

CHAPTER V

DETAILED STUDY OF CIVIL LAW SYSTEM

SUBSTANTIVE & PROCEDURAL ASPECTS

Civil law is the law of the state, law of the land, law of the lawyers and law courts. In measuring civil liability the law attaches more importance to the principal of compensation than to that of fault. The civil law barring few exceptions takes no account of character of the offender or motive for the same. It also does not take account of probable or intended consequences but only of the consequences, which actually ensue. **1 The word civil is derived from 'jus civile' of roman. The law is not a scattered mass isolated decisions or directives coming in piecemeal in the sovereign. It is intended to be an organic whole.**2 The Civil Law thus deals with civil or private rights with remedy as contrasted with criminal laws where the state is involved. Civil Law is that body or branch of laws which every particular nation or state or city has established peculiarly for itself.

The objective of civil law is to decide civil liability for an act or omission. Such liability is in various forms like damages, specific performance, compensation and various other segments like property law, intellectual property law, civil aspects of the marital law etc.

According to Mulla suits may be divided into 2 classes namely suits which are of civil nature and suits which are not of civil nature. Suits of civil nature comes within the domain of civil law system.**3

**1 SALMOND ON JURISPRUDENCE PG.107.

**2 DEAN POUND QUOTED IN JURISPRUDENCE BY M P TANDAN AT PAGE 53.

**3 MULLA CIVIL PROCEDURE CODE PG.17 12TH EDITION.

The word "civil nature" means such rights as are vested in the citizen and fall within the domain of civil law and not public law.**4

In terms of enforcement, ordinary civil courts are the proper tribunals to which resort must be had for enforcement of civil right and that no wrong of a civil nature shall be without a remedy in the civil court.**5 The same principles have been applied in the privy council ruling which is still followed. There may be, where right is interpreted with injuria sine damno sufficient to found an action but no action can be maintained where there is neither damnum nor injuria."**6

The civil law administered in India in modern times is influenced by the Common Law including English Law of torts as applied and found suitable in Indian conditions and as modified by acts of Indian Legislature.**7

I

JURISDICTION OF COURTS

The word jurisdiction is used in various contexts. It means legal authority, extent of power and limitation on such powers. It is a term of comprehensive import embracing every kind of judicial action. It means power and authority of the court to hear and determine a judicial proceeding and power to render particular judgement in question. In other words it is the right and power of the court to adjudicate the subject matter in a given case.**8

**4 JUSTICE HOLLOWAY IN 11 MLJ 422

**5 ASHBY V/s. WHITE 1 SMITHS LC 216.

**6 LAW OF TORTS BY RATANLAL AND DHIRAJLAL 23RD(CENTERNARY) EDITION 1997 AT PAGE 15.

**7 SETALWAD IN COMMON LAW IN INDIA PAGE 110.

**8 BLACK'S LAW DICTIONARY 8TH EDITION.

The jurisdiction is basically of 3 types.

- (a) Pecuniary
- (b) Territorial
- (c) As to subject matter

The first and fundamental rule governing jurisdiction is that suit shall be instituted in the court of lowest grade competent to try it. In a case before Gujarat High Court a Panchayat employee challenged his suspension order by filing a suit in Civil Judge (J. D.). Under Section 32 of Bombay Civil Courts Act the jurisdiction of civil courts is not excluded. It was held that the suit was properly filed.**9

The pecuniary jurisdiction of a court depends on valuation of subject matter. Such valuation is made in accordance with the provisions of suit valuation Act. The pecuniary jurisdiction of various courts is as under in State of Gujarat:

<u>TYPE OF COURT</u>	<u>JURISDICTION</u>
Small Causes Court	upto Rs.5,000/-
Junior Division	upto Rs.50,000/-
Senior Division	Rs.50,000/- upto any amount

The rules governing territorial jurisdictions of the courts have been summarised below.

1. The suits relating to recovery of immovable property or the sale or foreclosure or for determination of any right relating to immovable property should be instituted in the court within whose jurisdiction the property is situated. Where the property is situated within jurisdiction of different courts it can be instituted in any of the courts. Hence if properties are located within jurisdiction of 2 courts suit can be instituted in any of the court.**10

**9 NATAVARLAL PARMAR V/s. DIST. PANCHAYAT AIR 1990 GUJ.142.

**10 MADHAV DESHPANDE V/s. MADHAV DHARMADHIKARI AIR 1988 SC 1347.

The suits for compensation for wrong to person or movables can be instituted at the place where the wrong was done or defendant resides and carries on business.**11 The suit shall be instituted where the defendant resides or carries on business or where the cause of action, wholly or in part arises. The jurisdiction of court in matter of contract will depend on citus of the contract and connecting factor. Cause of action means every fact if traversed would be necessary for the plaintiff to prove in order to support his right to a judgement. It means a bundle of facts which taken together, gives plaintiff right to relief.**12

In case of breach of contract an action can be brought either at the place where contract was made or where the breach was committed. If parties reside at different place and contract does not mention any thing about place of execution, place where the advance payment was made will have the jurisdiction.**13 Any contract which absolutely debars the Indian courts from having the jurisdiction is by itself void and can not be enforced.**14

Lack of territorial or pecuniary jurisdiction is one of the most common defence raised by the defendants. Sometimes it is raised as a preliminary issue, with a view to prevent the court from assuming the jurisdiction. It is provided that the objection as to place of suing is not to be allowed unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there is consequential failure of justice. The Supreme Court has held that objections as to territorial jurisdiction can not be entertained before appellate court in absence of evidence of failure of justice.**15

****11 SECTION 19 CPC**

****12 ABC LAMINART (PVT.)LTD. V/s. A.P.AGENCIES 1989 44 TAXMANN 443 AND SUPREME COURT.**

****13 SHAKTI CEMENT V/s. FACT AIR 1990 KER.86**

****14 RAJENDRA SETHIA V/s. PUNJAB NATIONAL BANK AIR 1991 DEL.285**

****15 KOOPILAN V/s. KUNTALAN AIR 1981 SC 1683.**

II

ALL CIVIL SUITS TO BE TRIED BY CIVIL COURTS

The Civil Procedure Code stipulates that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. The onus of proving that the court does not have jurisdiction lies on the party who disputes the jurisdiction. The jurisdiction is decided by averments in the plaint and not on defence.

The exclusion of jurisdiction of civil courts should not be readily inferred. It must be either explicitly expressed or clearly implied. **16 Whenever a right not existing earlier is created by a statute and the statute itself provides machinery for enforcement of right, here both the right and remedy are creation of statute and hence jurisdiction of civil courts is impliedly barred.**17

Some examples where the jurisdiction of civil court is barred are narrated below:-

Motor Vehicles Act.

Special tribunal has the jurisdiction.

Disputes relating to terms of service
of Govt. servants

Central Administrative Tribunal.

Disputes relating to members of
Co-operative Societies.

Board of Nominees

When there is no specific exclusion civil court is legally competent to determine the matter. Thus the court can decide rent payable by the tenant under Bombay Tenancy and agricultural lands Act 1944.**18

**16 G. S. SHINDE V/s. R. B. JOSHI AIR 1979 SC 653.

**17 RAJARAM BHARGVA V/s. UOI AIR 1988 SC 752.

**18 SMT. PARVATI V/s. FATEHSINGH RAO GAEKWAD AIR 1986 SC 2205.

If for part of the reliefs the suit is maintainable in the forum where it has been laid, it is open to the forum to shut out its doors to the suitor, thus the Supreme Court held that civil court had the jurisdiction to rectify the record relating to date of birth.**19

III

STAY, RESJUDICATA AND BAR TO FURTHER SUITS

With the object of preventing courts of concurrent jurisdiction simultaneously trying two parallel suits in respect of the same matter in issue, Civil Procedure Code has vested inherent power in the court to stay the suit.

