collaterally attacked. Therefore, in the light of the above decision of the Supreme Court, in this case, even though the attachment is erroneous and liable to be set aside in appropriate proceedings, the order of attachment is one made with jurisdiction and is not a nullity. Hence, it cannot be ignored or subjected to attack in collateral proceedings.[1] It was held that Order 38, rule 5 is intended for the protection of the person whose property is sought to be attached before judgment. If he did not receive the notice required by law, and was consequently denied the privilege of staying off the attachment by the offer of security, an injury would, no doubt, accrue to him: but the law gives him a remedy by way of appeal under Order 43, rule 1, from such an irregular order to get it set aside.

38.12. Contrary views had been taken in some of the earlier High Court decisions,[2, 3] but these were not accepted as correct in this case. Hence, it was observed, that the order of attachment in this case, though erroneous and liable to be set aside in appropriate proceedings, was an order made with jurisdiction, and was not a nullity.

38.13. The question arose in a recent Allahabad case[4], where it was held that if the procedure provided by law is not followed, the attachment is a nullity.

Recommendation

38.14. A clarification of the law is badly needed in view of the recent cases summarised above. On principle, such attachment should be void, and we recommend the insertion of a sub-rule in Order 38, rule 5, to that effect.[4a].

Order 38, Rule 11 A (news)

38.15. With respect to attachment before judgment (Order 38, rule 9), reference had been made in the earlier Report[5] to the controversy on a certain point. An Allahabad case[6] shows that the controversy still continues.

38.16. In the Allahabad case, the appellants filed a suit in 1947, and obtained an order of attachment before judgment in respect of the property of the judgment debtor. The property was attached. The Munsiff appointed the respondent as "superddar" (Custodian) of the property. In the security bond executed by the respondent, he made himself liable for any loss of the property entrusted to him. First, the suit was dismissed for default of the plaintiff; but later it

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1. *Dhian Singh* v. *Secretary of State*, A.I.R. 1945 Nag. 97.

2. *Abdul Karim* v. *Nur Mohammad*, A.I.R. 1920 Cal. 526, 527 (Newbould and Panton J.)

3. *Dular Singh* v. *Ram Chander*, A.I.R. 1934 All. 165, 167 (Radhhpal Singh J.)..

4. *Sri Krishna Gupta* v. *Ram Babu*, A.I.R. 1967 All. 136 (B. Dayal and D.D. Seth JJ.). [reviews case-law].

4a Amendment not drafted.

5. 27th Report, pages 80, 197, 233 (*infra*).

6. *Raj Chander* v. *Ramesh Kishore*, A.I.R. 1965 All. 546.

was restored. The defendant went in appeal, and the case was remanded for disposal on the merits, and ultimately the plaintiff obtained a decree. The decree-holder then moved an application for execution of the decree by arrest of the surety respondent, relying on the attachment before judgement and the connected bond.

38.17. The main object to this application for execution was that the order of attachment before judgment had come to an end with the dismissal of the suit, and the respondent's liability had also ceased with it. Negativing this contention, the High Court held that—

> "A plain reading of (Order 38), rule 9 goes to indicate that if and when the suit is dismissed, the court is under an obligation to make an order withdrawing the attachment. In other words, the order of attachment before judgment made by the court would fall with the dismissal of the suit. If the court either inadvertently or throgh carelessness omits to pass an order withdrawing the attachment and thereby fails to perform a duty imposed upon it, could it be said that the attachment shall subsist even though there is no suit in existence? No discretion is allowed to the court to permit the attachment to continue even after the dismissal of the suit. It, therefore, follows that the mandatory provisions of Rule 9 will not be affected by reason of the court having failed to comply with the provisions of the law."

38.18. It was also further held, that there was no distinction between the dismissal of suit for default and a dismissal of suit on merits.

> "If the plaintiff succeeds in getting the suit restored in one case and the dismissal of suit is set aside an appeal in the other, all that happens is that the suit becomes alive. It cannot be disputed that once a suit is dismissed either for default or on merits, it ceases to exist in the eye of the law, and any ancillary orders passed in the suit would automatically come to an end and cease to operate."

38.19. In the instant case, it was, therefore, held that the supurddar could not, after the attachment proceedings had become ineffective by reason of the dismissal of the suit for default, be held liable under the security bond executed by him.

38.20. In this connection, reference may be made to the earlier Report[1] portions dealing with Order 21, rule 57, and the proposed new Order 38, rule 11A. Order 21, rule 57 provides that where property has been attached in execution of a decree, but, because of the decree-holder's default, the court is unable to proceed further with the execution application then, it can dismiss the application, in which case "the attachment will cease". There was a conflict of views on the question whether this rule applied to attachment before judgment. As a solution, the Law Commission had suggested that a general rule applying the provisions of the Code (relating to attachment made in execution) to attachments before a judgment should be inserted.

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1. 27th Report, pages 80, 197, 233.

38.21. The proposed new rule was as follows:—

"Order 38, Rule 11A: The provisions of this Code applicable to an attachment made in execution of a decree shall, as far as may be, apply to an attachment made before judgment which continues after judgment by virtue of the provisions of rule 11."

38.22. The judgment of the Allahabad High Court on Order 38, Rule 9 is in conformity with the general principle recommended by the Law Commission (in its earlier report). The order of attachment made before judgment by the court would also fall with the dismissal of the suit.

Recommendation

38.23. The earlier recommendation should be carried out. It will not, however, solve the special difficulty created by the peculiar facts that were found in the Allahabad case, and it may, therefore, be worthwhile to provide also that the restoration of a suit does not revive the attachment made before dismissal. Accordingly, the following rule should be added as Order 38, Rule 11A—

"11A. (1) *The provisions of this Code applicable to an attachment made in execution of a decree shall, as far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule* 11.

(2) *An attachment made before judgment, in a suit which is dismissed for default, shall not revive merely by reason of the restoration of the suit.*"

CHAPTER 39

INJUNCTIONS AND OTHER INTERLOCUTORY ORDERS

Introduction

39.1. Order 39 deals with various interlocutory Orders, of which the most important are temporary injuctions.

39.2. The theoretical interest of the subject of injunctions is matched by its practical importance. Injunctions were invented by the Court of Chancery as equitable remedies. One of the earliest reported English cases deals with injunctions in relation to judicial proceedings, but the utility of injunctions was soon realised, and the remedy has now embraced other fields.

39.3. The equitable nature of the remedy is emphasised by several provisions of the Specific Relief Act[1] (which deals with permanent injunctions, and by rules in Order 39 (dealing with temporary injunctions). But it is odd that a subject of such importance has been dealt with in the Code in provisions which, at times, prove to be less comprehensive than they ought to be. It is for this reason that the matter was considered at some length in the earlier Report, and we also shall have a number of things to say on this Order.

39.4. The "interdict" of the Roman law bears a resemblance to the injunctions of courts of equity. It is said to have been called an interdict, because, it was *originally interposed in nature of an interlocutory decree* between two parties *contending for possession, until the dispute as to property could be tried.* But, afterwards, the appellation was extended to final decretal orders of the same nature[2].

Order 39, rule 1

39.6. We shall first deal with the scope of the power to grant temporary injunctions. Under Order 39, rule 1, where, in any suit, it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens or intends, to remove or dispose of his property with a view to defraud his creditors,

the court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders".

1. The Specific Relief Act, 1963.

2. Story, Equity Jurisprudence (1917), page 365.

39.7. The rule is primarily concerned with preservation of the property in dispute till legal rights are ascertained.

39.8. The situation where the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, is not covered on a literal reading. We think that it ought to be covered.

Recommendation

39.9. Accordingly, we recommend that Order 39, rule 1, should be revised as follows—

Revised Order 39 rule 1—

"1. Where, in any suit, it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens or intends, to remove or dispose of his property with a view to *defrauding* his creditors, or

(c) *that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,*

the court may be order grant a temporary injunction to restrain such act, or "make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property, or *dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit,* as the court thinks fit, until the disposal of the suit or until further orders".

Order 39, rule 3

39.10. Under Order 39, rule 3, the Court is required to issue notice to the opposite party before granting an injunction, "except where it appears that the object of granting the injunction would be defeated by the delay". It is under these words of exception that what are known as ex-parte ad interim injunctions are granted.

Ex-parte Ad interim injunctions

39.10A. Complaints are often heard that the grant of temporary injunctions—particulary ex parte—causes hardship, and is an indirect cause of delay.

Question in the Questionnaire as to temporary injunctions.

39.11. Having regard to the importance of the subject of temporary injunctions, we had in our Questionnaire[1] on the Code, included the following question[1]:—

"24.(a) Would you favour any limitations on the Court's power to issue temporary injunctions? In particular, do

1. Question 24.

you favour an amendment to the effect that an *ex parte* interim injunction should not be granted save in exceptional cases, and for reason to be recorded in that behalf?

(b) Would you favour the suggestion that in case an *ex parte* injunction is granted, it shall be discharged by the court if it is satisfied that the party which obtained the injunction is not taking diligent action to serve the opposite party or to take other steps necessary for the progress of the suit?".

The majority of replies agree with the approach shown in the question.

39.12. After taking into account all aspects of the matter, we have come to the conclusion that an amendment of the law is called for.

39.13. No doubt, such a power of issuing *ex parte* injunctions is needed for urgent cases. But practical experience suggests that there ought to be some restriction as to the duration for which the *ex parte* injunction should continue.

In the absence of such a restriction, the party obtaining an injunction loses interest in prosecuting the suit with diligence, and the party bound by the injunction suffers. While we realise that too severe or too many restrictions on the powers of the court may work hardship, we are of the view that some broad limitations would be useful and workable. What, we think, could be recommended is that—

(a) interim *ex parte* injunctions should not be granted for a duration exceeding, say, one month;

(b) hearing of the application for injunction should be finished within one month, where an interim *ex parte* injunction has been granted;

(c) if extension of the duration of an interim *ex parte* injunction becomes absolutely necessary, the extension should be granted only once and should not exceed 15 days, except with the consent of the opposite party;

(d) no interim *ex parte* injunction should be issued, unless a copy of the plaint accompanies it, as also a copy of the application for injunction.

39.13A. Some of the replies received on the question[1] put by us in this behalf favour an amendment as suggested, while some of them are opposed to it on the principle that what is discretionary cannot be made rigid. Bearing in mind the views expressed, we have made the above recommendation.

39.13B. We are, of the view that if a party, in an application for temporary injunction or in the supporting affidavit, knowingly makes a false statement on a material particular, the court should take that

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1. Para. 39·11, *supra*.

into account in exercising its discretion under Order 39, Rule 4,—that is to say—in considering the question whether the Court should vary or discharge the injunction. That is the law even now,[1] but it can be usefully emphasised.

39.14. It has been emphasised in England,[2] that an injunction may be refused if the plaintiffs have misled the defendant and the court. This is on the principle that he who comes in equity must come with clean hands—a maxim which has been described as not unrelated to the maxim *ex turpi causa non oritor actio of the* common law[3].

39.15. If, on hearing of a motion by a plaintiff for an injunction, or, in the alternative, to continue an interim injunction already obtained *ex parte*, it appears that the interim order was irregularly obtained by suppression of facts, the Court may discharge the *ex parte* order without any cross notice of motion for that purpose by the defendant; though it may grant the injunction asked for.

Motion of dissolve ex parte injunctions

39.16. Kerr states the position thus:

> "If, on the motion to dissolve an *ex parte* injunction, it appears that the plaintiff has misstated his case, either by misrepresentation, or by the suppression of material facts, so that an injunction has been obtained which would not have been obtained if a more accurate statement of the case had been made, the injunction will be dissolved on that ground alone[5]. The plaintiff will not be allowed to maintain it on the merits then disclosed[6]. Nor can he be heard to say that he was not aware of the importance of the facts so misstated or concealed,[7] or that he had forgotten them[8]. A motion to discharge an *ex parte* injunction on the ground of its having been obtained by misrepresentation is proper, though the injunction is about to expire[9].

39.17. It would be useful to codify the position by amending Order 39, rule 3.

Order 39, rule 4

39.18. Under Order, 39, rule 4, a court can discharge, set aside or vary a temporary injunction. It is obvious that where a party has been

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1. See English cases cited *Asiatic Engineering Co. v. Achhru Ram*, A.I.R. 1951 All. 746, para 51.

2. *Armstrong* v. *Sheppart & Short Ltd.* (1959) 2 Q.B. 384.

3. Snell, Equity, (1966), page 35.

4. *Boyse v. Gill* (1891), 64 L.T. 824, cited in Annula practice, under Order 50, rule 6.

5. Kerr on Injunctions, (1927) 660, 661.
Brown v. *Newall*, 2M & C., p. 570; 6L.J. Ch. 348 *Castelli* v. *Cook*, 7Ha., P. 94; *Dalglish* v. *Jarvie* Mac. & G. 231; 20 L.J. Ch. 475; 86 R.R. 83; *Ross* v. *Buxton* (1888) W.N. 55, *Boyce* v. *Gill* 64 L.T. (1891) W.N. p. 108; *Schmitten* v. *Faulka* (1893) W.N. 64. See *Rex* v. *Kensington Income Tax Commissioners*, (1917) 1 K.B. p. 517; 86 L.J.K.B., p. 261.

6. *Att. Gen.* v. *Corporation of Liverpool*, 1M. & C., p. 211; 43 R.R. 176; *Castelli* v. *Cook* 7 H.a., p. 94 *Dalglish* v. *Jarvie*, 2 Mac. & G., p. 238; 20 L.J. Ch. 475; 86 R.R. 83.

7. *Dalglish* v. *Jarvie*, 2 Mac. & G. p. 241; 20 L.J. Cj. 475; 86 R.R. 83.

8. *Clifton* v. *Robinson*, 16 Beav. 355; 96 R.R. 171.

9. *Wimbledon Local Board* v. *Croydon Sanitary Authority*, 32, Ch. D. 421; 56 L.J. Ch. 159.

heard (or had an opportunity of being heard) before the injunction was granted, the injunction should not be discharged etc. except in special cases. We propose an amendment to bring that out.

Recommendation

39.19. Accordingly, we recommend as follows:—

(i) The following proviso should be inserted below Order 39, rule 3—

"Provided that where an injunction has been granted without notice to the opposite party—

(a) *the period for which it shall be in force as initially fixed shall not exceed one month;*

(b) *hearing of the application for injunction shall, as far as practicable, be finished within one month; and*

"(c) *if it becomes absolutely necessary to extend the period for which the injunction is to remain in force, the extension shall not exceed fifteen days, except with the consent of the opposite party".*

(ii) The following further proviso should be added below Order 39, Rule 3:—

"Provided further that where an injunction is granted on the plaintiff's application without notice to the opposite party, the court shall, before granting it, require the plaintiff to file an affidavit stating that a copy of each of the following documents has been served on the opposite party by delivery to him, or where such service is not practicable, by sending it to him by registered post:—

(a) *the plaint,*

(b) *the documents on which the plaintiff relies.*

(c) *the application for injunction, and*

(d) *the affidavit or other documents on which the applicant relies".*

(iii) The following proviso should be inserted below rule 4 of Order 39:—

"Provided that if a party, in an application for temporary injunction or in the supporting affidavit, has knowingly made a false or misleading statement on a material particular, and the injunction was granted without notice, the court shall vacate the injunction unless for reasons to be recorded it considers it just not to do so".

