WORKSHOP-III

APPOINTMENT OF ADVOCATE COMMISSIONER

TOPIC:- Appointment Of Advocate Commissioner

Paper presented by

Sri G. Srinivas
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Sec 75 to 78 deals with the powers of the court to issue Commissions and detailed provisions have been made in Order 26 of the Code. The power of the court to issue commission is discretionary and can be exercised by the court for doing full and complete justice between the parties. It can be exercised by the court either on an application of the party to the suit or of its own motion (suo motu).

a)To examine witness: **sections 76-78; Order 26, Rules 1-8**

The court may issue a commission for the examination on interrogatories or otherwise of any person in the following circumstances:

1. if the person to be examined as a witness resides within the local limits of the court's jurisdiction, and (i) is exempted under the Code from attending court; or (ii) is from sickness or infirmity unable to attend court, or (iii) in the interest of justice, or for expeditious disposal of the case, or for any other reason, hi examination on commission will be proper; or

2. if he resides beyond the local limits of the jurisdiction of the court; or

3. if he is about to leave the jurisdiction of the court, or

4. if he is a government servant and cannot, in the opinion of the court, attend without detriment to the public service; or

5. if he residing out of India and the court is satisfied that his evidence is necessary.

b)To make local investigation**: Rules 9 & 10**

c)To adjust accounts: **Rules 11 & 12**

d) To make partition: **Rules 13 & 14**

e) To hold investigation**: Rule 10-A**

f) To sell property: **Rule 10-C**

g) To perform ministerial act**: Rule 10-B**

The provisions to issue commissions under the civil procedure code or exhaustive and hence the court cannot exercise inherent powers and sec.151 for the purpose.

The Supreme court of High courts under the constitution can exercise plenary powers to issue a commission for any purpose.

Appointment of advocate-commissioner when?- Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the recitals of the documents may not reveal the true facts and measuring of land on the spot by a Surveyor may become necessary. It is always better if the parties are allowed to adduce evidence at the stage of trial for better appreciation of the facts which will help the Court in effectively deciding the main dispute between the parties. If there is some delay in filing the application to appoint an Advocate Commissioner and if there are some laches on the part of one party, the Court may impose reasonable costs, but it is not desirable to dismiss an application on the ground of mere delay in filing it. In the light of the above referred decisions, I am of the view that the impugned order does not sustain in the eyes of law.

The evidence taken on commission shall form part of the record.

Advocate Commissioner can be appointed for performing ministerial work. Ministerial work means not the office work of the court. But work like accounting, calculation and other work of a like nature. Which courts are not likely to take up without unnecessary waste of time.

Commission to examine witnesses can only be issued in the case specified in the Rule-4 and 5 of Order -26 and in no other case . However, Rule-4A inserted by the amendment Act enlarge the scope of appointment of Commissioner.

The court can appoint second commissioner when there is no finding or findings which are not accepted or where the procedure adopted by the commissioner is not satisfactorily.

Power to grant commission is discretionary which is to be exercised on sound judiciary principles.

As per **sec. 77** a letter of request can also be issued to any authority other than court. **Ex:** a counsular authority etc.

As per **Rule 5 and sec.77** a court may issue a commission or letter of request for the examination of witness who is resides out of India.

In **Sarala Jain and others.Vs. Sangu Gangadhar**, in view of the law laid down by the Apex Court in **Mohd. Mehtab Khan's case,(2013 (3) ALD 64 (SC)),** His Lordship **M.Satyanarayana Murthy, J,** held that appointing advocate commissioner by the trial Court for the purpose of demarcating schedule property and fix boundary stones to the property of the respondents amounts to granting pre-trial decree as it satisfied part of the reliefs claimed in the suit. In such case, commissioner cannot be appointed for the said purpose. Further, it was held in this case that to appoint an advocate commissioner, Court has to keep in mind the following:

(1) Total pleadings of both parties;
(2) Relief claimed in suit;
(3) Appointment of advocate commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and (4) Necessity to appoint advocate commissioner to decide real controversy between parties.

If we keep these principles in mind while dealing with an application for appointment of advocate commissioner in a suit, we can easily find out whether allowing such application becomes pre-trial decree or not.

Advocate-Commissioner cannot be appointed for making an enquiry about factum of possession:-

In **K.M.A.Wahab & others vs. Eswaran & another,** reported in 2008 (3) CTC 597, His Lordship, **A.Kulasekaran, J,** has held that appointment of Advocate Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence. Similarly, in another case, **M/s. Benz Automobiles Private Limited vs. Mohanasundaram,** reported in **2003 (3) MLJ 391,** His Lordship **AR.Ramalingam,J,** has held that Advocate-Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if an Advocate-Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections, as the dispute in the suit could be resolved only on the basis of oral and documentary evidence let in by the parties.