No court shall proceed with trial of any suit in which the matter in issue is also directly and substantially, an issue in a previously instituted suit, between the same parties or between parties under whom they or any of them claim litigation under the same title, where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or constituted by the Central Government and having like jurisdiction on or before the Supreme Court.

The pendency of a suit in Foreign Court does not preclude the courts in India for trying a suit founded on same cause of action. The application for stay of suit is maintainable at any stage of the suit. The court does not have option to refuse on ground of delay or laches.**20 A party will not be allowed to move application for stay of suit unless he has filed a written statement. But such application may be entertained if the plaint of previously instituted suit is produced.

The principal of resjudicata aims at bringing finality to the litigation. The basic principal is that a final judgement rendered by a court of competent jurisdiction is conclusive on merits as to rights of the parties and constitutes an absolute bar against subsequent action involving the same claim.

**19 ISHAR SINGH V/s. NATIONAL FERTILIZER AIR 1991 SC 1546

**20 S P AGRAWAL V/s. SEMI CONDUCTORS LTD. AIR 1976 CAL.358

The Supreme Court in one of the judgement has explained the concept in following words. "It is true that in determining the application of the rule of resjudicata the court is not concerned with the correctness or otherwise of the earlier judgement. The matter in issue if it is one purely of fact decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and can not be re-opened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not be for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be resjudicata in a subsequent proceeding between the same parties where the cause of action is the same. Where however the question is one purely of law and it relates to the jurisdiction of the court sanctioning something which is illegal, by resort to the rule of resjudicate a party affected by the decision will not be precluded from challenging the validity of the order."**21

The principle of resjudicata applies only under following circumstances:

- (i) The matter directly and substantially in issue has been directly and substantially in issue in a formal suit between same parties or between whom they claim litigation under the same title.
- (ii) The matter is in the court competent to try such subsequent suits or the suits in which such issue has been subsequently raised and has been heard and finally decided.

The word former suit means suit decided prior, irrespective of the date of institution. The competence of the court shall be determined irrespective of provisions as to right of appeal. The matter must be decided on merits i.e. the issue was alleged by one party and denied by the other. Any relief, which might

**21 MATHURA PRASAD V/s. DOSSIBAI AIR 1971 SC 2355

and ought to have been made, ground of defence, is deemed to be pleaded. Any reliefs, which are not expressly granted, is deemed to be refused. The litigation has to be bonafide, Provisions apply to execution of decree. Only issues heard, and finally decided are covered by the principle of resjudicata. The principle of resjudicata is one of convenience and not one of absolute justice and it should not be unduly conditioned and qualified by technical interpretations.

The analogy of doctrine of resjudicata can be applied to appeals also. When 2 suits on the same matter were tried together by the same court and if appeal in one is barred or appeal from one is dismissed it applies as resjudicata to other.**22

Principle of resjudicata would come into play only when or matter directly and substantially in issue in the formal suit has been heard and finally decided on merits. If an erroneous decision has become final it will operate as resjudicata. The word 'bar to suits' refers to express provisions of certain laws under which jurisdiction of civil courts is exclusively debarred. The specific statutes like MRTP Act, Administrative Tribunals Act, Railway Claims Tribunal Act etc creates special forum that has been vested with exclusive power and the jurisdiction to decide the matters. In such cases the jurisdiction of civil cases is exclusively barred.

IV

TERRITORIAL JURISDICTION AND PLACE OF SUING

The purpose of territorial jurisdiction is to ensure smooth and speedy trial of the matter with least inconvenience to the affected parties. Hence the suit can not be filed at any place depending on wish of the party. The court concern should have territorial jurisdiction. The territorial jurisdiction is conferred on a court by following factors:-

**22 AIR 1974 SC 1320

- (i) By virtue of the fact of residence of the defendant
- (ii) By virtue of location of subject matter within jurisdiction of the court.
- (iii) By virtue of cause of action arising within jurisdiction of such court.

The inherent lack of jurisdiction can not be cured even by consent of parties, which means if the court does not have any jurisdiction at all, the parties can not subsequently confer it by an agreement.

V

PLAINT

The entire legal machinery under the Civil Law is set in motion by filing of plaint and hence plaint is the actual starting point of all pleadings in a case. Though the law has not laid down any tight jacket formats for plaints, its minimum contents have been prescribed.**23

The plaint shall contain the following particulars :-

- (i) Name of the court in which suit is to be filed.
- (ii) Name, description and place of residence of the plaintiff.
- (iii) Name, description and place of residence of the defendant so far it can be ascertained.
- (iv) Where the plaintiff or defendant is a minor or person of unsound mind statement to that effect.
- (v) Facts constituting the cause of action and when it arose.
- (vi) Fact showing that the court has jurisdiction.
- (vii) Relief which the plaintiff claims.
- (viii) Where plaintiff has allowed a set off or relinquishes a portion of his claim, the amount so allowed for relinquishment.
- (ix) Statement of the value of the subject matter of the suit for purpose of jurisdiction and court fees.

Depending upon the subject matter of the suit certain additional requirements also have been laid down as under:

TYPE OF SUIT

REQUIREMENTS

Money suits	precise amount to be claimed.
Suit relating to immovable property	precise particulars of the property.
Suits in a representative character	Plaint should show actual existence of interest of plaintiff in the matter.
Defendant interested in subject matter	the nature of interest is to be stated
Exemption from limitation law	Ground on which exemption claimed to be stated.
Relief claimed by the plaintiff	Relief to be specifically stated
Several distinct claim or causes of Relief	Distinct grounds to be specifically stated.

The plaintiff is required to annex list of documents which he has produced alongwith the plaint and shall also submit additional copies as may be required.

If after submitting the plaint the court finds that it should be submitted before some other court the plaint could be returned, and intimation thereof can be given to the plaintiff.

The court has power to reject the plaint on following grounds:

- (i) Where it does not disclose the cause of action
- (ii) Where the relief claimed is under valued and plaintiff fails to correct the valuation within the time fixed.
- (iii) If the relief is properly valued but insufficient court fee stamp is paid and the plaintiff fails to make good such amount.
- (iv) Where the suit appears to be time barred, from the statements in the plaint.
- (v) When the plaint does not disclose any cause of action.

The whole plaint should be rejected and not a portion of it. **24

The rejection of plaint on aforesaid grounds does not bar the plaintiff from presenting a fresh plaint. **25

Where the plaintiff sues upon a document in his possession or power he shall produce it in the court when plaint is presented. If the document is not in his possession the plaintiff will state in whose possession it is. A document, which has to be produced and has not been produced at the time of presenting, the plaint can not be received in evidence at the hearing of the suit without permission from the court.

Allegations made in the plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in written statement. **26

A party can not be granted a relief, which is not claimed in the plaint, if looking at the circumstances, granting of relief will result in serious prejudice to the interested party.