(iv) The following fourth proviso should be added to Order 39, rule 4—

"Provided further that where an order for injunction has been passed after giving a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party, unless there has been a change of circumstances, or, unless the court is satisfied that the order has caused undue hardship to that party".

CHAPTER 40

RECEIVERS

Introductory

40.1. Order 40, dealing with receivers, corresponds to section 503 of the old Code, of which the portions relating to a receiver's remuneration and his duties are now to be found in Rules 2 and 3. Under section 505 of the previous Code, a receiver could be appointed only by High Courts and District Courts, but under the present Code, all Courts can appoint a receiver. The test is 'just and convenient', which has been substituted for "necessary for the realisation, preservation or better custody or management of any property, movable or immovable, the subject of a suit or under attachment", thus enlarging the power of a Court[1].

No changes are needed in this Order.

1. See *Alagappa* v. *Krishnaswami*, A.I.R. 1921 Mad. 119, 120.

Chapter 41

APPEALS FROM ORIGINAL DECREES

Introductory

41.1. Procedure as to appeals from original decrees is governed by Order 41. It is briefly as follows:—

41.2. The appellant presents a memorandum, accompanied by a copy of the decree appealed against. The Code lays down rules as to the form and contents of this memorandum, and forbids the appellant to urge, without the leave of the Court, any ground of objections not set forth therein. To stop the practice of presenting appeals merely for the purpose of delaying execution, the Code declares that execution of a decree is not stayed by reason only of its having been appealed; but the appellate Court may stay execution when substantial loss may otherwise result to the appellant, and he applies without unreasonable delay and gives security for performing such decree as may ultimately be binding on him. The rules prescribe the procedure after the appellant's memorandum is admitted.

41.3. To afford the parties reasonable time for preparation and for instructing their pleaders (if they choose to employ any), a day is fixed for hearing the appeal, so as to allow the respondent sufficient time to appear and answer, and notice of the day so fixed must be published and served on him. If a party neglects to appear on the day so fixed, the consequence is judgment by default in the case of the appellant, and proceeding *ex parte* in the case of the respondent.

41.4. There are rules as to the judgment to be passed in appeal. In order that the litigants may understand the grounds of the decision, and exercise, if they see fit, the right of second appeal, the Code requires the judgment to state the points for determination, the decision thereupon, the reasons for the decision, and, when the decree appealed against is reversed, the relief to which the appellant is entitled[1].

Order 41, rule 1A (new)—Court fees on Appeal

41.5. One of the most important problems which a litigant has to face in respect of appeal is that of Court fees; and, having regard to its importance, we had, in our Questionnaire,[2] solicited views on the following question:—

> "32. Would you favour the insertion of a provision to the effect that at the time of filing of the appeal, only one-fourth of the prescribed court-fee need be paid, and the remaining may be paid when the appeal is admitted".

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1. This last provision was suggested by Sir Barnes Peacock's ruling in *Bell* v. *Gurudas Roy* 1 Ben. A.C. 50.

2. Question 32.

L/B(N)229MofLJ&CA—20

41.6. Majority of the replies on this question favour, broadly, the suggestion made in the question. After some discussion, we have also come to the same conclusion.

Recommendation

41.7. We, accordingly, recommend insertion of the following rule—

> 1A. *At the time of filling of the appeal, only one fourth of the requisite court-fees need be paid, and the remainder of the court-fees may be paid when the appeal is admitted under rule* 11".

Order 41, rule 3A (new) Refund of Court Fees and Process Fees.

41.8. If an appeal is rejected under any rule or dismissed as barred by limitation or for want of jurisdiction or otherwise than on the merits, then a refund of court-fees should in our view, be allowed. Even now, this can be done under the inherent powers of the court; but a specific provision on the subject would, in our view, be useful.

Recommendation

41.9. Accordingly, we recommend that a new rule should be inserted in Order 41, as follows:

> "3A. *Where an appeal is rejected under any rule contained in this Order or dismissed as barred by limitation or for want of jurisdiction or otherwise than on merits, without notice to the opposite party, the court may allow refund of the court fees and process fees paid in respect of the appeal, to such extent as the court may consider just*".

Order 41, rule 5.

41.10. One of the most important aspects of an appeal is the grant of stay of execution of the decree appealed from. In this context, the question whether a stay order operates immediately or only when it is communicated to the Court (or the officer conducting the sale) was examined at length in the Commission's earlier Report[1]. The Commission, after referring to the conflicting rulings on the subject, expressed the opinion "that ordinarily the order should be effective *immediately,* and a provision to the contrary may be abused by interested parties attempting deliberately to delay transmission of the order from the appellate Court to the lower Courts". At that time, the Commission did not recommend any amendment on the subject.

41.11. Since then, the Gujarat High Court has held[2] that the stay order granted by an appellate Court becomes effective not from the moment of its pronouncement. *but from the moment it is communicated to the Court.* It was held, therefore, that the decree passed by the Court of Small Causes, *before communication* of the stay order issued by the High Court (the communication actually took place the next day), was a proper decree.

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1. 27th Report, page 238, note on Order 41, Rule 5.
2. *Harish Kumar* v. *Chhunnalal*, A.I.R. 1956 Guj. 281.

On the fact, it was also held that the *signing* of the decree by the Judge of the Court of Small Causes *after* the stay order granted by the High Court had been communicated to it, was not a breach of the stay order, as the *judgment* had been pronounced before the stay was communicated.

Recommendation for amendment of Order 41, rule 5

41.12. We have given some thought to the matter and are of the view that stay should be effective from the date of communication, since the opposite view might create practical complications. At the same time, we think that an affidavit by an advocate based on personal knowledge should be acted upon, until a formal order is received, or until orders to the contrary are received from the court granting stay.

We, therefore, recommend that the following Explanation should be added to Order 41, rule 5(1).

"Explanation—*Stay ordered by the court of appeal shall be effective from its communication, but an affidavit by a pleader based on his personal knowledge stating that a stay has been ordered by the court of appeal shall be acted upon by the court of first instance, until a formal order is received, or until orders to the contrary are received from the court of appeal*".

Order 41, rule 11—Judgment in case of dismissal of appeal without notice

41.13. In the earlier Report[1], an amendment was suggested to carry out the recommendation made in the Fourteenth Report[2] with reference to Order 41, rule 11. The object was to provide that even where the appellate court dismisses an appeal without notice to the lower court, it shall deliver a formal judgment, and a decree shall be drawn up.

41.14. We agree that in such cases, a formal judgment would be useful. The above recommendation should, therefore, be carried out, both for the High Court and for the district court *when hearing first appeals*.

41.15. In the case of the High Court *when hearing a second appeal* however, the position should be the reverse. Having regard to the restricted scope of second appeals,[3] reasons should be required to be recorded if the appeal is *admitted*[4].

Order 41 rule 5 (4).

41.16. The question of stay of execution of decrees during the pendency of appeal has engaged our serious attention, and we propose an important change in this respect.

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1. 27th Report, page 238, note on Order 41, Rule 11.

2. 14th Report, Vol. 1, page 388, para 9.

3. See section 100 and recommendation relating thereto.

4. See paragraph 42.2 and 42.3 *infra*.

41.17. An appeal by itself does not operate as a stay of execution. But stay can be granted by the Court passing the decree or by the appellate court, for "sufficient cause".[1] The general direction in this respect in the Code is, that stay shall not be granted, unless the court is satisfied about the existence of three circumstances—

(a) likelihood of substantial loss to the applicant for stay, if the stay is not granted;

(b) application without unreasonable delay;

(c) security by the applicant for the due performance of such decree or order as may be ultimately binding upon him.

Sub-rule (3) of Order 41, rule 5 so provides—But sub-rule (4) of the same rule says—

"(4) *Notwithstanding anything contained in sub-rule* (3), the court may make an *ex parte* order for stay of execution pending the hearing of the application".

41.18. It is this sub-rule which causes trouble in practice. Once an *ex parte* order of stay is obtained, the appellant is not interested in prompt disposal of the appeal. Moreover, it is common experience that often the very object of appealing is to obtain stay, particularly in respect of money decrees, and even if the appellant knows that he has no case, he appeals with the above object.

41.19. Having regard to what is stated above, we are of the view that Order 41, rule 5, sub-rule (4), requires radical modification, so that the remedy provided by it may not be abused. It is against the spirit of sub-rule (4) to grant stay as a matter of course, and it certainly is unjust that stay without the safeguards contemplated by sub-rule (3) should be granted *ex parte*, even pending the hearing of the application.

Recommendation

41.20. We, therefore, recommend that Order 41, rule 5(4), should be revised as follows:—

"(4) *Subject to the provisions of sub-rule* (3), the court may make an *ex parte* order for stay of execution pending the hearing of the application".

Order 41, rule 11 and appeals under section 47

41.21. A recommendation had been made in the 14th Report of the Commission[2] to the effect that in case of appeals against orders in execution of money decrees, a restriction should be placed *on the right of appeal*, by requiring the appellant judgment-debtor to deposit, or at least give security for, the decretal amount, as a condition

1. Order 41, Rules 5(1) and 5(2).

2. 14th Report, Volume 1, page 442, para 21.

precedent to the admission of the appeal. The Report referred to the proposal of the Civil Justice Committee to that effect[1], and recommended the acceptance of the proposal.

41.22. The Civil Justice Committee had stated in its Report that after trial, it was only just that such a protection should be given to the successful decree-holder.

41.23. The Law Commission in its Report[2] on the Code, after noting the above recommendations, expressed the view that such a rigid provision might cause hardship, and did not, therefore, favour an amendment. It also expressed the view that the restriction against stay, embodied in Order 41, rule 5(3) (read with Order 41, rule 8), was enough.

41.24. We have considered the matter at length, and have come to the conclusion that a provision emphasising the need for demanding security in such cases would prove to be useful. At the same time, we appreciate that a strict or rigid provision may cause hardship in some cases. It appears to us that while the entertaining of the appeal need not be postponed until security is furnished, the apeal should be admitted conditionally, that is to say, if security is not furnished within the time fixed by the appellate court, then the appeal should be liable to be rejected.

Recommendation

41.25. Accordingly, we recommend the addition of the following sub-rule to Order 41, rule 11:—

> "(4) *Where an appeal is admitted under this rule against a determination of any such question as is referred in section 47, and the question relates to the execution, discharge or satisfaction of a decree for the payment of money, and the appeal is by the judgment-debtor, the admission of the appeal shall be conditional on the appellant furnishing security for the due performance of such decree or order as may ultimately be binding upon him; and if the appellant does not furnish such security within such time as may be fixed by the Court, the appeal shall* be rejected."

41.25A. As to dismissal of appeal without notice, we have already referred[3] to the earlier recommendation.

Order 41, rule 12A (New)—Admission of appeal restricted to certain grounds.

41.26. On the question as to whether appeals (particularly, second appeals) can be admitted on certain grounds only, there has been some discussion.

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1. Civil Justice Committee Report, (1925) page 401.

2. 27th Report, page 30, para 68.

3. Para 41.13, *supra*.

41.27. In its Report[1], one of the previous Commissions, stating that there was a conflict on the subject, observed that this difficulty could be met by an amendment of the law. It recommended the insertion of a statutory requirement providing that the judge admitting the appeal should state the point or points of law which arise for consideration in the second appeal, to ensure a stricter and better security at the stage of admission.

41.28. In its Report on the Code, however, a later Commission,[2] which considered this recommendation, came to the conclusion that the power of the appellate Court should not be so confined.

41.29. We have examined the matter at some length; and as we take a different view in this matter, we propose to discuss the position in some detail.

41.30. An examination of judicial decisions reveals that the trend of rulings is to the effect that a Court cannot restrict the grounds on which an appeal is to be heard finally,[3] though the appellant can give up some of the grounds[4] at the hearing.

41.31. In this connection, attention may be invited to the observations of Asutoosh Mookherjee J. in a Calcutta case,[5] where he stated as follows:—

> "But in so far as the objection taken that the Appellants should be restricted to the one ground for the consideration of which the appeals were admitted, we are of opinion that it ought not to prevail. It is not competent to a Court of Appeal under Rule, 12 of Order 41 of the Code to restrict the ground or grounds upon which the appeal admitted under the rule is to be heard finally; in other words, the restrictive order of this Court made at the time when the cases were heard under Rule 11 of Order 41 was *ultra vires*. Rule 11 provides that 'the Appellate Court after sending for the record, if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice of the appeal to the court against whose decree the appeal is made and without serving notice on the respondent or his pleader'. Rule 12 then provides that "Unless the appellate court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal". It is worthy of note that a day is to be fixed for hearing the appeal, that is to say, the whole appeal and *not any selected grounds out of those specified in the memorandum of appeal*. Consequentally, all the grounds taken in the memo of appeal by the appellants are open for consideration at the final hearing, and we now proceed to examine them."

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1. 14th Report, Vol. I, page 392, para 16 second sub-paragraph.
2. 27th Report, page 123, Note on section 100, para 2.
3. *Krishnaji* v. *Madhusa*, A.I.R. 1934 Bom. 207, 211 (F.B.)
   (b) *Sukhdeo* v. *Gendalal*, A.I.R. 1954 M. P. 24, 25 (Reviews cases).
   (c) (1967) 1 Mys. L. J. 1, Cited in the yearly Digest.
4. *Rekha Thakur*, v. *Ramnavel an* A.I.R. 1936, Pat. 7, 8, 9.
5. *Lukki Narain Serowji* v. *Sri Ram Chandra* (1911) 15 Cal. W.N. 921, 922 (D.B.)

41.32. These observations seem to have been followed in later decisions of that High Court as well as of other High Courts; and there is, therefore, no conflict on the question whether an appeal can be admitted *on some grounds only*.

41.33. The conflict really is on a slightly different matter, namely, whether the admission of an appeal *in part* is illegal. The Bombay view[1] on the subject is, that if the subject-matter is severable, this can be done. The Madras view is, that it cannot be done.[2]

41.34. We think that on the first point[3]—namely, the admission of appeal restricted to certain grounds,—the law should be altered, in the interest of simplification of procedure and avoidance of delay. On the second point[4], namely,—the admission of an appeal in part where severable,—the law should be clarified.

41.35. The alteration on the first point, and the clarification on the second point, should be based on the same approach, namely, the court should have power to restrict the admission to certain grounds only or to a part only (as the case may be).

Recommendation

41.36. Accordingly, we recommend that the following rule should be added in Order 41.

> "12A. *The Court may, at the time of admission of the appeal, direct that the appeal is admitted in part only or on specific grounds only, and where such an order is passed, it shall not be open to the appellant to argue the appeal on any other part or to urge any other ground of appeal, as the case may be, without the leave of the Court.*"

Order 41, rule 14, and dispensing with service on respondent against whom case was ex parte.

41.37. With reference to service of the memorandum of appeal, one point was considered in the earlier Report[5]. A recommendation had been made in the Forteenth Report[6] to the effect, that in the case of parties who had not appeared in the court below, and who had not filed any address for service, a provision may be made to dispense with service of the notice of appeal. A somewhat similar recommendation had been made by the Civil Justice Committee[7] also, which observed that the necessity of serving each of those respondents against whom the suit had proceeded *ex parte*, with notice of appeal or of any interlocutory motion, led to an unnecessary delay. It stated, that this was more specially the case where the appellant had obtained an interim stay of execution, as it would be easy for an *ex parte* defendant to collude with the

1. *Krishnaji* v. *Madhusa*, A. I.R. 1934 Bom. 207 (F.B.)
2. *Eswariah* v. *Rameshwaraya*, A.I.R. 1940 Mad. 483.
3. Paragraph 41·30, *supra*.
4. Paragraph 41·33, *supra*.
5. 27th Report, page 239, Note on Order 41, rule 14.
6. 14th Report, Vol. I, Page 393, para 21.
7. Civil Justice Committee (1925) Report, page 117, para 27, second sub-para.

defendant-appellant and evade service of notice. Amendments on these lines, too, have been made by the High Courts of Allahabad, Andhra Pradesh, Assam, Calcutta, Madhya Pradesh, Madras, Mysore and Punjab, in Order 41, rule 14, and by the High Courts of Orissa and Patna by inserting Order 41, rule 14A.