In **Rajendran vs. Lilly Ammal alias Nelli Ammal,** reported in **1998 (II) CTC 163,** His Lordship **S.Jagadeesan, J,** has held that Advocate-Commissioner cannot be appointed to find out the fact as to who is in possession of suit property in a case. In another case, in **Kuttiyappan, D. vs. Meenakshiammal Polytechnic Unit of M/s. Meenakshiammal Trust, reported in 2005 (4) CTC 676,** Her Lordship **R.Banumathi, J** held that the

defendants therein were not entitled to seek for appointment of Advocate-Commissioner to note their possession, as it is well settled that Commissioner cannot be appointed for noting down the factum of possession or the enjoyment of property. Similar issue was considered in another case, in **Minor Amid Stanly & another vs. Lakshmiammal & others,s reported in CDJ 2009 MHC 324,** His Lordship **S.Palanivelu, J,** has held that the factum of possession cannot be ascertained by Commissioner, as the same could be proved by letting in oral and documentary evidence by the parties before the Court.

However, in **T.S. Ramu vs. Neelakandan, reported in 2004 (2) CTC 674,** His Lordship **S.Sardar Zackria Hussain, J,** has held that appointment of Advocate-Commissioner to find out the actual area under the occupation of the tenant and to file report is legally maintainable under Section 18 (A) of the Act. However, in the instant case, the purpose for seeking appointment of Commissioner is different.

Material issue of determining the possession cannot be left to an Advocate-Commissioner.

In **Chandrasekharan vs. Doss Naidu, reported in 2005 (3) MLJ 473,** Her Lordship **R.Banumathi, J** has held that though appointment of Advocate-Commissioner was sought for under the pretext of noting down the physical features, indirectly it was only to find out the factum of possession. As the material issue involved in the suit relating to the nature of possession and lawful right of the parties, it was held that the material issue of determining the possession cannot be left to an Advocate-Commissioner.

Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties:-

In **Krishnamurthy, T.K vs. Tamil Nadu Water and Drainage Board, reported in 2006 (5) CTC 178,** His Lordship **S.Rajeswaran, J** has held that Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties, since the parties should prove their case by letting in legally acceptable evidence and the report of the

Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

Advocate Commissioner is an officer of the Court:- In para 118, in 2014, the **Hon'ble High Court in M.Gurumoorthy And Others vs C.Kamalamma And Others, A.S.M.P.No.1898 of 2012 and batch**, dt.22-04-2014, observed as follows:"…This indicates that the Advocate Commissioners report Ex.A.21 is factually incorrect and is a false report prepared by her to help the Defendants to play fraud on the court and help them to get a final decree behind the back of the plaintiffs. It is unfortunate that even the Advocate Commissioner appointed by the trial court, who is supposed to be an officer of the Court, acted in this manner."

*In a recent case decided by the **High Court of Kerala**, the Court elucidated on the appointment of Advocate Commissioner for recording of evidence in marital disputes and the caution to be exercised by Courts while issuing Commission.*

The Court remarked that remarked that *"one should be very careful before permitting the issue of a commission which will deprive the other side of the great advantage of having a witness cross-examined before the face of the Court itself."*

Relevant Law:

Under Section 75 of Code of Civil Procedure (CPC), the Court has been conferred with the power to issue commissions for incidental proceedings like examine any person, to make local investigation, to examine or adjust accounts, to make partition or to hold a scientific, technical or expert investigation, to conduct sale of property or perform any ministerial act. However, such power is not absolute and is subject to conditions or limitations. Apart from the said statutory provision the Court can appoint an Advocate Commissioner under Order 26 Rule 9 for the purpose of elucidating on any matter in dispute.

Facts of the case: The case at hand pertained to matrimonial dispute between the Petitioner and the Respondent whose cases were pending in the Family Court. The Family Court in the case ordered joint trial of the cases and also appointed an Advocate Commissioner to record evidence of the witnesses. Subsequently, the petitioner sought for permission to adduce oral evidence before the Court itself than having it recorded by an Advocate Commissioner. The Family Court turned down the Petitioner's request.

Aggrieved by the same Petitioner approached the High Court contending that provisions of the CPC shall apply to the suits and proceedings before a Family Court only subject to the provisions of the Family Courts Act, 1984. It is the prerogative of the Judge and the Judge alone of the Family Court to record a memorandum of the substance of what the witness deposes which cannot be exercised by an Advocate Commissioner.