**24 ROOPLAL SATHI V/s. SINGH 1982 3SCC 487

**25 ORDER 7 RULE 13 OF CPC

**26 ABDULLA BIN ALI V/s. GALLAPPA, AIR 1985 SC 577

It is not necessary to allege in the pleading the facts which the law presumes in his favour. The pleading shall contain and contain only a statement in concise form of material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. Any condition precedent to the performance or occurrence of which is intended to be distinctly specified in the pleading, shall be mentioned.

The pleadings of the party's form the foundation of their case and it is not open to them to give up the case setout in the pleading and propound a new and different case.

If properties are not correctly and fully described and some properties had been omitted from schedule of original plaint, the amendment can be allowed in plaint.**27 Application for amendments moved by both the parties contribute substantially to delay because it is to be heard and decided by court.

VI

NECESSARY PARTIES TO THE SUIT

The Civil Procedure Code stipulates that the following persons may be joined as plaintiff:

- (a) Any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in alternative.
- (b) If such persons brought separate suit common question of law or fact will arise.**28

**27 VEREEKUTHY V/s. C. M. MATHUKUTTY, AIR 1981 SC 1533

**28 ORDER 1, RULE 1 AND 3 OF CIVIL PROCEDURE CODE.

The following persons may be joined as defendants:

- (a) Any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons whether jointly, severally or in the alternative and
- (b) If separate suits were brought against such persons, any common question of law or fact will arise.

The Calcutta High Court has held that unless the joinder of parties is a proper joinder, court will not pass directive for separate trial. Suit can not be tried against a person who has been wrongly joined if there is no cause of action against a person, suit will not be maintainable. **29 Once a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified.

It is possible to pass a decree without issuing a summons. When defendant appeared at presentation of the plaint and admitted the plaintiff's claim.

A person may be added as a defendant to a suit though no relief may be claimed against him, provided his presence is necessary for complete and final decision of questions involved in the suit. Such a person is called a proper party as distinguished from necessary party. A person may not be a necessary party and yet he may be a proper party.**30 If there is improper addition of plaintiff or Defendants it is called misjoinder of parties and if a necessary party is not joined it is called non-joinder of parties.

Where a suit is brought against a person who is found to have died before its institution, bringing his legal representatives on record, by amending the plaint is not permissible, even though suit is filed in ignorance of the death. The reason is that suit against dead person is a nullity right from beginning. **31

**29 INDIAN OVERSEAS BANK V/S. THERMOLITH PRODUCTS (P) LTD. AIR 1979 CAL.112

**30 MULLA, CIVIL PROCEDURE CODE, 12TH EDITION, PAGE 436.

**31 CUTTACK MUNICIPALITY V/s. SHYAM SUNDER AIR 1977 ORISSA 137

The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear just to the court, order that name of any party improperly joined as plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant and whose presence before the court may be necessary to enable the court to effectually and completely adjudicate upon the same, such party may be added.**32

Whenever a defendant is added, the plaint shall unless the court otherwise directs, be amended in such manner as may be necessary and amended copies of the summons and plaint be served on new defendant and if the court deems it fit on original defendant.

If after institution of a suit, a party is added as plaintiff or defendant, the date of addition is to be considered as regards that party as date of institution of suit. Hence if necessary parties are not joined within period of limitation suit must be dismissed.**33 Subject to provisions of Limitation Act referred above person may be added as party to a suit at any stage of the suit including arguments stage or the stage or decree.

All objections on the ground of non-joinder or misjoinder of the parties shall be taken at the earliest possible opportunity and in all cases where issues are settled at or before such settlement unless grounds of objection have arisen subsequently.

Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the court sue, or be sued or may defend such suit on behalf of all persons interested. Such suits are called representative suits. In such suit claim can not be abandoned or matter compromised without permission from the court. **34

**32 ORDER 1, RULE 10(L) OF CIVIL PROCEDURE CODE.

**33 SECTION 21, LIMITATION ACT, 1963

**34 ORDER 1, RULE 8, CIVIL PROCEDURE CODE.

VII**SUMMONS**

Summons is an instrument used by the court to commence a civil action or proceedings and is a means to acquire jurisdiction over party. It is a process directed to a proper officer requiring him to notify the person named, that an action has been commenced against him, in the court from where process is issued and that he is required to appear, on a day named and answer the claim in such action. When the suit is duly instituted summons may be issued to defendant to appear and answer the claim.

Defendant to whom a summons has been issued may appear in person or by a pleader duly instructed or by a pleader accompanied by some person who is able to answer all questions.

To expedite the filing of reply and adjudication of claim, the court may direct filing of written statement on date of appearance and issue suitable summons for that purpose. Failure to do so may result in Ex-parte judgement under order 8, rule 10. The provisions of substituted service have to be resorted when the summons is not served by normal process through the court bailiff. Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for purpose of avoiding service or that for any others reason the summons can not be served in ordinary way the court shall order summons to be served by affixing copy thereof in conspicuous part of the house. **35

To expedite service of summons one more provision is relating to substituted service under which the court orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant last resided or carried on business or personally worked for gain. **36

**35 ORDER 5, RULE 20 OF CIVIL PROCEDURE CODE.

**36 ORDER 20 RULE – 1A, INSERTED BY AMENDMENT ACT, 1976 WITH EFFECT FROM 1/2/1977.

Where the service is substituted, the court shall fix time for appearance of the defendant as the case may require.

Delay in service of summons is identified as one of the major reasons for delay in judicial proceedings. To avoid the delay, service of summons can be made simultaneously by registered post and also by normal court process. While allowing additional service is at the discretion of the court, but court can refuse the permission only if it considers it unnecessary to allow the same in circumstances of the case. **37

Service of summons by post was one of the measures recommended by Law Commission of India to reduce delay. **38 The provision of service by registered post is only in addition to the service of summons in ordinary course through court process. Mere issue by power without ordinary process is not proper. If the defendant refuses to take service of summons, when tendered to him, or the fact that the acknowledgement has been lost or mislaid or has not been received back by the court for any other reason within 30 days from date of issue of summons, court can draw a presumption that summons is duly served.

VIII

APPEARANCE OF PARTIES

The scheme of Civil Procedure Code envisages that, as far as practicable and possible the proceedings should not be conducted to the detriment of a party in his absence. At the same time, it can not be a party's privilege not to appear and delay the proceedings.

**37 BHAGWAN SINGH V/s. RAM SINGH AIR 1988, PAT.166.

**38 27TH REPORT OF LAW COMMISSION OF INDIA. PAGE 137

On the day fixed in the summons the defendant is required to appear and answer and the parties shall attend the court unless the hearing is adjourned to a future day fixed by the court. If the defendant is absent court may proceed *ex parte*. Where on the day so fixed it is found that summons has not been served upon defendant is consequence of failure of plaintiff to pay the court fee or postal charges the court may dismiss the suit. Where neither the plaintiff nor the Defendant appears the court may dismiss the suit. Such dismissal does not bar fresh suit in respect of same cause of action. **39

If the defendant appears and plaintiff does not appear and the defendant does not admit the plaintiff's claim wholly or partly, court shall pass order dismissing the suit. If defendant appears and admits part or whole of the claim the decree will be passed accordingly.