41.38. The earlier Commission noted the above position, but felt that it was unnecessary to carry out the suggested change, as not much delay is caused by the necessity of service of notice of appeal.

41.39. It appears to us, however, that such a provision would be useful, as saving delay.

Recommendation

41.40. We, therefore, recommend that in Order 41, Rule 14, the following sub-rules should be added—

"(3) *The notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal.*

(4) *Notwithstanding anything to the contrary contained in sub-rule* (1), *it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for service either "in the trial court or, in the case of a second appeal, in the lower appellate Court, or has appeared in the appeal.*

(5) *Nothing in sub-rule* (4) *shall bar the respondent referred to in the appeal and defending it.*"

Order 41, rule 17 and disposal on merits in absence of the appellant

41.41. When an appellate Court does not dismiss an appeal summarily, it should fix a date for the hearing of the appeal and notice of the date should be affixed in the appellate Court house and should be served on the respondent or on his pleader, under Order 41, rules 12 and 14. The procedure thereafter is provided in Order 41, rule 17, which lays down that "Where on the day fixed, or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed." In this rule, the word 'may' shows that, apart from dismissal of the appeal for default, the court can pass other orders. One such order could be adjournment of the appeal.

41.42. But there is a conflict of decisions on the question whether, if the appellant does not appear, the appellate court can, under this rule, *dispose of the appeal on the merits*. The Allahabad view[1] is that a decision on the merits is permissible.

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1. *Gajram* v. *Ram Rati*, A.I.R. 1965 All. 547, 549 (Desai and Pathak J. J.)

41.43. Answering the query—how an appeal can be disposed of on merits without the appellant's or his counsel being heard, the Court observed "I see no anomaly or even difficulty in this. The appellate court can read the judgment appealed from and the memorandum of appeal and hear the respondent or his counsel and then can certainly decide onmerits whether the appeal should be dismissed or not. If the appeal is a good one and the respondent or his counsel is unable to show any cause for its being dismissed the appellate court can certainly allow it on merits in spite of the appellant's absence. Similarly, if it finds that the grounds of appeal have no substance, it can dismiss it on merits. Orally hearing a party or his pleader is not an essential ingredient of a decision on merits and the appeal in the instant case could have been dismissed by the learned Additional Judge on merits in spite of the appellants' absence."

41.44. A later Allahabad case[1] takes the same view.

41.45. As to Order 41, rule 30, the Allahabad High Court[2] deals with the position thus:

> "Order XLI R.30 no doubt makes the hearing of the parties or their pleaders a condition precedent to the pronouncing of judgment, but this condition has been laid down for the benefit of the parties and in their own interest, and its fulfilment is, by its very nature, dependent upon their volition and co-operation. The parties cannot, therefore, by refusing to avail of the benefit and by withholding their co-operation incapacitate the Court for using that power to the exercise of which the condition has been attached. If the opportunity for the fulfilment of the condition has been allowed, although it has not been availed of, the condition will be deemed to have been complied with and the Court will acquire the competence to exercise the power conferred upon it as if the condition had been fulfiled. If this were not so, the parties would, by their own omission to avail of the opportunity granted to them, be able to create an insurmountable impediment in what the Court has been authorised to do by the statute and render the power given to it totally ineffective and nugatory."

41.46. Other High Courts, however, take a different view. The most important case in support of the view that the court has no power to dismiss an appeal on the merits (if the appellant does not appear at the hearing), is a Madras one[3]. Mostly, the line of reasoning adopted in the Madras case has been accepted in the decision of other High Courts.

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1. *Babu Ram* v. *Bhagwan Dass*, A.I.R. 1966, All. 1. (F.B.)
2. *Babu Ram* v. *Bhagwan Dass*, A.I.R. 1966 All. 1. 10, para 45.
3. *Musalirakth Muhamad* v. *Manaviakrama*, A.I.R. 1923 Mad. 13.

41.47. The facts of the Madras case were as follows:—

> On the date of hearing of an appeal before the Subordinate Judge, the appellant was not present, but a *Vakil* holding a *Vakalatnama* from him was present, and applied for an adjournment. The adjournment was refused, and the *vakil* thereupon informed the court that as he had no instructions or papers, he could not argue the appeal; he took no further part in the proceedings.

The Subordinate Judge, instead of dismissing the appeal for default, considered the evidence bearing on the appellant's claim with reference to the memorandum of appeal, and dismissed the appeal on the merits with costs.

41.48. It was contended before the High Court (on behalf of the appellant) that it was not competent for the Subordinate Judge to inquire into the merits of the case in the absence of the appellant and his pleader, and that he could deal with the appeal only in the manner provided by Order 41, Rule 17(1). This contention was accepted by the Divisional Bench which heard the case, and the judgment of the Subordinate Judge was held to be without jurisdiction. Both the Judges constituting the Bench referred to the change from the words, 'shall be dismissed' in section 556 of the Old Code[1], to the words "the Court may make an order that the appeal be dismissed" in Order 41, rule 17(1) of the present Code, but they were of the view that in spite of the change, the Subordinate Judge had no power to go into the merits of the appeal. Under the previous Code, the Court had considered it to be undesirable[2] to dismiss the appeal on the merits.

41.49. According to most High Courts, dismissal on the merits is illegal[3], when the appellant is not present. In a Punjab[4] case it was held that the remedy is an application for restoration under Order 41, rule 19.

Amendment desirable to remove conflict

41.50. Having regard to the conflict of decisions, it is desirable to make the wording of rule 17 more explicit. Theoretically, a dismissal on merits should be permissible.

41.51. No doubt, the following passage from a Supreme Court case[5](in reference to Order 41, Rule 30) may lend support to the Allahabad view.

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1. Section 556, C.P.C. 1882.
2. *Mohesh Chunder Bose* v. *Thakur Das*, 20 Suth. W.R. 425.
3. (*a*) *Taher Sheikh* v. *Otaruddin Howaldar*, A.I.R. 1929 Cal. 475.
   (*b*) *Mosafir Whoton* v. *Mt. Bademi*, A.I.R. 1963 Pat. 1 (overruling A.I.R. 1921 Pat 325).
   (*c*) *Digendre Chandra* v. *Radha Bellai*, A.I.R. 1953 Assam. 191.
   (*d*) (*1968*) Ardh. W.R. 356, cited in the Yearly Digest.
4. *Kundha Singh* v. *Punjab State*, A.I.R. 1962 Punj. 82 (P. C. Pandit J.)
5. *Sukhpal Singh* v. *Kalyan Singh* A.I.R. 1963 S.C. 146; (1963) 2 SCR 733.

"Where the appellant and his pleader are not prepared to address the Court, there is no hearing and, therefore, nothing is shown to the Appellate Court as to why it should interfere with the decision of the Court below. The burden of proof is on an appellant to show that the decision which he appeals from was wrong and where he does not address the Court at all, it appears to us that there is no point raised for determination and therefore, it is not necessary to give a decision on any point or the reasons for the decision. It is sufficient for the Court to pass an order of dismissal for default. Such an order does not necessarily mean that the appeal is dismissed for *default of appearance*. In such circumstances, the order means that the appeal is dismissed for default of proof".

However, these observations should not be taken as necessarily implying that a disposal on the merits is necessary where the *appellant is absent*. It is not *necessary* for the Court to give a decision on merits, though it is open to it to do so.

Recommendation

41.52. Moreover, in practice a decision on merits in the appellant's absence, is rarely given, and therefore, *the better course would be to preclude a decision on merits in such cases*. We are of the view that the Code should be amended on the above lines.

Accordingly, we recommend that the following Explanation should be added in Order 41, rule 17(1):—

"Explanation—*Nothing in this sub-rule shall be construed as empowering the court to dismiss the appeal on the merits*".

Order 41, rule 18

41.52A. A point concerning Order 41, rule 18 was discussed in the earlier Report[1] as follows:—

"The Fourteenth Report recommended the adoption by High Courts of some local Amendment[2], whereunder, if on the day of hearing of the appeal, it is found that the notice for the respondent has not been served and the appellant fails to deposit the expenses of serving the notice again, the court has power to order that the appeal be rejected. This is a matter of detail which may be left to the High Courts."

41.52B. We are, however, of the view that it is desirable to adopt the amendment suggested in the 14th Report and insert it in the Code. Such a provision will, to some extent, expedite disposal of appeals.

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1. 27th Report, page 239, Note on Order 41, rule 18.

2. 14th Report, Volume I, page 293, para 22.

Recommendation

41.53. Accordingly, we recommend that Order 41, rule 18, should be revised as follows:—

"18. Where, on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, or, *if the notice is returned unserved, to deposit within any subsequent period fixed, the sum required to defray the costs of any further attempt to serve the notice,* the court may make an order that the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing."

Order 41, rule 18 and refund of process fees.

41.54. A point relevant to Order 41, rule 18 and refund of fees may now be considered.

Refund of process fees where appeal dismissed without notice.

41.55. A recommendation had been made in the Forteenth Report[1-2] for an amendment allowing the refund of process fees where an appeal is dismissed without notice to the other party. The Commission, however, in its Report on the Code,[3] felt, that this should be left to be dealt with by the practice of the Courts. No amendment was, therefore, suggested.

41.56. We agree with the view taken in the Report on the Code, but for a different reason. As process fees are paid after admission of the appeal, it is not necessary to provide for refund when the appeal is dismissed summarily.

41.57. For the above reason, we recommend no change in the existing rule.

Order 41, rule 20

41.58. As to Order 41, rule 20, the earlier Report[4] on the Code discussed the controversy as to whether a respondent can be added in an appeal after the period of limitation for appeal had expired. The decisions on the subject will be found discussed in the undermentioned cases[5-6].

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1. 14th Report, Vol. 1, page 393, para 22.
2. See also Order 41A, rule 2, inserted in Madras.
3. 27th Report, page 240, note on Order 41, rule 18 and refund.
4. 27th Report, page 240, Note on Order 41, rule 20.
5. *P. Ananda* v. *M. Acharyulu*, A.I.R. 1958, A.P. 43 (F.B.)
6. *Notified Area Committee, Buria* v. *Govind Ram* A.I.R. 1959 Pun. 277, 278 (F.B.)

Some of these decisions[1] proceed on the inherent power of the court to add the respondent in such cases.

41.59. In a recent case,[2] the Andhra Pradesh High Court held that Order 41, rule 20, is concerned with a party to the suit who was not made a party to the appeal though interested in the result of the appeal. The appellate court can, then, in exercise of its discretion direct that he be made a respondent. This provision is only limited to certain contingencies. It was held:

> ".....that apart from the provisions of Order 41, rule 20, C.P.C., the appellate court has inherent powers to permit parties to be added to appeals in suitable cases and the language of rule 20 of Order 41 is not exclusive or exhaustive so as to deprive the appellate court of the inherent powers in this behalf. When once it is clear that Rule 20 of Order 41 is not exhaustive of the powers of the appellate court for impleading or adding parties to the appeal, certainly powers under Order 1, rule 10, C.P.C. read with section 107(2) C.P.C. and under other appropriate provisions including section 151 C.P.C. in proper cases can be availed of even in appeal,... .....It is obvious that a person who was not *eo nomine* a party to the such also can be added as a party to the appeal under the provisions of the Code".

41.60. In this case it was, therefore, held that the court below did not err in permitting the petitioner to be made a party to the appeal who was a settlee *pendents lite* of one of the items of suit property brought by the plaintiff and was a person interested in the results thereof.

41.61. In one Kerala case,[3] the question raised was whether a party could be impleaded in the Civil Revision Petition after the expiry of the period prescribed for filing the petition. The Kerala High Court held that though the law of limitation does not apply to an addition of parties by the court of appeal under Order 41, rule 20 of the Code, yet the power under that provision is discretionary, and should not be exercised in all cases, for instance, where the party is extremely negligent. But if the court finds it necessary to bring a party upon the record of an appeal, in order to do justice between the parties, the court has ample power to do so *irrespective of limitation, even in second appeal*. Even apart from the provisions of Order 41, rule 20, the High Court has power, under section 151 of the Code, to add a respondent to the appeal, even after the expiry of the period of limitation for the appeal against him, if in the circumstances of the case before it, it thinks fit to do so. The conditions to be satisfied before a party is impleaded under Order 41, rule 20 are in the first place,

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1. For example :

   (*a*) *Munshi Ram* v. *Abdul Aziz*, A.I.R. 1943 Lah. 252.

   (*b*) *Pritam Ram* v. *Dhani Ram*, A.I.R. 1924 Pat. 1773.

2. *Subbarayudu* v. *Brahmanandan*, A.I.R. 1970 A.P. 211, 215 (D.B.), following *Notified Area Committee, Buria* v. *Gobind Ram*, A.I.R. 1959 Punj. 277 (F.B.)

3. *Rugmani* v. *Chellappa Routher*, (1969) Ker. L.T. 789.

that the person must have been a party to the suit but not made party in the appeal, and secondly, that the person added is one interested in the result of the appeal. Once the impleadment is found necessary in the interests of justice, the question of limitation need not deter the court, because the necessity for the impleadment strikes the Court *only at the* time of hearing, and by that time, in most cases, the period allowed for filing the appeal or revision will be over.

41.62. In the circumstances, the prayer for impleadment was allowed.

41.63. In one Punjab case,[1] it was held that where a memorandum of appeal does not mention the name of a contesting party, and the mistake creeps in on account of the erroneous certified copies having been supplied by the court officials to the appellant, he should not be made to suffer on account of the mistake having been committed by some officer of the court in the discharge of his duties. It is quite apparent that the appellant or his counsel did not notice that error at the time when the appeal was filed, and the names of the parties in the memorandum of appeal had been mechanically copied out from those mentioned in the heading of the judgment of the trial court. The mistake on the part of the appellant or his counsel is, therefore, bona fide and honest, and the appellate court has ample power to allow the *mistake to be rectified and the party added, even after the expiry of period of limitation for appeal.*

41.64. In one Patna case[2], the appeal was filed by an insolvent in time against one of the creditors. When the other two creditors were made parties to the appeal, the period of limitation under section 75 (4) of the Provincial Insolvency Act had expired. It was held that under provisions of Order 41, rule 20, even at the time of hearing of appeal, the court could make persons interested in the result of the appeal party to the appeal, and the *question of limitation would not arise in such cases.*

41.65. In an Allahabad case[3] under the U.P. Consolidation of Holdings Act, 1954 (Section 48), failure to implead necessary parties to appeal was held to be fatal. It was held that the court was not bound to have necessary parties brought on record.

41.66. It is obvious that the postion s, to some extent, nebulous.[4] The previous Commission did examine it and stated that the correct view is, that after the period of limitation has expired against a party he ceases to be "interested in the appeal" within the meaning of rule 20, as interpreted by the Privy Council.[5]

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1. *Puran Singh* v. *Gehal Singh* I.L.R. (1969), 2 Punj. 369, 372, following *Notified Area Committee, Buria,* v. *Gobind Ram,* A.I.R. 1959 Punj. 277 (F.B.)