It is a serious matter to dismiss the plaintiff's suit without hearing him and that course ought not to be adopted unless the court is satisfied that justice so requires. **40

If the plaintiff shows sufficient cause reopening of the matter is mandatory. What is sufficient cause depends upon facts and circumstances of each case and the court should adopt liberal and generous construction which will advance cause of justice and hence restoration shall ordinarily not be denied. **41

The law laid down by the Supreme Court is that a party must have a fair and reasonable opportunity to represent his case. For that he must have notice of proceedings and service of summons is a condition precedent for fair trial. **42

**39 ORDER 9, RULE 3 CIVIL PROCEDURE CODE.

**40 SAMDESANI V/s. CENTRAL BANK OF INDIA. AIR 1938 BOM.199.

**41 LAKSHMI COMMERCIAL BANK V/s. HANSRAJ, AIR 1981 PH 228.

**42 BEGUM PARA NASIR KHAN V/S. FERNANDS (1984), 2SCC 595.

Where the plaintiff fails to apply for a fresh summons for one month after the summons sent earlier returned without serving, the court will issue fresh summons if the plaintiff satisfies the court that:-

- (i) He has failed, in spite of his best efforts to discover residence of defendant who is not served.
- (ii) Such defendant is avoiding service of process.
- (iii) There is any sufficient cause for extension of time then the court may extend the time.

If an ex parte decree is passed and the defendant satisfies that he was prevented by sufficient cause then he has the following remedies open :-

- (i) Prefer appeal against decree.
- (ii) Apply for Review.
- (iii) Apply for setting aside the Ex parte Decree.

The words "Sufficient Cause" has not been defined and it will depend on facts and circumstances of each case.**43

Mistake of pleader in noting wrong date in diary, late arrival of train, inability due to illness or accident etc. or his non availability for justifiable reasons are sufficient grounds for setting aside the decrees.

XI

EX PARTE DECREES

A decree against the Defendant without hearing him or in his absence/in absence of his defence can be passed under the following circumstances :-

****43** UCO BANK V/S. IYENGER CONSULTANCY SERVICES, 1994 (SCC) 399 (SUPPLE.)

- (i) Where any party from whom a written statement is required fails to present the same within the time permitted or fixed by the court, as the case may be the court shall pronounce judgement against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgement a decree shall be drawn up.**44
- (ii) Where defendant has not filed a pleading, it shall be lawful for the court to pronounce judgement on the basis of facts contained in the plaint, except against person with disability.**45
- (iii) Where the plaintiff appears and defendant does not appear when suit is called up for hearing and summons is properly served the court may make an order that suit will be heard ex parte.**46

The provisions relating to ex parte decrees if cautiously applied can be used to expedite disposal of cases where defendant resorts to, dilatory tactics or he does not appear despite service of summons or he avoids service of summons.

A suit to set aside an ex parte decree is not maintainable, if the defendant alleges that ex parte decree was obtained by fraud, defendant can file regular suit to set aside such decree. The onus in such case lies on person who alleges fraud.**47

An exparte decree is an equally effective decree unless set aside in appeal or by the same court. The court, which passed exparte decree, has the power to set aside the decree. The provisions relating to exparte decree will be frustrated if the defendant was entitled to approach the court to set aside the decree as a matter of right. The court therefore has been vested with the power to impose

**44 ORDER 8, RULE 10 CIVIL PROCEDURE CODE.

**45 ORDER 8, RULE 5(2), CIVIL PROCEDURE CODE.

**46 ORDER 9, RULE 6(1)(A) OF CIVIL PROCEDURE CODE.

**47 RUPCHAND V/s. RAGHU VANSHI (P)LTD, AIR 1964 SC 1889.

terms - the wordings "Upon such terms as to". In order 9 rule 13 actually imply that some addition can be cast on the defendant and he may be, even directed to deposit some portion of decretal money or pay costs. The courts should refrain from imposing the condition of deposit of huge sum as condition precedent for setting aside the decree.

A litigant is expected to comply with the terms imposed but can not be penalized on technical ground, such as bond provided was not duly stamped etc.**48

If an *ex parte* Decree is to be set aside on condition of defendant making some payment, the proper course for court is to pass an order to direct the defendant to deposit the amount on a specified day and only after the amount is so paid the order for setting aside the decree be passed and decree should remain in full force upto that stage.

X

INTERLOCUTORY PROCEEDINGS

The period involved between initiation and disposal of litigation is substantially long. The intervention of the court may sometimes be required to maintain the position as it prevailed on the date of litigation. In legal parlance it is known as "status quo". It means preserving existing state of things on a given day. In that context interlocutory orders are provisional, interim, temporary as compare to final. It does not finally determine cause of action but only decides some intervening matter pertaining to the cause.

**48 BHAGWANDAS ARORA V/s. FIRST ADDITIONAL DIST. JUDGE (AIR 1983 SC 954)

The litigants for following types of interlocutory orders/interim relief approach the Civil Courts in India.

PROVISIONS

PARTICULARS

Order 38	Arrest and attachment before judgement
Order 39	Temporary injunctions and interlocutory orders
Order 40	Appointment of receiver
Order 26	Appointment of commissioner

The procedure followed in the court is that the separate application for interim relief is moved at the time of filing of suit or at a subsequent stage. The court either grants the order *ex parte* or issues urgent show cause notice and the reply is to be filed within short time.

To avoid the possibility of *ex parte* orders the party apprehending such orders may file caveat application under section 148A of the Civil Procedure Code. Whenever a caveat application is filed and copy is served on the other side by registered post it is obligatory for the person filing application to send a copy of the application and papers and document.

Section 148 A does not contemplate enforcement of a notice when notice is otherwise ruled out by provisions of the Civil Procedure Code. Hence judgement debtor is not entitled to notice of an execution of decree by lodging a caveat in anticipation of an execution application.**49

**49 CHLORIDE INDIA LTD. V/S. GANESHDAS AIR 1986 CAL.74.

There is no prescribed form for a caveat and hence it may be lodged in any form. No ex-parte orders can be passed without hearing the caveator or without giving him a notice. Such orders are bad in law.**50

A. ARREST AND ATTACHMENT BEFORE JUDGEMENT

The court has power to pass orders for arrest before judgement under the following circumstances :-

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- (i) The defendant with intent to delay the plaintiff, or to avoid any process of the court or to obstruct or delay the plaintiff the execution of any decree that may be passed against him.
 - ⇒ Has absconded or left the local limits of the jurisdiction of the court.
 - ⇒ Is about to abscond or leave the local limits of the court.
 - ⇒ Has disposed off or removed from local limits of the court his property.
-

Defendant is about to leave India under circumstances affording reasonable probability that plaintiff will or may thereby be obstructed or delayed in execution of decree.

In such case court may issue a warrant to arrest the defendant and bring him before the court. He may not be arrested if he furnishes security or makes payment of the amount mentioned in the warrant.

The orders for attachment before judgement can be granted if at any stage of the 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,

****50 RESERVE BANK OF INDIA EMPLOYEES ASSOC. v/S. RBI 1981 CITED BY MULLA-CPC AT PAGE 385.**

-
- ⇒ Is about to dispose off the whole or any part of his property or
 - ⇒ Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.
-

In such case the court may direct the defendant either to furnish security or to appear and satisfy why security should not be furnished. Where such cause is not shown the property may be attached.