2. *Rameshwar Lal Agarwala* v. *Kuli Main* (1969) Labour I.C. 790, 792 (Pat.) quoted in the Yearly Digest (1969), Column. 470.

3. 1966 All. W.R. (H. C.) 138—Quoted in the Yearly Digest, (1968) page. 473.

4. 27th Report, page 240.

5. *Chelalingam* v. *Seethai,* I.L.R. 6 Rangoon 29; A.I.R. 1927 P. C. 252.

41.67. The previous Commission also noted that the question whether such a party can be impleaded under the inherent power of the Court, or whether a separate appeal can be filed against that respondent after obtaining leave of the Court under section 5, Limitation Act were (in the view of the Commission) different matters. The previous Commission considered it unnecessary to make any amendment to cover such cases.

41.68. We are, however, of the view that it would be better if the position as regards rule 20 is clarified, and we think that the restrictive view, namely, that a respondent cannot be added after expiry of the period of limitation, should be expressly enacted. At the same time the court should have powers to grant requests for impleading a party after expiry of limitation for reasons to be recorded.

Recommendation

41.69. Accordingly, we recommend that the following sub-rule should be added[1] in Order 41, rule 20—

> "(2) *No respondent shall be added under this rule after the expiry of the period of limitation for appeal, unless the court, for reasons to be recorded, allows that to be done, on such terms as to costs, as it thinks fit*".

Order 41, rule 22

41.70. Order 41, rule 22 gives two distinct rights to the respondent in the appeal. The first is the right of upholding the decree of the court of first instance on any *of the grounds on which that court decided against him*, and, in that case, no notice or memorandum required by the later provisions of the rule is necessary. The second right is that of taking any objection, called "cross-objection"—to the decree which the respondent might have taken by way of appeal.

41.71. The distinction between the two, though fine, is appreciable. In the first case, the respondent *supports* the decree. In the second case, he *attacks*[2] it. The first requires no formal document. The second does, and court-fees may have to be paid.

41.72. There is a third remedy—cross-appeal. But this is outside the rule.

41.73. The rationale behind the two remedies has been thus explained[3]—

> "When an appeal is preferred, the appellant is, generally speaking, seeking to get rid of an adverse decision, adverse to him wholly or in part, which means that the opposite party, had succeeded wholly or in part. That success might be the result of a decision in his favour on one or some only of several grounds urged by him; the Court negativing the other or others. As regards these latter grounds, he cannot and need not appeal, however, erroneous the decision, because there is no right of appeal

1. Existing Order 41, rule 20, to be renumbered as Order 41, rule 20, sub-rule (1)
2. Para 41.73, *infra*.
3. *Venkata Rao, Murthi* A.I.R. 1943 Mad. 698-700.

to a party, who has succeeded. But when the opposite party prefers on appeal, he may find himself in a difficult situation, he is obliged to remain content with supporting the decision on the only point or points on which he had succeeded without resorting to the others on which he had failed. For instance, it may turn out on examination that some or all of these other grounds are good, while those accepted by the lower Court are unsubstantial..... *It is to provide for such a contingency, and to avoid injustice to the respondent in such a case, that the rule has been enacted giving him liberty to support the decree if necessary by relying on any of the grounds decided against him in the Court below.*[1] The use of the word 'support' makes it plain that the right given is limited to the sustaining of the decree in so far as it is in his favour, and does not extend beyond so as to enable him to obtain an alteration, giving him a further advantage. This, he can secure only by an appeal or cross objection. Where a suit is wholly dismissed or wholly decreed, it is open to the respondent to support the decision, by re-agitating ground negatived by the lower Court. This is simple enough and the language of the rule is easily understood and applied. Where, however, the suit is decreed in part and dismissed as to the rest, we have in reality what may be described as a double or composite decree. There is a decree for the plaintiff in respect of the part decreed, and a decree for the defendant in respect of the part dismissed. If the plaintiff appeals, he does so for the purpose of displacing the decree in so far as it is in favour of defendant. If the defendant appeals, he again does so for the purpose of getting rid of the decree in so far as it has gone in plaintiff's favour. In either case the party who features as the respondent has a decree in his favour which he is allowed to support on any of the grounds decided against him by the Court which passed the decree. When he does this and no more, he is only supporting and not attacking his decree. The principle can be appreciated by taking a simple illustration.

Let us take a case where a plaintiff sues for a debt of, say Rs. 1,000, and the suit is contested by the defendant on two grounds, (i) discharge, and (ii) limitation. Let us assume that the trial Court dismisses the suit on the ground of limitation, while negativing the plea of discharge. The plaintiff in an appeal from that decree may be able to satisfy the appellate Court that the decision on the point of limitation is incorrect. In such an eventuality, Order 41, rule 22 enables the defendant to sustain the decree by making good the plea of discharge found against him by the Court below."

41.74. and 41.75. In a Punjab case[2] Dua, C. J. has held—

"Rule 22 of Order 41, Civil Procedure Code is apparently a special provision permitting a respondent, who has not appealed from a decree, to object to the said decree in the

1. Emphasis supplied.

2. *Krishna Gopal*, v. *Haji Mohd., Muslim*, A.I.R. 1969 Delhi 126, 129.

> opposite party's appeal as if he had himself preferred a separate appeal ..... where a decree is partly against one suitor and partly against another, one of such parties, being satisfied with his partial success, may not prefer an appeal within limitation, but on the other party appealing may like to re-open the adverse part of the decree. In the larger interest of the cause of justice, it is in such circumstances that the party satisfied with partial success is granted another opportunity of challenging the part of the decree against him upon his opponent preferring an appeal, of which notice is served on him. In order to avail of this right, he has to take cross-objections within one month from the date of service on him of notice of the hearing of his opponent's appeal."

41.76. In this case, there was a decree against some defendants. One defendant's appeal was dismissed. There was an appeal by the others. The court left open the question whether the defendant whose appeal was dismissed can assail the decree and re-open the controversy in the garb of cross-objections.

41.77. Further, it was held that cross-objections are to be heard when the appeal is heard; and as a general rule, the court is expected to dispose of both the appeals and the cross-objections together by one judgment, and the decision should be incorporated in one decree. By means of a deeming fiction, the cross-objections are, for certain purposes, treated as a memorandum of appeal, but they are neither registered as an appeal nor are they clothed with an independent status as such. They do not constitute a separate independent cause or writ, but largely draw their source of survival from the competence of the appeal in which they are taken; and the exceptions to this dependence are provided in sub-rule (4) of Rule 22.

41.78. In the present case, it was held that in the absence of any binding precedent or any clear provision of law, it would not be advisable to remit the case to the lower appellate court for adjudicating on the cross-objections on the merits after the final disposal of the appeal, even if otherwise such a course were legally permissible and called for.

41.79. In a Calcutta case,[1] there was an appeal, by the plaintiff whose suit for recovery of damages against the defendant municipality to the extent of Rs. 1,000 or more succeeded in part (for Rs. 842.62), in the trial court, but failed wholly in the first court of appeal. On one of the points taken by plaintiff in the Calcutta High Court (negligence of the municipality), the defendant had filed a cross-objection.

41.80. The High Court held, that where the particular issue of negligence is found against the defendant municipality, and at the same time the decree dismissing the whole suit is completely in its favour, a cross-objection is hardly called for. The defendant municipality, now the respondent, can support the decree on the ground

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1. *Nrisingha Prasad v. Bhadreswar Municipality*, (1969) 73 Cal. W. N. 88, 90.

that the issue of negligence should have been decided in its favour. That is what Order 41, Rule 22 sub-rule (1) of the Civil Procedure Code provides for.[1] So the cross-objection, wholly unnecessary one, may be left alone.

41.81. So much as regards the working of rule 22. We have referred above to the two limbs of the rule which give two remedies.[2] Now, there is a small verbal point regarding the first remedy. The relevant portion of the rule says that the respondent may "support the decree on any of the grounds decided against him in the court below". These words, at first sight, appear to be strange, because a person cannot *support* a decree on a ground decided *against* him. What is meant is. that he may support it by asserting that the ground decided against him should have been decided in his favour. It is desirable to make this clear.

Recommendation

41.82. We recommend, therefore, that Order 41, rule 22, sub-rule (1), should be revised, so as to read as follows:—

> "(1) Any respondent, though he may not have appealed from any part of the decree, may,—
>
> (a) not only support of the decree by *stating that the decision in respect of any ground decided against him in the court below ought to have been in his favour;* but also
>
> (b) take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time, as the Appellate Court may see fit to allow."

41.83. There is also another point relevant to Order 41, Rule 22. We are separately recommending[3] that a Court must decide all issues, even if the case can be disposed of on a preliminary point, except where a question of jurisdiction or bar to suit is involved. This renders desirable a change in the provisions as to cross objection. Where a decision of the trial court on a preliminary issue is favourable to the respondent, and the other issues are decided against him, the respondent should, in view of the recommendation referred to be empowered to file cross-objection. Strictly speaking, this follows from the change proposed in the section relating to appeal[4] read with the words "any cross-objection which he could have taken by way of appeal" which appear in Order 41, rule 22. But an express provision would be desirable.

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1. Following *Lala Gauri Shankar Lal* vs. *Janki Pershad* (1890) I.L.R. 17 Cal. 809 (P. C.), a case under section 561 of the 1882 Code, corresponding to Order 41, Rule 22.

2. Paragraph 41.70, *supra*.

3. See discussion relating to section 96, and Order 14, rule 2.

4. Section 96.

Recommendation

41.84. We recommend, therefore, that the following Explanation should be inserted below Order 41, rule 22(1):—

> "Explanation—*A respondent aggrieved by a finding of a court which is incorporated in a decree may, under this rule, file cross-objection in respect of the decree in so far as it relates to that finding, notwithstanding that, by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, wholly or in part, is in favour of that respondent.*"

Order 41, rule 22—(Cross-objections between respondents)

41.85. With reference to Order 41, rule 22, the following point was considered in the earlier Report:[1]

> "A suggestion has been made to the effect that a respondent *should* not be allowed to file a cross-objection in which the appellant is not interested. While that would be the ordinary rule,[2] a rigid provision may not be desirable, because there may be cases where a different rule might have to be applied. The suggestion has not, therefore, been carried out."

41. 86. We examined the matter again, but have come to the same conclusion as was recorded in the earlier Report. Cross-objections as between respondent and respondent are not unknown, and we do not think it proper to change the existing position.

Order 41, rule 23

41.87. Order 41, rule 23, provides for remand where the lower court has decided the suit on a preliminary issue. We are recommending separately[3] that a Court may decide all issues except those of jurisdiction or bar of suit. The amendment proposed by us leaves the matter to the court's discretion. Hence no consequential changes will be required in Order 41, rule 23.

Order 41, rule 23A (New)

41.88. and 41.89. In the earlier Report[4] on the Code insertion of the following new rule was recommended:

> "23A. Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

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1. 27th Report, page 240, Note on Order 41, rule 22.
2. Foot notes in the 27th Report citing case law have been ommitted here.
3. See discussion as to Order 14, rule 2.
4. 27th Report, page 242, and draft rule at page 82.

L/(B(D)229MofL,J.&C.A.—21(a)

Recommendation

41.90. We agree, accordingly, we recommend that rule 23A should be inserted as follows:

> "23.A. *Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.*"

Order 41, rule 27

41.91. Order 41, rule 27 relates to taking of additional evidence in the Appellate Court. In the earlier Report an amendment had been recommended in this rule in implementation of the recommendation made in the 14th Report.[2] The object was to provide that additional evidence may be allowed by the appellate court, if the evidence could not be produced in the lower court because it was not within the knowledge, etc., of the party seeking to produce it now.

41.92. We have examined the matter, and we entirely agree with the recommendation.

Order 41, rule 31, Contents of Appellate Judgment

41.93. At present, under Order 41, rule 31, the judgment of a Court of first appeal or second appeal has to contain the points for determination, the decision thereon, and the reasons for the decision, and where the decree under appeal is reversed or varied, the relief to which the appellant is entitled. It was suggested to us that while these requirements are obviously necessary in the case of a Court of first instance, their literal application to Courts of appeal may not be necessary in every case. If the court of appeal has nothing new to say on any of the points decided by the Court of first instance, repetition could be usefully avoided. In other words, the judgment of a Court of appeal could be in continuation to that of the trial court, since it is to be in support of the same. We considered a suggestion was to make provisions on the following lines:

(a) When the arguments advanced before the Court of appeal are the same as were noticed by the Court below whose reasons for accepting or rejecting them appear to the Court of appeal to be sound, the judgment of the Court of appeal need only say that much, and may merely add that no fresh argument has been urged. In such cases, the appeal would be dismissed without any discussion on the points involved.

(b) Where the same arguments as were urged before the trial Court are repeated before the Court of appeal, but the Court of appeal comes to a different conclusion on a particular point or points, the judgment of the Court of appeal could start straightway with a discussion of those particular point or points, followed by its decision thereon and the effect of that decision.

1. 27th Report, page 241, Note on Order 41, rule 27.
2. 14th Report, Vol. 1, page 405, para 45, second sub-para.

Where, before the Court of appeal, a new argument is advanced in support of, or against, a finding of the court below, or an altogether new point is urged, the judgment of the court of appeal could start straightaway with a discussion of the particular point or points, its decision thereon, and the effect of that decision.

41.94. We have considered the suggestion, but are not inclined to recommend any amendment. The present rule is sufficiently elastic. To enact provisions on the lines suggested would make the rule cumbersome, without making any difference in practice.

Order 41, Rule 33

41.95. Under Order 41, rule 33, the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and *may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.*[1]

The illustration to the section is as follows:—

> "A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y."

We are of the view that this rule should be amended to cover cross suits and also a suit in which two decrees are passed. This is desirable in order to remove the difficulty caused by the uncertainty[2] in this behalf as regards *res judicata.*

Recommendation

41.96. Accordingly, we recommend that the main paragraph of the rule should be revised as follows:—

> "33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power—
>
> (a) may be exercised by the court notwithstanding that the appeal is as to part only of the decree, and
>
> (b) may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or *objection,* and
>
> (c) *may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.*

1. The proviso to the rule is not material, for the present purpose.
2. See discussion relating to section 11.

CHAPTER 42

APPEALS FROM APPELLATE DECREES

Introductory

42.1. Procedure as to appeals from appellate decrees is dealt with in Order 42. In general the rules as to appellate procedure in first appeals apply to subsequent appeals.

Order 42, rule 2 (New)

42.2. We have already made a recommendation,[1] that when a second appeal is admitted, reasons must be given, but that no reasons need be given for not admitting it.

Recommendation

42.3. Accordingly, we recommend that the following rule should be inserted in Order 42—

> "2(1) *When an appeal from an appellate decree is admitted, the Court admitting it shall record its reasons for doing so.*
>
> (2) *It shall not be necessary for the Court to record reasons for not admitting an appeal from an appellate decree.*"

1. See discussion under Order 41, rule 11, paragraph 41.15, *supra*.

CHAPTER 43

APPEALS FROM ORDERS

Introductory

43.1. Apart from appeals from original and appellate decrees which have been dealt with in separate Orders, the Code allows appeals from certain orders enumerated in section 104, and Order 43, rule 1.

Order 43, rule 1—Analysis of orders listed in Order 43, rule 1

43.2. Order 43, rule 1, lists the orders that are appealable.

For a proper consideration of the provisions of this rule, it would be convenient if the orders enumerated are grouped under a few classes. One possible classification would be between orders which are directly or indirectly in the nature of final adjudications, and orders which are merely interlocutory.

43.3. Again, while considering the finality of orders in this context, one could keep several aspects separate.

There are—

(i) orders which are final, in the sense that they put an end to the list, but are not preceded or accompanied by decrees that are themselves separately appealable;

(ii) orders which are final inasmuch as they put an end to the list, but are preceded or accompanied by decrees that are themselves appealable;

(iii) orders which are final in relation to *the particular court;* and

(iv) other orders— which may, for the sake of convenience, be referred to as interlocutory orders; and

(v) originating orders.

43.3A. Accordingly, an attempt is made below to divide the orders enumerated in Order 43, rule 1, into a few classes, on the above basis—

Class (i)

Orders which are final, in the sense that they put an end to the list, but are not preceded or accompanied by decrees that are themselves separately appealable—Clause (c), Clause (f), Clause (k), Clause (l),—(refusal to give leave), Clause (n), Clause (t),—(in part), (Refusing to re-admit), Clause (u), Clause (v).

Class (ii)

Orders which are final inasmuch as they put an end to the list, but are preceded or accompanied by decrees that are appealable—Clause (b), Clause (d), Clause (h), Clause (m), in part—i.e. orders recording a compromise. Clause (t), in part—Refusal to re-hear.

Class (iii)

Orders which are final in relation to the particular court—Clause (a).

Class (iv)

Interlocutory orders—Clause (e), Clause (g), Clause (i), Clause (j), Clause (l)—Order giving leave, Clause (m), in part—Refusal to record a compromise. Clause (o), Clause (p), Clause (q), Clause (r), Clause (s).

Class (v)

Originating Orders—Clause (w).

Our approach

43.4. Our approach in making recommendations for the curtailment of appeals against orders is, broadly speaking, as follows:—

(i) Where the order is accompanied or followed by another final adjudication (usually a decree), which itself is appealable,[1] it is desirable to abolish the appeal against the orders, but at the same time to provide for an opportunity to challenge the order in the appeal against the final adjudication. The principal object of such an approach is to avoid successive appeals which add to the length of the litigation.

(ii) Where the order is not accompanied or followed by any such final adjudication, then obviously the question of avoiding successive appeals does not arise, but abolition or modification of the right of appeal against that order should be considered on other relevant considerations, including, in particular—(1) whether the order, if allowed to stand, would cause such hardship to the aggrieved party as to justify a right of appeal, and (2) whether any other remedy would be equally adequate.

We shall now indicate the changes needed in the various clauses of Order 43, rule 1.

Order 43, rule 1(a)

43.5. Order 43, rule 1(a), provides for appeal against an order under Order 7, rule 10, where a plaint is returned to be presented to the proper court. The only change which is necessary in this rule is, that the right of appeal under this rule should be subject to the new restriction which we propose[2] on the right in certain cases.

1. See para 43.3A, *supra*.
2. See Order 7, rule 10A (New)

Recommendation

43.6. Accordingly, we recommend that in Order 43, rule 1(a), the words *"subject to the provisions of Order 7, rule 10A"*, should be added at the end.

Order 43, rule 1(b)

43.7. Rule 1(b) provides appeal against an order under Order 8, rule 10—where the party fails to present a written statement within the time fixed by the court, and the court pronounces judgment against him.

43.8. We are of the view that an appeal against an order under Order 8, rule 10 pronouncing judgment against a party, should be abolished. The idea is to reduce the present two successive appeals to one. The defendant can, in an appeal from the decree passed as a result of the order, take the same point as he can take in appeal under Order 43, rule 1(b). To avoid doubts whether such a point can be taken,—doubts which may arise because the judgment pronounced under Order 8, rule 10, would be regarded as final in the appeal against the decree—an axpress provision could be made to clarify the position. No doubt, the appellant will have to pay high court fees on the appeal. But we would recommend to State Governments, that the court fees for appeals against the decree in such cases should be reduced to the Court fees for appeal against orders.

Recommendation

43.9. In short, our recommendations are as follows—

(i) Order 43, rule 1(b) should be deleted;

(ii) court fees on an appeal against the decree in cases where judgment is pronounced under Order 8, rule 10 should be reduced to the court fees for orders;[1]

(iii) the following rule[2] should be inserted as Order 43, rule 1A:—

> "1A. *Where a court pronounces judgment against a defendant under Order 8, rule 10, he may appeal against the decree following on the judgment on the ground that the judgment ought not to have been so pronounced.*"

Order 43, rule 1(c)

43.10. Order 43, 1(c) needs no change.

Order 43, rule 1(d)

43.11. Rule (1) (d) provides for appeal against an order under Order 9, Rule 13, rejecting an application for an order to set aside a decree passed *ex parte*. It requires no change.

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1. Para 43.8, *supra*.

2. To be inserted as Order 43, rule1 \

Order 43, rule 1(e)

43.12. Rule 1 (e) provides for appeal against order under Order 10, rule 4, where the court postpones the hearing of a suit because the pleader refuses or is unable to answer any material question relating to the suit and directs the party to be present on such day.

Recommendation

43.13. We recommend.—

(i) abolition of the right of appeal under rule 1(e). The ground can be taken in appeal against the main decree.

(ii) insertion of Order 43, rule 1-B, as follows[1]:—

"1-B. Where a Court passes an order against a party under Order 10, Rule 4, the party may appeal against the decree in the suit on the ground that the court ought not be have passed such order".

Order 43, rule 1 (f)

43.14. Under rule 1 (f), an order under Order 11, rule 21, is appealable. The order so made appealable deals with non-compliance with an order for discovery etc. The effect of such non-compliance is, that in the case of the plaintiff the suit is dismissed, and in case of a defendant, his defence is struck out.

We have, after some discussion, come to the conclusion that this right of appeal should be retained.

Order 43, rule 1 (g)

43.15. Rule 1 (g) provides for appeal against an order under Order 16, rule 10 for attachment,—where a witness fails to comply with a summons to attend or produce a relevant document.

Appeal against arrest[2] is dealt with separately—

43.16. The Code does contain[3] a provision where under the person whose property is attached can apply to the court for vacating the attachment. This should suffice.

Recommendation

43.17. We recommend therefore that appeal under rule 1 (g) should be abolished.

Order 43, rule 1 (h)

43.18. Rule 1(h) provides for appeal against an order under Order 16, rule 20. Under Order 16, rule 20, if any party to a suit refuses to give evidence when called on by the court, the court may pronounce judgment against him or make such order as it thinks fit.

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1. To be inserted as Order 43, rule 1-B.
2. Section 104(1)(h).
3. Order 16, rule 11.

43.19. We are of the view that the appeal under Order 43, rule 1(h) should be abolished. The defendant can, in an appeal from the decree passed as a result of the order, take the same point as he can take in appeal under Order 43, rule 1(h). To avoid doubts whether such a point can be taken, the matter could be provided expressly[1]. The idea is to reduce the present two successive appeals to one.

43.20. We would also recommend to State Governments, that court fee for appeals against the decree in such cases should be reduced to the Court fees for appeal against orders.

Recommendation

43.21. In short, our recommendation is—

(i) to delete Order 43, rule 1(h);

(ii) to reduce court fees, as indicated above[2];

(iii) to insert Order 43, rule 1-C, as follows[3]:—

"1-C. *Where a court pronounces judgment against a party under Order 16, rule 20, he may appeal against the decree following on the judgment on the ground that judgment ought not to have been so pronounced".*

Order 43, rule 1 (i)

43.22. Under rule 1(i), an appeal is allowed against an order made under Order 21, rule 34, on an objection to the execution of a decree and the draft of the document prepared by the decree-holder or the endorsement of the negotiable instrument.

The scope of Order 21, rule 34, is now proposed to be limited[4]. However, no change is needed in the rule relating to appeal.

Order 43, rule 1 (j)

43.23. Order 43, rule 1(j) provides for appeal against an order under Order 21, rule 72 or rule 92 setting aside or refusing to set aside a sale, where a decree-holder purchases property in execution without the permission of the Court. No change is needed in this rule.[5]

43.24. On the question whether an appeal lies from an order dismissing, *for default*, an application under Order 21, rule 90, the decisions were conflicting. In an earlier Calcutta case[6], it was held that the language of Order 43, rule 1(j), is wide enough to cover such cases, as the effect of such an order is to confirm the sale under Order 21, rule 92. It may, however be pointed out that under clause (j) of Order 43, rule 1, an appeal lies against an order refusing to set

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1. *Cf.* Discussion as to Order 43, rule 1 (b).

2. Para, 4 3.20 *supra*.

3. To be inserted as Order 43, rule 1-C.

4. See discussion as to Order, 21, rule 34.

5. It has been considered desireable to retain Order 21, rule 72.

6. *Kali Kanta Chuckerbatty* v. *Shyam Lal*, A.I.R. 1917 Cal. 815, following (1915) 30 I. C. 492 and (1910) 45 I. C. 493.

aside a sale and not against an order confirming the sale. This decision was followed in another Calcutta High Court case[1], where also it was held that the effect of the dismissal of an application under rule 90 is to confirm the sale under rule 92, and hence an appeal lies against the Order.

43.24A. The Patna High Court[2] has, following two Calcutta cases[3-4], held that an order dismissing an application under Order 21, rule 90 for non-prosecution is appealable under Order 43, rule 1(j). The reason given being that if the application is disposed of on merits and is dismissed the result is that the sale is confirmed, likewise if the application is dismissed for non-prosecution, the result is the same. Further, the question of appealability under Order 43, rule 1(j) does not depend upon whether the order under Order 21, rule 92 results in the confirmation of the sale, but on the fact whether the order is one refusing to set aside the sale or setting aside the sale.

43.25. On the other hand, in another Calcutta decision[5], it was held that an order of dismissal for default is not a confirmation of the sale, and does not preclude the party from making a fresh application, and that such an order is not appealable under Order 43, Rule 1(j). In that case, Page J. observed that in dismissing the application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties *refuses to consider whether the sale should be set aside or not*. It was observed further, that it is not every order of rejection that has been made appealable under Order 43, Rule 1(j), but only that order of rejection by which the Court, on a demand being made by a person to set aside a sale, refuses to set aside the sale. This stands to reason, as a party who has allowed his application to be rejected for default or non-prosecution, cannot really complain that the Court has refused to set aside the sale on prayer.

43.26. In a Madhya Pradesh case[6], in a proceeding for the execution of a money decree against the respondent judgment debtors, certain property belonging to the judgment-debtors was sold and purchased by the second appellant Rajaram. Thereupon, the judgment debtors filed applications under Order 21, Rule 90 for setting aside the sale. The application was dismissed by the executing court for default of appearance of the judgment-debtors. Thereafter, the judgment-debtors filed applications for restoration of their applications under Order 21, Rule 90 and section 47. These applications were rejected by the District Judge. A revision petition against this order of the District Judge was dismissed by the High Court by a single Judge decision. Thereafter, the judgment debtors filed an appeal in the High Court against the order of the District Judge, Tare J., who heard the

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1. *Nurendranath* v. *Rakhal Dass*, A.I.R. 1925, Cal. 510.
2. *Rajapratap* v. *Trilokinath*, A.I.R. 1957 Pat. 465.
3. *Basant Kumar* v. *Khirode Chandra*, A.I.R. 1928 Cal. 25.
4. *Anandlal* v. *Bhim Sankar*, A.I.R. 1929 Cal. 407.
5. *Basaratulla* v. *Reazuddin*, A.I.R. 1926 Cal. 733.
6. *Gopi Lal* v. *Sitaram*, A.I.R. 1968 M.P. 196 (D.B.)

appeal, took the view that the appeal was not tenable, in view of the dismissal by the High Court of the revision petition filed by the judgment-debtors. Apparently, the single Judge, while deciding as above, expressed some opinion on the correctness of the orders of the District Judge.

43.27. Letters Patent appeals were preferred by the decree-holder and the auction-purchaser. Although they were not aggrieved by the actual conclusion reached by the Single Judge (dismissing the appeal of the judgment-debtors), their grievance was that having held that the appeal preferred by the judgment debtors was not tenable, the single Judge was not justified in expressing any opinion on the correctness of the orders passed by the District Judge.

43.28. It was observed that the first question which the single Judge had to consider was, whether the earlier appeal (the appeal preferred by the judgment-debtors) was competent or not; it was only after holding that the appeal was tenable that the Single Judge could have entered into the merits of the orders passed by the District Judge.

43. 29. The High Court agreed with the reasoning of the Calcutta case[1] referred to above[2], where it was observed that when an application under Order 21, Rule 90 is dismissed for default, the court does not "refuse" to set aside the sale. Hence, an order dismissing an application under Order 21, Rule 90, for default is not appealable under Order 43, Rule 1(j). It was observed further, that it is not that a person whose application under Order 21, Rule 90 is dismissed for default has no remedy. Such a dismissal by the Court is in the exercise of its inherent powers, and the application can be restored by the court in the exercise of its inherent powers.

43.30. This appears to be the view likely to prevail, and the matter could be left as it is.

Order 43, rule 1 (k)

43.31. Rule 1(k) provides for appeal against an order under Order 22, rule 9, where the plaintiff or his representative applies to set aside the abatement or dismissal of the suit and this application has been refused. It needs no change.

Order 43, rule 1 (l)

43.32. Rule 1(l) provides for appeal against an order under Order 22, rule 10, giving or refusing to give leave to continue suit in case of assignment of interest before final order in the suit. No change is required in this respect.

Order 43, rule 1 (m)

43.33. Rule 1 (m) provides for appeal against an order under Order 23, rule 3, recording or refusing to record an agreement, compromise or satisfaction.

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1. *Basaratulla* v. *Rensuddin*, A.I.R. 1926 Cal. 773.
2. Para. 43.25, *supra*.

43.34. Our views on this rule are as follows—

(1) No appeal should be allowed against an order recording or refusing to record a compromise. The trial should go on.

(2) But, in the appeal against the decree, the fact that a compromise ought to have been recorded or ought not to have been recorded, should be permitted to be taken, as a ground of appeal.

(3) The object behind the above amendment is to avoid successive appeals concerning the same suit.

Recommendation

43.35. Accordingly, we recommend that the following rule should be added[1] as Order 43, rule 1-D:—

"1-D. (1) *In an appeal against the decree in a suit passed after recording a compromise, it shall be open to the appellant to contest the decree on the ground that a compromise ought not to have been recorded in the suit*:

(2) *In an appeal against the decree passed in a suit in which the court has refused to record a compromise, it shall be open to the appellant to contest the decree on the ground that a compromise ought to have been recorded*".

Order 43, rule 1 (n)

43.36. Under rule 1(n), an appeal is allowed against an order rejecting an application for an order under Order 25, rule 2 to set aside the dismissal of suit for failing to furnish security. It needs no change.

Order 41, rule 1 (nn) (New)-recommended

43-37. As already recommended[2], the orders under Order 33, Rule 5 and Rule 7, rejecting the application for permission to sue as an indigent person, should be made appealable.

Order 43, rule 1 (o)

—43.37A. Under Order 43, rule 1(o), an appeal is allowed against an order under Order 34, rules 2, 4 or 7, refusing to extend the time for the payment of mortgage-money.

Recommendation to delete Order 43, rule 1(o)

We recommend that this right of appeal should be abolished, in view of the changes proposed in the scheme of Order 34, whereunder such orders will now be passed after the decree[3].