The Supreme Court held that object behind the order of attachment is to give an assurance to the plaintiff that decree if passed would be satisfied. It is a sort of guarantee against decree becoming infructuous for want of property available from which decree can be satisfied.**51 Before invoking this provision it is necessary for the plaintiff to establish that the defendant has acted or is about to act with intent to obstruct or delay the execution of decree likely to be passed.**52 Moment the suit is decreed in favour of the plaintiff attachment before judgement operates as attachment in execution of decree.**53

B. INJUNCTIONS

The substantive law-governing injunction is the Specific Relief Act. Section 36 to 42 of Specific Relief Act deals with injunctions. The purpose of granting injunctions has been explained by Madras High Court as under :-

"An interim injunction can be granted to a person on the footing that person is prima facie entitled to a right which deserves to be protected as an interim measure till the disposal of the suit in which validity of the claim is to be investigated."**54

**51 SARDAR GOVINDRAO V/s. DEVI SAHAY AIR 1982 SC 989

**52 BANK OF INDIA v/S. NATIONAL TILE WORK IND. AIR 1989 DEL.60

**53 SMT.PUSHPAMALA JAIN V/s. BOB AIR 1990 P&H 28

**54 ABU BAKAR V/s. KUNHAMAO AIR 1958 MAD. 287.

The court may grant a temporary injunction to restrain the defendant if it is proved by affidavit or otherwise.

-
- ⇒ That any property in dispute in a suit in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of decree.
 - ⇒ The defendant threatens or intends to remove or dispose off his property with a view to defraud his creditors.
 - ⇒ The defendant threatens to dispossess the plaintiff or other wise cause injury to plaintiff in relation to any property in dispute in the suit.
-

The court has the power to direct the plaintiff to provide security. The court may order for police protection in favour of plaintiff only if it is complained that defendants had violated the injunction order.**55 If there is disobedience or breach of injunction the person who is guilty can be imprisoned. An injunction to a corporation is binding on the corporation and its officers.

No injunction can be granted unless the plaintiff has bonafidely established that they have a prima facie case meaning thereby that, a bonafide contention or serious question to be tried. Court should usually refrain from granting injunction restraining performance of contractual obligations arising out of a letter of credit or bank guarantee.**56 When bank guarantee is involved the balance of convenience lies in not granting the injunction.**57 An interim order of injunction passed without giving opportunity to the other party can be vacated on any ground of fact or law.**58

**55 ABDUL RAHIM V/s. NAZARULLAH AIR 1999 KER.3

**56 UNITED COMMERCIAL BANK V/s. BOI AIR 1981 SC 1426.

**57 SENTEX INDIA LTD. V/s. WILMARE IMPEX CORP. LTD. AIR 1986 SC 1924.

**58 K K AGRAWALA V/s. RBI AIR 1991 CAL.272.

The injunctions granted as aforesaid are interim in nature and it is stipulated that where injunction is granted without giving notice to opposite party the court shall make and endeavors to finally dispose of the application within 30 days on the date on which the injunction was granted and where it is unable to do so reason for it will be recorded.**59 If is observed in most of the cases the injunction application is not finally disposed off within the aforesaid period and hence the provision remains a dead letter. Even when the defendant is prompt in filing reply, the plaintiff seeks adjournment and time for filing rejoinder, which is major reason for delay. The table below shows the position of injunction matters studied for this research.

TABLE

<u>POSITION</u>	<u>NO.OF CASES</u>
1. No. injunction applications filed	49
2. Exparte Injunction granted	9
3. Show cause notice issued	40
4. Pending for filing of reply/written statement	29
5. pending for filing rejoinder by plaintiff.	15
6. Pending for hearing.	10
7. Pending for order.	10
8. Decided - within one month	5
1-3 months	20
3-6 months	12
6-12 months	6
and beyond one year	6

**59 ORDER 39 RULE 3 OF CPC.

B. APPOINTMENT OF RECEIVER

Receiver is a person appointed by a court for the purpose of preserving property of a debtor pending an action against him or applying the property in satisfaction of a creditors claim whenever there is danger that in absence of such appointment property will be lost, removed or injured.**60.

The receiver can be appointed for following purpose, before or after passing of a decree.

- (i) For possession and custody of the property and remove the person in such possession.
- (ii) Manage the property.

For realisation, protection and improvement of the property.

The receiver is bound to act as per the directives of the court and any act done by him in violation of such directives will not be protected.**61 The receiver is under an obligation to furnish security and submit accounts. If he fails to do so without reasonable cause his property may be attached.

C. APPOINTMENT OF COMMISSIONER

The court may appoint commissioner for various purposes including examination of witness, making local investigation or for sale of movable property.**62

**60 BLACK'S LAW DICTIONARY 6TH EDITION PAGE 1268.

**61 KRISHNA KUMAR KHEMKA V/s. GRINDLAYS BANK AIR 1991 SC 899

**62 ORDER 26 OF CPC

A person who is a party has to be examined first before witness whether commission should examine a witness is a matter of judicious discretion. When statutory duties are entrusted to persons whose absence would cause great inconvenience to others no one else can perform that duty, it can be safely concluded that absence of such persons is detrimental to public service.**63

Apart from the aforesaid specific provisions the court also has inherent powers under section 151 which stipulates that the court has inherent power to make such orders as may be necessary for the ends of the justice or to prevent abuse of process of court. The consistent interpretation of Section is that exercise of such power should not indirectly facilitate deliberate violation of other laws like under valuation in court fees.**64

XI

WRITTEN STATEMENT

The defendant is required to file written statement of his defence at or before the first hearing or such time as may be allowed alongwith the written statement the defendant should also produce list of documents relied upon by him. If defendant disputes maintainability of the suit or takes the plea that the transaction is void it must be specifically stated. A general denial of grounds alleged in the plaint is not sufficient and denial has to be specific. The denial should not be an evasive denial but it must be on point of substance. Every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading shall be deemed to be admitted.**65

**63 INDRAJIT ROY V/s. BOB AIR 1991 ORRISA 45

**64 SCHEDULE CASTE CO-OP. SOCIETY LTD. V/s. UOI AIR 1991 SC 730.

**65 ORDER 8 RULE 5 OF CPC.

If any set off is claimed particulars thereof should be stated. The plaintiff can submit defence to a set off. Other than this no pleading can be presented except with the leave of the court. Admission made in the pleadings, does not necessarily bind the party and amendment in the pleading can be made. **66 If the court finds that defendant is delaying filing of written statement deliberately, he may be given last opportunity to file written statement on certain conditions including deposit of some amount.**67

If the defendant fails to present written statement within stipulated time court may pronounce judgement against him and draw a decree. A decree which is passed by the court if the defendant neglects to file his written statement within the time granted can not be said to be an ex parte decree and hence can not be set aside under order 9 rule 13.**68

XII

PROCEDURE AFTER FILING WRITTEN STATEMENT AND APPEARANCE

A. EXAMINATION OF PARTIES

Examination of parties is an important stage after appearance. At first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement. Such admissions and denials shall be recorded. The examination may be an oral examination. When a party, if the pleader of the party who appears, refuses or is unable to answer any material question court may direct the concerned party should remain present in the court. If the party does not remain present court may pass such orders as deemed fit.**69