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1. To be inserted as Order 43, Rule 1-D.

2. See discussion as to Order 33, Rules 5 & 7.

3. See discussion as to Order 34.

Order 43, rule 1 (p)

43.38. Orders under Order 35, rule 4 or rule 6 in interpleader suits are appealable under Order 43, rule 1(p). Roughly stated, the situations covered are—

(1) where the court declares that the plaintiff is discharged from all liability and awarded costs;

(2) where the court adjudicates title to the thing claimed, on admissions or other evidence;

(3) where the court frames issues for trial, or where any claimant is made plaintiff in lieu of or in addition to the original plaintiff;

(4) where the costs of the plaintiff are given as a charge on the thing claimed or in some other effectual way.

We recommend no change in this provision.

Order 43, rule 1 (q)

43.39. Rule 1(q) allows appeal against orders under Order 38, rules 2, 3 or 6 regarding security by the defendant, on application by the surety to be discharged or on application by the defendant against attachment of property on showing cause for furnishing security.

It needs no change.

Order 43, rule 1 (r)

43.40. Rule 1(r) allows appeal against an order under Order 39, rules, 1, 2, 4 or 10, regarding temporary injunction; injunctions to restrain repetition or continuance or breach of contract or other injury of any kind, varying, discharging or setting aside an order for injunction; or where the court orders the money etc. to be deposited in court etc.

It needs no change.

Order 43, rule 1 (s)

43.41. Rule 1(s) permits appeals against orders under Order 40, rule 1 or 4 for appointing receivers, and for enforcement of receiver's duties.

It needs no change.

Order 43, rule 1 (t)

43.42. Rule 1 (t) allows appeal against an order refusing, under Order 41, rule 19, the re-admission of an appeal dismissed for default or refusing, under Order 41, rule 21, to re-hear an appeal, on the application of a respondent against whom an *ex parte* appellate decree was made.

It needs no change.

43.43 and 43.44. Rule 1(u) allows appeal against an order under Order 41, rule 23, remanding a case where an appeal would lie from the decree of the appellate court. Although we are recommending an amendment whereunder all issues are to be decided by the court, there will be an exception as to issues of jurisdiction or bar of suit[1]. Hence the provision in rule 1(u) will still be needed. It should, therefore, be retained.

Order 43, rule 1(v)

43.45. Under Order 43, rule 1(v), an order under Order 45, rule 6 made by any court other than a High Court refusing the grant of a certificate to appeal to the Supreme Court is appealable.

Recommendation

43.46. The appeal contemplated by Order 43 rule 1(v) is obsolete, and should be abolished. We recommend accordingly.

Order 43, rule 1(w)

43.47. Order 43, rule 1(w) provides for appeal against an order under Order 47, rule 4, granting an application for review. The text of this rule needs no change. But we are recommending certain changes in Order 47, rule 7, which will have the effect of expanding the scope of this appeal.

Order 43, rule 1-A (New)

43.48. A new rule 1-A is proposed to be inserted[2] in Order 43.

Order 43 rule 1-B (New)

43.49. A new rule 1-B is proposed[3] to be inserted in Order 43.

Order 43, rule 1-C (new)

43.50. A new rule 1-C is proposed[4] to be inserted.

Order 43, rule 1-D (new)

43.51. A new rule 1-D is proposed to be inserted.[5]

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1. See discussion as to Order 14, rule 2.
2. See discussion as to Order 47, rule 7.
3. See discussion as to Order 43, rule 1(b)., *supra*.
4. See discussion as to Order 43, rule 1(c), *supra*.
5. See discussion as to Order 43, rule 1(h), *supra*.
6. See discussion as to Order 43, rule 1(m), *supra*.

CHAPTER 44

APPEALS BY INDIGENT PERSONS

Introductory

44.1. Appeals by indigent persons (described in the Code as "paupers") form the subject-matter of Order 44.

There is only one important point to be considered under this rule, which we discuss below. Verbal changes to substitute the expression "indigent person" will, of course, be needed.[1]

Order 44, rule 1(2)

44.2. With reference to Order 44, rule 1(2), the following discussion is found in the earlier Report.[2]

> "Order 44, rule 1(2) provides that an application by a pauper for leave to appeal as a pauper must be rejected unless he can show that the decree is contrary to law or usage having the force of law or is otherwise erroneous or unjust etc. A suggestion has been put forth that this provision is unconstitutional under article 13 and 14 (since no such restriction is applicable to appeals by non-paupers.) It is however, felt that the existing provision is *prima facie* reasonable, as it is intended to prevent frivolous appeals by a pauper. It can be justified on the ground that a person who has failed in one court should show a *prima facie* case before he can be permitted to appear."

Recommendation

44.3. We are, however, of a different view. We think that the present restriction cannot be regarded as justifiable or reasonable, and is likely to be regarded as discriminatory and is even otherwise unjust and unfair. It should be removed, as no rational basis can be advanced in its support.

We therefore, recommend that Order 44, rule 1, sub-rule (2), should be deleted.

Order 44, Rule 2

44.4. Order 44, Rule 2, contemplates an inquiry into pauperism of the appellant (who wishes to appeal as a pauper) by or under the orders of the appellate court. In the interests of expedition, we recommend the following small amendments—

(i) Where the person applying for leave to appeal as a pauper was allowed to sue as a pauper, such inquiry

1. See discussion as to Order 33.

2. 27th Report, page 244, note on Order 44, rule 1(2).

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should be ordered if he makes an affidavit that he has *not ceased to be a pauper* after the decree of the first court, unless the affidavit is challenged later .

(ii) Inquiry that a person has now become a pauper should ordinarily be made by the appellate court (and not by the lower court);

(iii) Inquiry by an officer of the appellate Court to whom the power is delegated by the court, should also be permitted.

Recommendations

44.5. Accordingly, we recommend that rule 2 should be revised as follows: —

"2. The inquiry into the question whether the applicant is an *indigent person* may be made either by the appellate court or, under the orders of the appellate court, *by an officer of that court or under such orders by the court from* whose decision the appeal is preferred.

Provided that, if the applicant was allowed to sue or appeal *as an indigent person* in the court from whose decree the appeal is preferred, no further inquiry in respect of the question whether he is *an indigent person* shall be necessary, *if the applicant has made an affidavit stating that he has not ceased to be an indigent person since the date of the decree appealed from; but if the Government pleader or the respondent disputes the truth of such statement, in the affidavit, an inquiry into the question whether he is an indigent person shall be held.*

Provided, further, that, where it is alleged that a person has become an indigent person since the date of the decree appealed from, the inquiry shall be made only by the appellate court or by an officer of that court under its orders, unless the appellate court considers it necessary in the circumstances of the case that the inquiry should be held by the court from whose decision the appeal is preferred."

CHAPTER 45

APPEALS TO THE SUPREME COURT

Introductory

45.1. Procedure in appeals to the Supreme Court, in so far as the proceedings leading to such appeal take place in the High Court, is dealt with in Order 45.

45.2. Originally, Order 45 dealt with appeals to the King in Council, that is to say, the Judicial Committee of the Privy Council, to whom, in cases of a certain amount, there was an appeal in the last resort from the judgments of the Court of British India (and of all the other dependencies and colonies of the realm). This Chapter reproduced the provisions of an Act[1] of 1874, which had been, as a Bill, submitted to, and approved by, the Judicial Committee, and which was repealed and re-enacted by the Code of 1877. With minor modifications, the Order has continued in successive Codes. It needs no change.[2]

1. The Privy Council Appeal Act 1874.

2. As to the history of article 133 of the Constitution, see 45th Report of the Law Commission, paragraphs 7 and 8.

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CHAPTER 46

REFERENCE

Introductory

46.1. Order 46 deals with reference to the High Court.

The Court trying any suit or appeal in which the decree is final, i.e. which cannot come before the High Court on appeal, may either of its own motion or on the application of any of the parties, draw up a statement of the facts and the question, and refer such statement, with its own opinion on the point, for the decision of the High Court.

Order 46, Rule 1

46.2. Order 46 rule 1, is as follows:—

> "Where, before or on the hearing of a *suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree*, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal or executing the decree entertains a reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court."

46.3. A suggestion was made during our discussion that a subordinate court should have power to refer to the High Court a substantial question of law of first impression even where the case is one in which appeal lies. We have discussed it at some length, but are unable to accept it. The likely effect of such an amendment would be that numerous references would be made to the High Court on the slightest pretext, and the situation resulting from it would be impossible to deal with. No doubt, it would be in the interests of the public if questions of law could be settled by a final and binding decision of the highest court of the State. But there are overriding practical considerations in the way of the proposed amendment. Moreover, the suit would remain pending till the High Court decides the issue. Lastly, it is not correct to assume that the trial court will decide the question wrongly in every case.

We do not, therefore, recommend any such change.

CHAPTER 47

REVIEW

Introductory

47.1. Order 47 provides for review of judgments. Review is limited to specific grounds, and the scope is much limited compared with the scope of review under some other systems.

47.2. For example, Order 41 of the Third Schedule to the Court Ordinance of the Gold Coast provides as follows[1]—

> "1. Any judge, magistrate, or other judicial officer, may, upon such grounds as he shall consider sufficient, review any judgement or decision given by him (except where either party shall have obtained leave to appeal, or a reference shall have been made upon a special case, and such appeal or reference is not withdrawn), and upon such review it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary, or confirm his previous judgment or decision, or to order a non-suit.
>
> 2. Any application for review of judgment must be made not later than fourteen days after such judgment. After the expiration of fourteen days an application for review shall not be admitted, except by special leave of the court, on such terms as seem just."

Order 47, rule 1

47.3. According to some High Courts[2], the fact that the view of the law taken in a judgment has been altered by the subsequent decision of a superior court in another case, is not a ground for review of the judgment. According to the Kerala High Court, however, it is a ground for review[3].

47.4. In the Kerala case[4], Raman Nayar J. held that the fact that a subsequent *binding authority* took a different view of the law from what had been taken in the decision sought to be reviewed, was a good ground for review. For, it would be the "discovery of a new and important matter", and in any case, "an error apparent on the face of the record", within the meaning of Order 47, rule 1:

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1. See *Kofi Forfie* v. *Seifali* (1958) W.L.R. 52, 54 (P. C.)
2. (a) *Liaqat Husain* v. *Mohamad Razi*, A.I.R. 1944 Oudh 198 (D.B.);
   (b) *Lachmi* v. *Chisa*, A.I.R. 1960 Punj. 43, 45, para. 4;
   (c) *Patel Naranbhai* v. *Patel Gopaldas*, A.I.R. 1972 Guj. 229.
3. (a) *Pathrose* v. *Sankaran Nair*, A.I.R. 1969 Ker. 186;
   (b) *Chandreshekaran Nayar* v. *P. Nair*, (1969) K.L.T. 687.
4. *Pathrose* v. *Sankaran Nair*, A.I.R. 1969 Ker. 186.

In his opinion, this would be a case where, without any elaborate argument, one could point to an error regarding which there could reasonably be no two opinions entertained. That the phrase "error apparent on the face of the record" is not limited to errors of fact, but extends to errors of law, was, in his view, a position well-settled[1], and found statutory recognition in the Court Fees Act.[2] He pointed out that the phrase 'Mistake apparent from the record' occurring in section 35 of the Indian Income-tax Act, 1922, is synonymous with the phrase, "mistake or error apparent on the fact of the record". It was also pointed out that the Supreme Court had held that a mistake of law which is glaring and obvious is a "mistake apparent from the record."

47.5. Further, it makes no difference whether the binding authority demonstrating the error was a decision rendered before, or one rendered after, the decision in which the error occurred, for a judicial decision only declares the law and does not make or change it. A binding judicial authority is analogous to a statute which changes the law with retrospective effect. Following the Supreme Court case[3], it was held in the Kerala case that if a subsequent legislation rendering a decision erroneous is a good ground for review, there is no reason why a subsequent binding decision declaring to be erroneous should not be a good ground.

47.6. In an Andhra case[4], the facts were as follows:—

> An order was passed by the Andhra Pradesh High Court under Article 226 of the Constitution on 1-2-1968, following a Supreme Court decision. The decision of the Supreme Court which was relied on had been reversed by the Supreme Court on 25-10-1967, but was not fully reported by 1-2-1968, and was not brought to the notice of the High Court. It was held, that there was an error apparent on the face of the record in the order dated 1-2-1968, justifying review of the order. An error of counsel was sufficient ground for review.

The Andhra case is based on error of counsel as a ground of review. But the Kerala ruling to which we have referred above[5] is a direct one.

Recommendation

47.7. It is felt that the position should be settled on this point. If the law is altered by judicial pronouncement of a higher court[6], the party affected should not, in our opinion, have a right to get the judgment reviewed.

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1. *Venkatachalam I.T.O.* v. *Bombay D. & M. Co. Ltd.*, A.I.R. 1958 S. C. 875, referred to.
2. Section 15, Court Fees Act, 1870.
3. *Venkatachalam I.T.O.* v. *Bombay D. & M. Co.* A.I.R. 1958 S.C. 875.
4. *I. T. Officer* v. *Srinivasa Rao*, A.I.R. 1969 A.P. 441, 443, para. 7.
5. Para 47.5, *supra*.
6. As to the effect of subsequent legislation, see A.I.R. 1963 All 541.

47.8. An amendment adopting the Kerala view will create a serious practical problem. It will keep alive the possibility of review indefinitely. Under the Limitation Act,[1] the period of limitation for an appilcation for review has been prescribed, but the delay can, "for sufficient cause", be condoned by the Court under that Act[2]. Where an application for review is made on the ground of a later binding authority, the party applying for review will usually be able to plead "sufficient cause." because it is only when the superior court has made a pronouncement that he will have a ground for review; and he can, therefore, argue with considerable force that there was "sufficient cause" for his not making the application earlier.

Recommendation

47.9. We, therefore, recommend that the following Explanation should be added below Order 47, Rule 1—

"Explanation—*The fact that the view taken on a question of law in the judgment of a Court has been reversed or modified by the subsequent decision of a superior court in another case is not a ground for review of the judgment.*"

Order 47, rule 7

47.10. There is one point concerning Order 47, rule 7, which was discussed in the earlier Report[3] in these words:—

> "Under Order 43, rule 1(w), an appeal lies from an order under Order 47, rule 4 granting an application for review, but the scope of such appeal is limited to the grounds specified in clauses (b) and (c) of Order 47, rule 7(2). It follows, that where a review is granted on the ground of a mistake or error apparent on the face of the record, or "for any other sufficient reasons", no appeal would lie against the order granting review. This is not a satisfactory position. There does not seem to be any valid reason why an appeal should lie when a review is granted on certain grounds, and not where it is granted on other grounds. We recommend, that the restriction at present imposed by Order 47, rule 7 on the right of appeal against an order granting review should be removed."

47.10A. We agree with the view taken in the earlier Report, namely, that the restriction at present imposed by Order 47, rule 7, on the right of appeal against an order granting review should be removed.

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1. Article 124, Limitation Act, 1963.

2. Section 5, Limitation Act, 1963.

3. 27th Report, page 32, paragraph 71. Also see pages 243-244 (Notes), and draft amendment at page 84.

CHAPTER 48

MISCELLANEOUS

Introductory

48.1. Order 48 deals with miscellaneous matters and needs no change.

CHAPTER 49

CHARTERED HIGH COURTS

Introductory

49.1. Order 49 deals with chartered High Courts. No changes are recommended in this Order.

CHAPTER 50

PROVINCIAL COURTS OF SMALL CAUSES

Introductory

50.1. Order 50 deals with courts of Small Causes outside the Presidency Towns. No changes are recommended in the Order.

CHAPTER 51

PRESIDENCY COURTS OF SMALL CAUSES

Introductory

51.1. Order 51 deals with courts of Small Causes in the Presidency Towns.

It needs no change.

CHAPTER 52

FORMS

Introductory

52.1. The various Appendices to the Code contain a number of forms. We shall deal in this Chapter with such of them as require amendment.

Appendix B Form No. 2

52.2. In the Commission's 14th Report,[1] a recommendation was made that instead of a separate order requiring the defendant to file a written statement, the summons by which the plaint is served on the defendant should itself require him to file a written statement within a specified time. The Commission, in its Report on the Code,[2] did not consider such an amendment to be useful; but we think that it would be useful, as likely to reduce delay.

Recommendation

52.3. We, therefore, recommend that the necessary amendment should be made for that purpose Appendix B, Form No. 2 should be revised, as follows—

"**No. 2**

SUMMONS FOR SETTLEMENT OF ISSUES

(Order 5, Rules 1 and 5)

(*Title*)

To

(Name, description and place of residence)

Whereas ..... has instituted a suit against you for ..... you are hereby summoned to appear in this Court in person, or by a pleader who is duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of..... 19.....at.....o'clock in the..... noon, to answer the claim: *and you are hereby further directed to file on that day a written statement of your defence, and to produce on the same day all documents in your possession or power upon which you base your defence or set-off or counter-claim, and where you rely on any other document whether in your possession or power or not, as evidence in support of your defence or set-off or counter-claim, you shall enter such documents in a list to be added or annexed to the written statement.*

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1. 14th Report, Vol. 1, page 302, para 11.

2. 27th Report, page 12, para, 25.

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, this.....day of .....19 .

Notice—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree which may be against your person or property, or both."

Appendix B Form No. 4

52.4. We recommend that for the existing Form No. 4 in Appendix B, be substituted as Form No. 4:—

"No. 4

SUMMONS IN SUMMARY SUIT

(Order 37, Rule 2)

(*Title*)

To

(Name, description and place of residence).

WHERAS has instituted a suit against you under Order 37 of the Code of Civil Procedure, 1908, for Rs. and interest, you are hereby summoned within ten days from the service hereof, to cause an appearance to be entered for you, in default whereof the plaintiff will be entitled after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you, the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to ask the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

Given under my hand and the seal of the Court, this ..... day of .....19 .

Judge "

1. This is consequential on the change proposed to Order 37, Rule 2.

Appendix B Form No 4A (new)

52.5. We recommend[1] that after Form No. 4 in the Appendix B the following form be inserted—

"**No. 4A**

SUMMONS FOR JUDGMENT IN SUMMARY SUIT

(Order 37, Rule 3)

(*Title*)

In the Court, at suit No. of 19 .

X Y Z Plaintiff

Versus

A B C Defendant

Upon reading the affidavit of (the plaintiff or as may be).

Let all parties concerned attend the (Judge or Civil Judge, as may be) on day the day of 19 , at o'clock in the noon on the hearing of an application on the part of the plaintiff that he be at liberty to sign the judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs. for and interest and costs.

Dated the day of 19 . This summons was taken out by Pleader for ".

1. This is consequential on the change proposed to Order 37, rule 3.

CHAPTER 53

NEED FOR NATIONAL ACADEMY FOR JUDICIAL TRAINING

Introductory

53.1. As already indicated in the Chapter on our approach[1], we now proceed to discuss certain matters to which we attach considerable importance. These concern the remuneration and training of members of the judiciary.

Importance of role of Judges

53.2. Although we have attempted to examine the question of introducing reasonable changes in the Code of Civil Procedure, as comprehensively as we could, within the time at our disposal, we ought to indicate some other important aspects which may, on a superficial view, appear to be collateral to our inquiry, but which we regard as an integral part of the basic purpose of our inquiry.

It is plain that a Code of Civil Procedure is a means towards speedy administration of justice by civil courts; however, the role which reforms of Civil Procedure Code can play for the legal system as a whole is limited. Apart from the part which rational procedure will play in making the administration of justice speedy, less costly and less unpredictable, the role of Judges in this direction is undoubtedly crucial. That is why we are expressing our views on this aspect of the matter emphatically in the present Chapter.

53.3. Even at the cost of repetition, we wish to emphasise that the success of any system, and particularly the judicial system, depends on the men who work the system. Judges play an important role in its working, and we must, therefore, make some recommendations for adequately preparing our junior judges for their task.

But the Members of the Bar have also a vital contribution to make, and their willing and unstinted cooperation can contribute to the successful working of the system.

As has been lucidly stated[2],—

> "After all, the success or failure of any procedural system depends upon the men who administer it. Of the three groups that comprise the judicial branch of government—secretariat, judiciary and counsel—the last is the most important, the judiciary perform a vital function, but they are recruited from the ranks of counsel and their performance depends upon, and seldom rises above, that of counsel. In an adversary system it is the adversaries who do the bulk of the work."

1. Chapter 1 B, *supra*.

2. David Kilgour, "Procedure and Judicial Administration in Canada" in Mewhinney (Ed.) Canadian Jurisprudence, (1958), 301, 312.

Remuneration of judicial officers

53.4. In this connection, we must, first and foremost, refer to the question of adequate remuneration to members of the judiciary which has been discussed more than once. It is obvious that ill-paid judicial officers cannot give their best.

53.5. What is more important is, poor remuneration for junior judicial officers can never attract competent lawyers to join the judicial service. We confess that we are unable to decide how we should express our firm belief in this matter, in order to convince the Union Government and the State Governments that they are ill-serving judicial administration by refusing to recognize the patent truth that for the success of the judicial process, we must attract competent lawyers to join the judicial service, and that competent lawyers just will not be attracted to the judicial service unless the terms of their service are radically improved.

53.5.A. *We are fully conscious that the subject of the terms and conditions of service of the subordinate judiciary is a matter for the State Governments to decide, but we would urge the Union Government to persuade the State Governments to take the necessary action without delay before the judicial process falls into complete disrepute by its inefficiency and unsatisfactory working.* If the rule of law is to become and continue to be a reality in our national life, our courts must be manned by competent and experienced and fearless judges. It is in this context that we proceed to make our recommendations.

Number of Judges

53.6. We should also re-iterate here what was said in the earlier Report[1], as to the need for *increasing the number of judges.* Discussing the causes of delay, the Commission observed:—

> "(1) There is congestion of work in several courts. The only way of removing such congestion is to appoint additional judges. Unless the arrears in any court are wiped out by the appointment of additional Judges, any improvements in procedure will not result in the expeditious disposal of cases in that Court.
>
> (2) The remuneration at present payable to Judges is grossly inadequate. The Law Commission, has in its Fourteenth Report, made certain recommendations on this subject. If Judges are expected to work efficiently and honestly, they should be properly paid, having regard to their status and the nature of work done by them.
>
> (3) A great deal of preliminary work for getting cases ready for disposal is done by the ministerial staff. The ministerial staff should be of sufficient strength to handle such work properly and expeditiously. The emoluments paid to the ministerial staff in subordinate courts are near the starvation level. A great deal of corruption among

1. 27th Report, page 10, para 16(1) and 16(2).

the ministerial staff in subordinate courts is due to this factor. It is, therefore, imperative that the conditions of service of such ministerial staff should be improved."

Training of judicial officers

53.7. We would, also, like to emphasise the need for the training of judicial officers, who join judicial service in the lowest cadre. We attach vital importance to the question of proper training. Although this topic is outside the purview of the Code of Civil Procedure, we are dealing with it here because, in our view, no amount of reform of the law of procedure will succeed if those who administer the law are not properly equipped for their task.

53.8. The quality and output of work of judicial officers will, to a great extent, depend not only on the mental and intellectual equipment which they posses, but also on their ideals and sense of service. The State should, therefore, do its maximum to ensure that they enter on their duties with the best equipment and with the highest sense of service.

Institute recommended

53.9. In the relatively isolated atmosphere of the law school, it is not possible to impart familiarity with the real life drama in the court. It is, therefore, eminently desirable that those who will be called upon to face that drama and to pronounce verdict on it should be adequately prepared for it. We, therefore, recommend, as a first step, the establishment of an institute for the purpose of training of judicial officers.

Training needed to raise intellectual calibre

53.10. The training to be imparted at the institute should be such as to ensure that members of the lower judiciary have an intellectual equipment of the best order. It should be borne in mind that enrichment of the calibre of subordinate judiciary is a measure necessary to ensure bettter judicial qualities in the higher judiciary, because many members of the latter are drawn from the former.

Training to be on all-India basis

53.11. It is desirable in the national interest that the training should be organised on an all-India basis, and the proposed Institute should, therefore, be an all-India Institute. The appointments to judicial services should of course, continue to be made by the States; but it is desirable that the training should have an 'all-India' character, for more reasons than one. In the first place, it is the task of the judiciary to apply and interpret the law and familiarise itself with the process of weighing evidence. In India, because of the federal structure and also because of the vastness of the country, it is specially necessary that the unity of the legal system based on the several Codes of substantive and procedural law, should be preserved and maintained as a balance against diversities of interpretation. Judicial outlook

towards the interpretation of statutes should, in its broad features, be uniform. Initial training on an 'all-India' level would prove to be a great step towards maintaining the uniformity referred to above.

In the second place, the meeting together of officers from various States—officers who will, in the course of their work, come in daily contact with the average citizen,—could, in the long run, foster national integration. Mutual discussions and activities pursued together are bound to foster an understanding of the habits and cultures of people of the several States; it is such understanding which, more than anything else, will pave the way for integration of hearts, and is much more valuable than mere mechanical integration.

Lastly, the level of judicial officers should also be uniform, as far as possible, throughout India.

Director and staff

53.12. It is desirable that the Institute which we recommend should be headed by a person of the status of sitting Supreme Court Judge; and on the staff there should be at least some persons who are of the status of High Court Judges and senior District Judges. All the officers, including the Director, should be on a tenure basis.

Training to be condition precedent to confirmation

53.13. We further recommend that the successful completion of the training which we have proposed should be a condition precedent to confirmation to appointment in the judiciary.

Principles to be kept in mind in framing syllabus

53.14. We would like to indicate broadly the principles which should be kept in mind when framing the course of training.

In this connection, we may refer to the two "commandments", enunciated by Whitehead.

The two commandments enunciated by Whitehead in his famous essay on the Aims of Education were[1]—'do not teach too many subjects' and 'What you teach, teach thoroughly'. "The result of teaching small parts of a large number of subjects is the passive receiption of disconnected ideas not illuminated with any spark of vitality. Let the main ideas which are introduced.....be few and important, and let them be thrown into every combination possible".

Subjects

53.15. The subjects to be included should be such as to deal with the relationship of law to other social sciences, including, in particular, economics and sociology.[2] The emphasis should not be

1. Whitehead, Education in the "Age of Science" (Winter, 1959) Deadalus, page 193, as quoted by Kamla Chowdhry, "Developing Administrators for Tomorrow (April-June, 1960, 15 Indian Journal of Public Administration, page 226.

2. For details, see para 53.19 to 53.26, *infra*.

on technical law or procedure, but on law as a part of an inter-disciplinary study and on the application of the law to the facts of a particular case.

Report of U.K. Committee

53.16. In the Report of the Committee on Civil Service in U.K.,[1] two main attributes were considered essential, in varying combinations, for work in the Government service.

> "One is being skilled in one's job—skill which comes from training and sustained experience. The other in having the fundamental knowledge of and deep familiarity with a subject that enable a man to move with ease among its concepts. Both spring from and re-inforce a constant striving for higher standards."

It is this "constant striving for higher standards" which will be fostered by proper training. It may, therefore, become necessary to provide, to prospective members of the judiciary, some familiarity with the social back-ground[2] in which the laws which they have to administer, operate.

Objectives of training

53.17. The effectiveness and success of the service afforded by the administration of justice must largely depend upon the degree to which it can effectively respond to the genuine needs of the community. And this pre-supposes sufficient knowledge of the problems and difficulties of the community. The importance of education in these aspects is, therefore, obvious.

The almost exclusively legal universe in which those concerned with the law function should not become an ivory tower, so as to lead to these needs being ignored. With the growth of the welfare element in State activities, these aspects will assume more and more importance.

Indications as to subjects

53.18. Bearing in mind the considerations mentioned above, we indicate the guidelines which should be followed in framing the syllabus for the training proposed above.

Social change and legal institutions

53.19. A subject of importance is the effect of social change on legal institutions. It is now well recognised that many of the fundamental legal concepts have undergone modifications owing to social changes.

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1. Report of the (Fulton) Committee (U.K.) The Central Service (1968).

2. See also para 53.19 to 53.26, *infra*.

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Views of Rescoe Pound

53.20. In this connection, we may refer to the observations made by Roscoe Pound[1]:

> "I am content to see in legal history the record of a continually wider recognising and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of Waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering."

53.21. Looked at from this broad point of view, the conclusion inevitably follows that:

> "Jurisprudence, ethics, economics politics and sociology, are distinct enough at the core but shade out into each other.....All the social sciences must be co-workers, and emphatically all must be co-workers with jurisprudence"[2].

It is in the light of this jurisprudential view of the judicial role that we propose to describe the scope and nature of the work to be done at the Institute which we have in mind.

Effect of pulls competing for recognition

53.22. The law is predominantly as an instrument of social engineering in which conflicting pulls of political philosophy, economic interests, ethical values, struggle for recognition. This struggle has to be viewed against the background of history, tradition and development of legal techniques. A working knowledge of those disciplines is therefore essential.

We shall indicate below, by way of illustration, the effect of these pulls upon a few branches of the law.

Property and contracts

53.23. Taking first, the field of property, it may be noted that the concept of property has been gradually widened, but at the same time the principles governing the power and the use of property have been profoundly modified under the impact of new social ideas.

Again, in the law of contracts, the emphasis on contract as an instrument of *free bargaining* between the parties has been largely modified,—sometimes by the operation of commercial forces (e.g. the emergence of standardised contracts), sometimes by econmic pressures (e.g. the evolution of collective agreements) and sometimes by the impact of positive legislation (e.g. through the imposition of statutory conditions on contracts).

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1. Roscoe Pound, "An Introduction to the Philosophy of Law", page 57.
2. Roscoe Pound, "An Introduction to the Philosophy of Law", p. 57.

Torts

53.24. A similar phenomenon is noticeable in torts. At common law, the rules of the law of torts, which were designed to adjust the consequences of loss, placed the liability on the person who caused the harm. But the shifting of this liability started with the emergence of vicarious responsibility, and now, on a vastly wider scale, with the progress of insurance. This change in liability reflects, in the realm of torts, the operation of private as well as of social forces similiar to those operating in the field of contract.

Criminal law

53.25. Criminal law has also witnessed several developments during recent times. The most interesting, of course, is the differentiation between the old-style type of criminal offence and the new type of public welfare offence. The yardstick in both cases is the gravity of the interest that has been injured. But new types of interest deserving of protection by the State and unknown to the older criminal law have emerged. Some-but not all-of these can be measured in terms of older concepts of criminal law. Some require a new approach. Both the traditional 'criminal' type of offence and the new 'public welfare' type of offences have, therefore, been employed in order to protect the new types of interests.