**66 MAHENDRA RADIO AND TELEVISION V/s. SBI AIR 1988 ALL.257.

**67 RAMESHCHAND V/s. PNB AIR 1990 SC 1147.

**68 TRADERS BANK LTD. V/s. AVTAR SINGH AIR 1988 DEL.55

**69 ORDER 10 OF CPC.

B. DISCOVERY AND INSPECTION

The purpose of discovery and inspection of document and facts is to enable the parties to ascertain the facts to be proved. With the leave of the court the plaintiff or defendant may deliver interrogatories in writing for examination of opposite parties which are required to be answered and which are related to the matter. Main object of interrogatories is to save expenses by enabling a party to obtain an admission from his opponent, which makes the burden of proof easier.**70 It creates right in favour of a party to require his opponent to answer on oath such questions, framed by the former, relating to the matter in question in the suit between them as the court may allow. **71 The basic rule governing interrogatories is that, it must have reasonably does have connections with matters in question. **72 If there are any objections to the interrogatories on the ground that they are scandalous or irrelevant the court may consider the same. Interrogatories shall be answered by affidavit to be filed within 10 days. **73 If there is any omission to answer the court may require further answer. Any party may without filing an affidavit apply to the court for an order directing any other party to make discovery on oath of the documents in his possession, power, control and relevant for deciding the issues involved. Applications for production of documents by the other side sometimes constitute major problems for the litigants and causes delay. In a case before Gujarat High Court the defendant preferred revision when his demand to produce all cheques and vouchers right from inception of transaction were demanded from Bank of Baroda. The Gujarat High Court has rejected the revision.**74

**70 WOODROFFE AND AMIR ALI CODE OF CIVIL PROCEDURE 3RD EDITION AT PG.1749.

**71 HALSBURY'S LAWS OF ENGLAND VOL.2 AT PG.92.

**72 RAJNARAIN V/s. SMT. INDIRA NEHRU GANDHI AIR 1972 SC 1309.

**73 ORDER 7 RULE 8.

**74 CIVIL REVISION APPLI.609/98 BOMBAY CUT PIECE STORE V/s. BANK OF BARODA.



To avoid such delays courts can be judicious in production of documents.

On the following grounds production of documents can be resisted :-

- (i) Those documents are within legal or professional privilege.
- (ii) The documents in question may tend to criminal risk to the party or to expose him to forfeiture.
- (iii) Production is contrary to public policy.
- (iv) Documents are not in sole possession of party giving discovery.
- (v) Documents are in possession of party solely as agent or on behalf of another.
- (vi) Documents relate solely to the case of party giving the discovery.**75

It shall be lawful for the court at any time during pendency of any suit to order production by any party thereto upon oath of documents in his possession.

C. ADMISSIONS

Any party to a suit may give notice, by his pleading or otherwise in writing that he admits truth of part or whole claim of other party.

Either party may call upon other party to admit within 15 days from date of service of the notice, any document saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the cost of proving any such documents shall be paid by party so neglecting or refusing.

Every document which a party is called upon to admit, if not devised specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents shall be deemed to be admitted.**76

The court may however at its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.

**75 HALSBURY'S LAWS OF ENGLAND, VOL.II PP.72-73

**76 ORDER 11, RULE 14, CIVIL PROCEDURE CODE.

Any party may by notice in writing, at any time not later than 9 days before the day fixed for hearing, call on any other party to admit for purposes of suit only, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit the same within 6 days after service of such notice or within such time as may be allowed by court. Where admission of facts have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for determination of any such question between the parties, make such order or give such judgement as it may think fit.

Notice to produce documents shall be given in Form No. 12 prescribed in Appendix C to Civil Procedure Code.

The Supreme Court has held that to rely upon the alleged admission in written statement, such admission has to be taken as a whole and it is not permissible to rely on part of admission ignoring the other.**77

D. PRODUCTION AND IMPOUNDING OF DOCUMENTS

The parties or their pleaders shall produce at or before the settlement of issues, all documentary evidence of every description in their possession or power, on which they intend to rely, and which has not been filed in the court or ordered to be produced.

No documentary evidence in the possession or power of any party, which should have been but has not been produced in accordance with the aforesaid requirements, shall be subsequently admissible.

On every document which is admitted in evidence the court shall record number and title of suit, name of person producing document, date on which it is produced and statement of its being admitted.

**77 DUDH NATH PANDEY V/s. SURESH C. BHANASALI, AIR 1986 SC 1509.

Any person whether a party to the suit or not, desirous of receiving back any document produced is entitled to receive back the same where the suit or appeal thereon is disposed off.

Any objection as to mode of proof, ought to have been raised at any time when document is sought to be proved in evidence. When document is exhibited without any objection as to mode of proof, it is not proper for the court to take any objection regarding the mode of proof for providing the document at final stage.**78

E. FRAMING OF ISSUES

Issues arise when material proposition of fact or law is affirmed by one party and denied by the other. Material propositions are those propositions of law or facts which a plaintiff must allege in order to show a right to sue and defendant must allege in order to constitute his defence.

Issues may be issues of law or issues of facts.

The court shall at first hearing, after reading the plaint and written statement ascertain upon what material propositions of facts or law parties are at variance.**79

Court is required to pronounce judgement on all the issues. Issues may be framed from allegations made on oath by the parties or in answer to interrogatories or from contents of documents produced by either party.

If the court is of the opinion that the case or any part thereof may be disposed of on issue of law only. It may first try it, if issue relates to:-

- (i) Jurisdiction of the court.
- (ii) Bar to the suit created by law for the time being in force.

**78 BRIJ MOHAN ARORA V/s. BANK OF BARODA, AIR 1988 DELHI 321.

The bar of resjudicata as provided under section 11 of Civil Procedure Code constitutes a bar as contemplated and can be tried as preliminary issue.**80

F. DISPOSAL AT FIRST HEARING

This provision has very rare practical application. Where at first hearing of a suit it appears that the parties are not at issue on any question of law or fact the court may at once pronounce judgement.

Where the parties are at issue on some question of law or fact and issues have been framed by the court as herein-above provided, if the court is satisfied that no further argument or evidence than what the parties can at once adduce is required upon such of the issues as may be sufficient for decision of the suit and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues and if the finding thereon is sufficient for the decision, may pronounce judgement accordingly.

Where summons is issued for final disposal of the suit and either party fails without sufficient cause to produce the evidence, court may pronounce judgement after framing the issues.**81

G. SUMMONING AND ATTENDANCE OF WITNESSES82**

On the date appointed by the court and not later than 15 days after the date on which issues are settled parties shall present in court a list of witnesses whom they propose to call either to give evidence or to produce documents. Expenses of such witnesses will have to be paid in the court, or if summons is directly served on witness the expenses may be directly paid. Time, place and purpose of attendance is to be specified in the summons.

**80 SMT. LAXMI MANI V/s. MANIK CHANDRA DAS AIR 1991 CAL.237.

**81 ORDER 15 CIVIL PROCEDURE CODE.

**82 ORDER 16, CIVIL PROCEDURE CODE

Any person may be summonsed to produce a document without being summoned to give evidence and upon production of such documents he is deemed to have complied the same. The court may on application of any party for issue of summons permit such party to effect service of summons on such person.

Where a person to who summons has been issued either to attend or to give evidence or production of any documents and his deposition or production is material and person has failed to attend without lawful excuse, court may issue orders for arrest either with or without bail. If the witness appears such orders maybe withdrawn.

Court is also having suo moto powers the court may of its own accord, summon and examine any witness including a party to the suit or strangers to the suit.

No witness can be called to give evidence unless he resides within local limits of the court or within 500 Kms. Where conveyance by railway/steamer is available or the party pays airfare.

If defendants apprehend danger to their witnesses it was for them to disclose their names and addresses so that the court will be in a position to give necessary direction for ensuring their safety. Therefore petition for exemption moved by the witnesses will be rejected.**83

H. ADJOURNMENTS AND COSTS

Adjournments frequently sought by the parties contribute significantly to the delays caused in deciding the matters. The granting of adjournments is at the discretion of the court. The rules governing adjournments are considerably strict and if applied in their true spirit can substantially reduce the delays involved.

The provisions governing adjournments and costs are given in the following table:-

<u>ISSUE</u>	<u>POSITION OF LAW</u>
Adjournment	Can be granted, if sufficient cause is shown, at any stage of the suit.

**83 BENNETT COLEMAN & CO. LTD. V/s. JANKI BALLABH PATNAIK AIR 1989 ORI.145.

Costs	The court can make order as to costs occasioned by adjournment.
Matters under Hearing	When hearing has commenced it shall be continued from day to day unless court for exceptional reasons to be recorded by it finds that adjournment of hearing beyond the following day is necessary.
Adjournment at request of the party	Shall not be granted unless circumstances are of beyond the control of the party.
Pleader busy in other court	It shall not be a ground for adjournment.
Illness or inability of pleader to conduct the case (other than mentioned above)	Normally adjournment will not be granted unless court is satisfied that party could not have engaged other pleader.
Witness present but party or his pleader not present or not ready to examine or cross examine	Court may record statement of such person and pass orders dispensing with his examination in chief or cross-examination.
Absence on the date when matter is adjourned	If the hearing is adjourned and party fails to appear, judgement may be passed.
Failure to produce evidence or Witnesses	If the party despite time given fails to comply the suit may be decided accordingly.

No suit which has begun should be adjourned even if the counsel is busy in other court, it is necessary that in such cases the alternative arrangements should be made to ensure continuous hearing.**84

****84 SANGAM ELECTRONICS V/s. HYDERABAD ALLWYN METAL WORKS LTD. AIR 1984 DELHI 384.**

The court may award costs in respect of...

- (a) Expenditure incurred for giving any notice is required to be given by law, before the institution of the suit.
- (b) Expenditure incurred on any notice, which though not required to be given by law, has been given by the party before institution of suit.
- (c) Expenses for typing, writing or printing of pleadings.
- (d) Charges paid for inspection of court record.
- (e) Expenses incurred for producing witness.
- (f) In case of appeals, charges incurred for obtaining certified copies.
- (g) Cost of pleader, court fees, and expenses as per High Court Rules.

Usually the costs shall follow the event and if it is not so, the court will give the reasons.

The Supreme Court has held, that even lawyers are not immune from the provisions, and if the appeal is dismissed for default of the appellant's counsel, cost of suit will be recovered from the said counsel. **85 If the court finds, that the claim or defence as against the objector is false or vexatious to the knowledge of the party by whom it has been put forward, and if such claim is disallowed, abandoned or withdrawn, court holding the claim false or vexatious may order compensatory costs. **86 If on any date fixed for hearing, a party to the suit fails to take step or obtains adjournment for producing evidence, the court may also award costs for causing delay. Even a successful party may be responsible for causing delay and it should be taken in account while awarding costs.**87

**85 RAFIQ V/s. MUNSHILAL, AIR 1981 SC 1400

**86 SECTION 35A, CIVIL PROCEDURE CODE.

**87 TAXMAN, CIVIL PROCEDURE CODE, 1992 EDITION, PAGE 63.

I. HEARING OF SUITS

The plaintiff is entitled to have first right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of relief. In such case defendant has the right to begin.

On the day fixed for hearing or any day to which hearing is adjourned, party having right to begin shall state his case and produce evidence in support thereof. The other party shall then state his case.

The parties will appear before the witnesses. In cases in which appeal is not allowed the judge shall make or dictate on a typewriter or cause to be mechanically recorded, a memorandum of the substance of deposition of witnesses.**88 A witness may be examined on commission also. If signature of witness is not taken on any part of deposition or correction it does not make deposition invalid.**89 The court may at any stage of a suit inspect any property or thing concerning which any question may arise. This provision for spot inspection is intended to advance cause of justice and to avoid unnecessary evidence being adduced in the court.**90

The court also has the power to recall any witness who is already called earlier and put such questions as deemed fit.

J. AFFIDAVITS

The court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit or affidavit of any witness may be read at hearing, on such condition, as court thinks reasonable. However if the party is bonafidely required for cross-examination and if such witness can be produced his affidavit may not be taken.

**88 ORDER XVIII, RULE 18 CIVIL PROCEDURE CODE.

**89 OWNERS AND PARTIES INTERESTED IN M. V. 'VALI PERO'

**90 ORDER XVIII, RULE 18 CIVIL PROCEDURE CODE, AIR 1989 SC 2206.

Even if evidence is given on affidavit the court may direct that such person will be produced for cross-examination.

Affidavit shall be contain only such facts as the deponent is able of his own knowledge to prove except on interlocutory applications on which statement of belief may be admitted provided grounds are stated.**91 The affidavits have to be properly verified to avoid any dispute at a later stage. Need for verification of affidavits is to test genuineness and authenticity of allegations and also to make the deponent responsible for allegation made.**92 Affidavit, which is not properly verified, is no affidavit at all. If affidavits are not in conformity with the rules than also they can be rejected. Instead of rejecting the affidavit the court may give opportunity to the party to file proper affidavit. Interlocutory applications can also be decided on affidavits.

Affidavit must be in writing, in the first person and must have been sworn before authorised officer.**93

XIII

JUDGEMENT

Judgement means the statement given by the judge on ground of which a decree is passed. Judgement is an adjudication pronounced as its name indeed denotes, upon the status of some particular subject mater by tribunal having competent authority for that purpose.**94

**91 ORDER XIX RULE 3 CIVIL PROCEDURE CODE.

**92 AIR 1972, SC 652.

**93 CIVIL PROCEDURE, JUSTICE C. K. THAKKAR, 4TH EDITION, PG.173.

**94 SMITH'S LEADING CASES 1908 AC 12 (HOUSE OF LORDS)

The court after the case has been heard shall pronounce judgement in open court either within one month of completion of arguments or as soon thereafter as may be practicable, and when the judgement is to be pronounced judge shall fix a day in advance for that purpose.

Where judgement is not pronounced within 30 days from the date on which hearing of case was concluded, the court shall record the reasons for such delay.

According to Halsbury's Law of England a judgement may be given at a trial or hearing of an action or hearing of a appeal or interlocutory relief or by way of summary judgement.**95

If the judge has vacated office after pronouncing the judgement but without signing a decree, a decree drawn up in accordance with such judgement may be signed by his successor.

The last paragraph of the judgement shall indicate in precise terms the relief, which has been granted by such judgement. Every endeavor shall be made to ensure that the decree is drawn as expeditiously as possible and in any case within 15 days from the date on which the judgement is pronounced.

Decree for recovery of immovable property shall specify the exact description of the property. Certified copy of the judgement and decree has to be furnished to the parties by the court at their expense.