Recent penological trends are also well-known, and we need not here enter into their details.

53.26. We are mentioning these developments in order to give a concrete though illustrative indication of matters which could be usefully included under the subject of law and society (or any other similar appellation which is considered suitable.)

Statutory interpretation

53.27. Another subject of importance is that of statutory interpretation. This subject is at present included in the courses leading to the law degree of most Indian Universities. But the emphasis in the training which we propose will be on the practical application of rules of interpretation, covering enacted[1] rules of interpretation as well as others.

53.28. As regards the process of interpretation of statutes, it is pertinent to note that, because perfect generalization for the future is impossible, no generalization is complete in any legislative measure. As Judge Breitel has observed[2],—

> "Aware of this impossibility, legislatures often do not more than purport to lay down the most general statements of law, intending that the courts and other law-applying agencies shall creatively adapt the general principle to specific

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1. See the General Clauses Act, 1897.

2. Judge Breitel "Courts and Law-making" Columbia Law School Centennial Symposium (1959).

cases. Thus, every time a statute uses a rule of reason, or a standard of fairness without specifications, there is conscious and deliberate delegation of this responsibility to the courts.....".

However, exhaustive a statute may be, there will still remain a group of cases where the purpose of the legislature is not easy of perception. "And here society and the legislature both entrust themselves to the law making powers of the courts[1]." The judiciary will, therefore, always have to concern itself with these 'interstices' of legislation[2]. One may call this process a creative one, or only a process of unfolding what is latent. The name does not matter.

Cardozo's view

53.29. In the following passage, Mr. Justice Cardozo expressed his views, formed on the basis of his personal experience[3], as to the judicial process. ".....logic and history, and custom, and utility and the accepted standards of right conduct, are the forces which, singly or in combination, shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby, promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savours of prejudice or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new course, of marking a new point of departure from which others who come after him will set out upon their journey.

If you ask how he is to know when one interest outweights another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here indeed, is the point of contact between the legislator's work and his".

Exercise of judicial discretion

53.30. Yet another subject which should be included is the exercise of judicial discretion in several branches of litigation. (A trainee could of course, be allowed to choose one of them[4]).

1. James M. Landis, "Note on statutory interpretation" (1929) 43 Harv. L. Review 886, 893.

2. *Cf. Southern Pacific Co. v. Jenson*, 244 U. S. 205, 221 (Holmes J.)

3. Cardozo, The Nature of the Judicial Process (1921), page 112-113.

4. E. g. Sentencing, or family law, or equitable relief.

53.31. For example, there are several factors to be taken as guides for the exercise of the discretion to grant matrimonial relief; (a) the position and interest of the children; (b) the interest of the party with whom the petitioner has committed adultery (where relief is claimed on that ground), with special regard to their future marriage; (c) the prospects of reconciliation; (d) the interests of the petitioner, particularly his prospects of re-marriage; (e) the interest of the community at large, balancing the sanctity of marriage against social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down[1].

53.32. Similarly, there is sufficient scope for the exercise of discretion in the field of equitable relief and also in regard to the award of costs and (in criminal cases) in the grant of bail and sentencing.

Duration of the course

53.33. We now come to the duration of the course. In our opinion, the total duration of the course should be one year; during the first three months, the probationers will undergo intensive course of training in the well-arranged curriculum; in the next six months they will be attached to the respective trial courts in their states, where they will gather experience about the working of the courts; and, in the last three months, they will once again be in the Institute, where they will receive training in the shape of lectures, seminars and group discussions. At the end of the year, the probationers will appear for an examination, and it is only on passing the examination that they will be confirmed and posted to the respective courts.

Conference to be held periodically

53.34. We also recommend that conferences should be held periodically, to supplement the training which we have recommended.

Question of expenses

53.35. We are fully conscious that our recommendation to start an All-India Institute will involve expenditure and we anticipate that an objection may be raised on this ground; but, we would like to emphasise the fact that Government have always thought it necessary to train their administrative officers in order that the general administration of the country should be efficient and for that purpose, administrative training centre, properly manned with a good curriculum and a well-planned out programme of the education of the probationers, has been in existence for many years. We are surprised that it did not occur to the Government so long to train judicial members who enter judicial service on lines especially suited for judicial work. We are, therefore, confident that the recommendations we have made will be accepted by the Union Government and that the Union Government will be able to persuade the State Governments to give their cooperation in implementing our recommendations, without any delay. As we have indicated in the course of our

1. *Cf. Blunt* v. *Blunt* (1943) A.C. 517 (Lord Simon, L.C.)

dicussion[1], the establishment of an All-India Institute of this character for the training of judicial officers will indirectly but inevitably contribute to national integration. We also feel that it will create an *espirit de corps* amongst our junior judicial officers throughout India and we wish to emphasis that these *espirit de corps* and the sense of national integration reinforced with the sense of idealism and a spirit of service will inevitably lead to a considerable improvement in the quality of administration of justice.

1. Paragraph 53.11, *supra*.

CHAPTER 54

CONCLUSION

Introductory

54.1. We have now come to the end of our Report. We shall take the opportunity of making certain general observations which are of importance in connection with the present inquiry.

Ultimate object of reform in procedure

54.2. The ultimate object of reform of procedure must be to make the trial of a cause in court a judicial investigation for the ascertainment of truth upon which to rest a righteous judgment, rather than merely a sporting contest of lawyers in the use of rules often adapted to obscure the truth and cause justice to miscarry. We hope that the recommendations which we have made will help in the realisation of this ultimate object.

54.3. It is also hoped that our recommendations will enable judicial officers to bring to bear on their work the best judicial qualities. A famous writer[1] has, while describing the qualities needed in a Judge, expressed himself thus:—

> "These, then are those faults which expose a man to the danger of smiting contrary to the law: a Judge must be clear from the spirit of party, independant of all favour, well inclined to the popular institutions of his country; firm in applying the rule, merciful in making the exception; patient, guarded in his speech, gentle and courteous to all. Add his learning, his labour, his experience, has probity, his practised and acute faculties, and this man is the light of the world, who adorns human life, and gives security to that life which he adorns."

Recommendations to be taken as a whole

54.4. We should, finally, emphasise that our recommendations in this report should be read as a whole. They are not a series of detached suggestions, but parts of an integrated scheme, and have been made in pursuance of our general approach which we have explained at the outset.

We should, before we part with this Report, place on record our warm appreciation of the assistance we have received from Mr. Bakshi, Secretary of the Commission, in dealing with the problem covered by the Report. As usual, Mr. Bakshi first prepared a draft which was treated as a Working Paper. The draft was considered by the Commission point by point, and, in the light of the decisions

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1. Sydney Smith The Judge that smites contrary to the law (1824), quoted in 29 Canadian Bar Review, 344.

taken tentatively by the Commission, Mr. Bakshi prepared a final draft for consideration which was after elaborate discussion approved by the Commission. Throughout the study of this problem, Mr. Bakshi took an active part in our deliberations, and has rendered very valuable assistance to the Commission.

P. B. GAJENDRAGADKAR	*Chairman*
V. R. KRISHNA IYER	*Member*
P. K. TRIPATHI	*Member*
S. S. DHAVAN	*Member*
P. M. BAKSHI	*Secretary*

NEW DELHI;

The 6th February, 1973.

APPENDIX

QUESTIONNAIRE OF THE LAW COMMISSION OF INDIA ON THE CODE OF CIVIL PROCEDURE

(*Issued March*, 1972)

Introductory Note

This questionnaire deals with some aspects of revision of the Code of Civil Procedure, 1908. It may be stated that revision of the Code was considered at length by one of the previous Law Commissions, which duly forwarded to Government a detailed Report on the Code.[1] A Bill intended to implement this Report was in due course introduced in Parliament; but the Bill lapsed. When the question of re-introduction of the Bill arose, the Government of India considered it desirable to request the present Commission to examine the Code afresh from the "basic angle of minimising costs and avoiding delays in litigation and taking into account its revised terms of reference".

The scope of the present inquiry will, therefore, be confined to a consideration of the major changes needed in the Code from the following points of view:—

(1) minimising costs;

(2) avoiding delays in litigation; and

(3) the revised terms of reference of this Commission, the most important of such terms being the implementation of the directive principles.

It is not proposed to examine again questions arising from the mass of case-law on the Code, the local amendments made in the various provisions of the Code, as well as the reforms introduced in other countries,—including, in particular, the changes made in England in 1962 by way of revision of the Rules of the Supreme Court,—as these have been already considered by the previous Commission. It ought, however, to be emphasised that the questions included here are illustrative only, and any suggestions for amendment of the Code on other matters from the point of view of the present terms of reference will be thankfully received.

Costs occasioned by delay[2]

1. Would you favour the insertion of a provision to the effect that the court shall, while passing an order for costs, make the party responsible for delay with reference to any step in the litigation, pay the cost proportionate to that delay, whatever may be the ultimate event of the suit?

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1. 27th Report of Law Commission.

2. The questions have been arranged, as far as possible, in the order in which the relevant provisions appear in the Code.

Arrest in execution of a money decree

2. Do you consider any change necessary in the present position regarding liability to arrest in execution of a money decree?

Suits and execution by or against the Government

3. Do you favour repeal of section 80 of the Code, which requires that two months' notice should be given of the institution of a suit against the Government or against a public officer, etc.?

4. What changes would you suggest in section 82 so as to expedite execution against the Government?

Pre-trial inquiry

5. Would you favour the insertion of a provision to the effect that particularly in suits by or against the Government, the court shall hold a pre-trial inquiry, with a view to narrowing down the scope of the controversy, and, (where such a course is practicable), for the settlement of the suit without trial?

Appeals against decrees

6. As regards the right of first appeal, would you favour any limitations based on the nature of the questions at issue, or on any other criterion?

7. There is a suggestion that from the judgments of lowest courts of first instance, an appeal on facts should be excluded in petty cases, say, cases of a nature triable by a court of small Causes from the point of view of subject-matter, where the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not more than three thousand rupees (or such other sum as may be considered proper), and the decree or order does not involve directly or indirectly some claim or question respecting property of an amount or value, exceeding three thousand rupees (or such other sum as may be considered proper).

   The proposal is that in these petty cases, the first appeal should be allowed only if the appeal court certifies that a question of law is involved, and the issue of such certificate should be decided either in chambers or in open court as the appeal court may think proper.

   What are your views in the matter? Would you agree with the suggestion?

8. Do you agree that a second appeal should be allowed only if a substantial question of law is involved?

Appeals in execution

9. Do you consider it advisable that the right of appeal against all interlocutory orders made under section 47 should be abolished?

10. Would you, as regards appeals against final orders under section 47, favour adoption of the principle that no such order shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any error, defect or irregularity in any proceedings not affecting the merits of the case or the jurisdiction of the Court?

11. Have you any other suggestions for restricting the right of appeal in respect of orders falling under section 47?

Appeals in general

12. Have you any other suggestions to make for reducing the multiplicity of appeals?

13. (a) Would you favour total deletion of section 115, Civil Procedure Code, (revision) leaving the High Court free to interfere under article 227 of the Constitution in cases of gross miscarriage of justice?

(b) In the alternative, do you favour any curtailment of the right of revision? If so, in what direction?

(c) In particular, do you favour any curtailment of the right of revision in the case of inter-locutory orders? If so, in what respects?

Service of summonses

14. Would you favour postal service of summonses in all cases?

15. Do you consider it desirable to allow service on the pleader of a party of all processes issued after the defendant enters appearance?

16. Do you favour an amendment permitting service of summonses by a party?

17. Do you favour the adoption of one or more of these methods of service simultaneously?

18. Would you permit the service of summonses on an agent nominated by the Government, a public corporation or a public company, in the case of a suit by or against them?

Arguments

19. Do you favour the introduction of written arguments in suits or appeals, and if so, what concrete suggestions would you make in this behalf?

Judgment and decree

20. (a) Do you think it desirable to provide that the last paragraph of the judgment should be so drafted as to indicate the relief granted in precise terms, thereby facilitating the drawing up of a formal decree without loss of time?

(b) Would you approve of the suggestion that in case a decree is not drawn up within a specified period, the aggrieved party may appeal against the judgment without filing a copy of the decree, treating the copy of the last paragraph of the judgment as the decree?

Execution of money decrees

21. What changes would you suggest in the existing procedure relating to the execution of money decrees, with a view to—
    (a) avoiding delay, and
    (b) simplifying the procedure?

22. Do you agree with the suggestion that where a decree for the payment of money remains unexecuted inspite of the best efforts of the decree holder, the State should assume responsibility for its payment upto a specified amount—
    (a) if the decree is for damages for tort, for maintenance or arrears of maintenance, or
    (b) the decree is against a public corporation, or
    (c) the decree is for a debt and its non-executability is certified by the executing court as due to a refusal or neglect by the judgment debtor to pay notwithstanding the fact that he has had means to pay it?

23. (a) Do you suggest any liberalisation of the provisions as to suits by poor persons?
    (b) Would you approve of the suggestion that the present definition of "pauper" be widened so as to include a person who is unable to *pay a part* of the court fees?

Temporary injunctions

24. (a) Would you favour any limitations on the courts power to issue temporary injunctions? In particular, do you favour an amendment to the effect that an *ex parte* interim injunction should not be granted save in exceptional cases, and for reasons to be recorded in that behalf?
    (b) Would you favour the suggestion that in case an *ex parte* injunction is granted, it shall be discharged by the court if it is satisfied that the party which obtained the injunction is not taking diligent action to serve the opposite party or other steps necessary for the progress of the suit?

Stay of execution

25. Would you make the imposition of security compulsory before stay of execution is granted under Order 21, Rule 26(3) or Order 41, Rule 5(4)?

Execution—need for radical changes

26. It was observed by the Privy Council that the troubles of a litigant in India begin when he obtains a decree. Bearing this in mind, would you suggest any radical changes with reference to the provisions relating to execution, in order to reduce any delay ,expense and inconvenience that is caused by the present provisions?

Appeals against orders

27. Would you favour any curtailment of the list of appealable orders as given in Order 43, Rule 1?

Appeal by poor persons

28. Would you favour removal of the present restriction in Order 44, Rule 1(2) on the right of appeal of a pauper?

Delay

29. Have you any other suggestions to make for reducing delay in the disposal of cases in so far as such delay is due to defects in the Code of Civil Procedure?

Poor persons or persons with inadequate means—Legal aid and process fees

30. How far do you consider it the duty of the State to provide,—
    (a) to a person without any means; or
    (b) to a person with inadequate means, the following facilities or concessions in full or part—
        (a) legal aid;
        (b) exemption from payment of process fees,[1]

Court-fees—general

31. (a) What suggestions would you make for reducing the amount of court fees?
    (b) In particular, do you agree with the view that court fees should be nominal and should not be a source of reimbursement to the State and certainly not a source of profit to the State?

Court-fees in appeal

32. Would you favour the insertion of a provision to the effect that at the time of filing of the appeal, only one-fourth of the prescribed court-fee need be paid, and the remaining may be paid when the appeal is admitted?

Expenses other than lawyer's fees and court-fees

33. What concrete suggestions would you like to make as regards reduction of the expenses of litigation, in so far as such reduction could be achieved by an amendment of the Code of Civil Procedure?

Other amendments

34. Have you any other suggestions to make for amendment of the Code of Civil Procedure in the light of the scope of the present inquiry?[2]

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1. See present restriction in Order 33, Rule 8.

2. See Introductory note.

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