There is no prescribed form for judgement because the subject matter of the case may vary. The following broad principles have to be noted: -

-
- ⇒ The judgement should be on each issue
 - ⇒ The decree has to be in conformity with judgement and shall contain all relevant particulars.
 - ⇒ In case of money decree the judgement may direct payment with or without interest.
-

**95 HALSBURY'S LAW OF ENGLAND VOL.26 AT PG.241 4TH EDITION.

In commercial transactions, the rule is that interest is to be avoided. Arbitrary refusal to order, payment of interest without application of mind is not justified. **96 The court has ample discretion to decide rate of interest, even if there is enough evidence to establish contractual rate of interest. **97 Weak financial position of defaulting debtor ordinarily can not be relevant circumstance in making departure from the rule that in commercial transaction rate of interest awarded should be contractual rate of interest. **98 When amounts sought to be realised by the banks from defendants were mentioned in the notices issued from time to time the principal amount due can also include interest. **99

The court may also award cost at its discretion. The Supreme Court has held that this rule applies even to the Government. In a matter where appeal preferred by the Government was ultimately dismissed by the supreme court and the respondent had to come to Delhi and spend money for lodging/boarding/travelling etc. the Supreme court directed the Government to pay RS.1500/- by way of cost**100

XV

DECREE AND EXECUTION

After the decree is passed the process of execution which involves actual implementation of the order of the court through the process of the court starts the entire process of executing of decree and delay involved has been discussed in chapter 13 of this thesis.

**96 UNITED COMMERCIAL BANK V/s. SATISHCHANDRA GHOSH AIR 1991 GAU.59.

**97 UNION BANK OF INDIA V/s. K K NAIR AIR 1991 KER.118.

**98 UNION BANK OF INDIA V/s. NARENDRA PLASTIC AIR 1991 GUJ.67.

**99 JAGDAMBA RICE MILLS V/s. ORIENTAL BANK OF COMMERCE AIR 1990 P & H 60.

**100 COMPTROLLER AND AUDITOR GENERAL OF INDIA V/s. JAGNANATHAN AIR 1987 SC 537.

XIV**APPEAL, REVIEW AND REVISION****A. APPEAL**

An appeal may be an appeal from order or an appeal from decree. All orders are not appellable and complete discretion of the appellable order has been given in order 43 of the code of Civil Procedure Code. The appeal has to be preferred within prescribed limitation period before the appellate court. The limitation period for appeal to High Court is 90 days and appeal to District Court is 30 days. If the period of limitation is expired, then application for condonation of delay also is required to be moved.

As appeal by itself shall not operate as stay of proceedings under the decree or order, except when directed otherwise by the appellate court, the execution of decree passed by the lower court also shall not be stayed for the mere reason that appeal is preferred.

Appeal constitutes one more round of litigation and is an extension of the litigation. The execution of decree of lower court shall not be stayed unless the court is satisfied that—

- (a) Substantial loss may result to the party applying for stay of execution.
- (b) Application has been made without unreasonable delay
- (c) Security has been given by the applicant for due performance of such decree.

The appellant shall have a right to begin in the appeal. Respondent also has a right to file cross objections, which may be, heard alongwith the appeal. The parties in appeal shall not be entitled to produce additional documents in appeal except when the lower court refused such evidence and appellate court finds it relevant.

In case of execution of money decree the general practice is that the decree should not be stayed unless the judgement debtor deposits part of the money which can be withdrawn by the decree holder. **101

When a suit is filed against the firm and all its partners, and subsequently the suit is decreed against some partners, and there is dismissal of the suit, in respect of other partners it is not necessary that the partners against whom decree is already passed, should be joined as respondent. **102

The first appeal lies on question of facts and law and the second when permissible lies only on the question of law.

In appeal additional evidence cannot be admitted as matter of right. The appellant has to establish that with best efforts the evidence could not be adduced before the trial court. The party against whom such evidence is adduced should also have an opportunity to rebut the evidence. And the evidence should be relevant for determination of the issue. **103

B. REVIEW

The right of review is having very limited scope under the Civil Procedure Code. The Supreme Court has laid down that the order can not be reviewed unless the court is satisfied that there is material irregularity on the face of the record and it has resulted in miscarriage of justice. **104

A review application is maintainable only when the following conditions are satisfied,

- a) If involves a decree or order from which no appeal is allowed or if allowed it is not preferred.

**101 STATE OF GUJARAT V/s. CBI AIR 1987 GUJ.113.

**102 SBI V/s. RKP BARVE AIR 1990 SC 1981

**103 SHIVAJI RAO NILANGEKAR PATIL V/s. DR. MAHESH GOSAWI AIR1987 SC 294

**104 COL.AVTAR SINGH V/S. UNION OF INDIA AIR 1980 SC 2041.

- b) The appellant was aggrieved, on the ground, that because of the discovery of a new and important matter of evidence, which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time of decree or on account of some mistake, apparently on the face of the record, or for any sufficient reason, desires to obtain a review of such decree. The other side will be granted an opportunity to be heard, when any review application has been granted.

The Supreme Court has held that review petition has a very limited scope and cannot be equated with original hearing and the judgement will not be considered except when there is glaring omission or patent mistake or grave error which has crept in order by judicial fallibility. An error apparent on the face of the record exists if of the two or more views canvassed on the point it is possible that controversy can admit only one view.**105 An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be error apparent on face of the record. **106

A review by no means is an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error. Where, without any elaborate argument, one could point to the error and say here is substantial point of law, which strikes one on the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record, would be made out. **107

C. REVISION

The High Court in its revision jurisdiction can interfere in any case decided by subordinate court under certain circumstances.

**105 NORTHERN INDIA CATERERS LTD. V/S. LIEUTENANT GOVERNOR OF DELHI AIR 1980 SC 674.

**106 MEERA V/S. NIRMALA, (1995) 1 SCC 170

**107 LECTURES ON ADMINISTRATIVE LAW BY JUSTICE C. K. THAKKAR (1996), LECTURE II.

The High Court may call for the record of any case which has been decided by subordinate court and in which no appeal lies, if such subordinate court appears

- a) To have exercised, a jurisdiction not vested in it by law, or
- b) To have failed to exercise a jurisdiction so vested, or
- c) To have acted in exercise of its jurisdiction illegally; or with material irregularity.

The power of revision enables the High Court to correct when necessary, errors of jurisdiction committed by subordinate court and provides the means to an aggrieved party to obtain rectification of non-appellable order. It is as such the exercise of superintending and visitorial powers of the High Court. **108

According to Justice Hidayatullah, the section is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exist or an assumption of jurisdiction when none exist and lastly with illegality or material irregularity. **109 The scope is restricted and erroneous decision on a question of law reached by subordinate court which has no relation to question of jurisdiction of that court cannot be corrected by the High Court. **110 If the court entertains a suit or an appeal which it has no jurisdiction to entertain than revision will lie and order made can be challenged. **111

The power of revision can be exercised suo moto also. The proceeding in such case should be sound for invoking revision powers. When the power is vested to revise, the authority is entitled to examine correctness, legality and propriety of the order. **112

**108 MANIKCHANDRA V/S. DEV DAS AIR 1986 SC 446.

**109 AIR 1964 SC 497 MAJOR KHANNA V/s BRIG. DILLON.

**110 JUSTICE GAJENDRAJANKAR IN PANDURANG V/S. MARUTI AIR 1966 SC.153.

**111 KUMARI RENUKA V/S. GRINDLY BANK AIR 1980 PUN.146

**112 SWASTIK OIL MILLS V/S. SB MUNSHI AIR 1968 SC 843.