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WORKSHOP-III

APPOINTMENT OF RECEIVERS

TOPIC: Appointment Of Receivers

Paper presented by

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The term receiver has not been defined in the Code of Civil Procedure. According to **Kerr** receiver is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land or personal estate which it does not seems to the reasonable to the court that either party should collect or receive, or for enabling the same to be distributed among the persons and title.

Receiver is an officer or representative of the court and he functions under its directions.

He is appointed to preserve, to protect, to manage the property a receiver may be appointed , the following principles must be borne in mind before a receiver is appointed by a court.

1. Appointment of receiver is a discretionary of a court.
2. It is a protective relief.
3. The object of preservation of property in dispute pending in judicial determination of the rights of the party to it.
4. He should not be appointed unless the prima facie, title or dangerous of waste and the parties must be willing to extend to the receiver, finances and all other necessary assistances which is needed for the

subsequent custody and disposal of the goods and proves that he has very excellent chance of succeeding in the suit.

5. It is one of the harshest remedies which the law provides for the enforcement of rights. Therefore, should not be lightly resorted to.

6. A court will never appointed receiver merely on the ground that it will do no harm.

7. Generally if the property is shown to be ‘in medio’, i.e., to say, in enjoyment of no one, it will be in the common interest of all parties to appoint a receiver.

8. The court should look at the conduct of the parties who makes an application of an appointment of receiver.

9. The Court may confer upon the receiver any of the following powers
   a. to institute and defend suits
   b. to realise, manage, protect, preserve and improve the property.
   c. to collect, apply and dispose of the rents and profits.
   d. to execute documents
   e. such other powers as it thinks fit.

   It is open to the court not confer all of the above power, they are conditioned by the terms of his appointment.

10. Even when full powers care conferred on him, he should take the advise of the court in all important matter if he want to protect himself. This is held in **Balbir Anand vs. Ram Jawya AIR 1960 RAJ 192**

11. A receiver cannot be sue or be sued without the leave of the court. However, grant of leave is the rule and refusal is exception.

12. If a suit is filed without such leave it is liable to be dismissed. But however, to prosecute a receiver for criminal offence alleged to have

been committed by him by abusing his authority as receiver no such sanction is necessary.

13. Since he is custodia legis, any obstruction or interference by anyone with his possession without leave of the court is interference with the court proceedings and he is liable for contempt of court. This was held in **SB Industries vs. Union Bank of India**

14. It is the duty of the receiver to furnish security as the court thinks, duly to account for what he shall receive in respect of the property.

15. He has liability to submit accounts in case his failure the court may direct his property to be attached and sold and make good any amount found to be due from him.

16. Leading and landmark case law on this appointment of receivers is **Krishnaswamy Chetty vs. Thangavelu Chetty AIR 1955 MAD 430.** wherein explained the five cardinal principles of appointment of receivers.

17. With respect of running business, receiver cannot be appointment this was held in **Ashok Traders vs. Gurumukh Das Saliya 2004(3) SEC 155.**

18. In general, receiver cannot be appointed by court suo motu but in exceptional cases court may appoint held in **Mahendra H. Patil vs. Ramnarayan 2000(9) SEC 119.**

19. Court must determine the turn till when the receiver shall be appointed held in **Hiralal vs. Lukaram AIR 1962 SE 21.**

20. Property in the hands of receiver cannot be attach without first obtaining the leave of the court.

21. It is the duty of the court to determine the fees or remuneration of the receiver.

22. Receiver cannot purchase the property of which he has been appointed receiver even at a court sale.

23. A receiver cannot deligate his powers to others.

24. Where the property is land paying revenue to the government or land of which the revenue has been assigned or redeem, the court may appoint the collector as receiver with his consent in the interest of those property.

25. Provisions relating to appointment of receiver:

a. **section 69 A of Transfer of Property Act:** in that it has enumerated the procedure, powers and duties of receiver relating to mortgage suits.

b. **Section 94 (d) CPC** appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property.

c. **Order 40 CPC** deals with the receivers which reads as follows:

Rule-1: Appointment of receivers

1. Where it appears to the Court to be just and convenient, the Court may by order –

(a) appoint a receiver of any property, whether before or after decree;

(b) Remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

2. Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Rule-2: Remuneration

The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Rule-3: Duties

Every receiver so appointed shall - (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property; (b) submit his accounts at such periods and in such form as the Court directs; (c) pay the amount due from him as the Court directs; and (d) be responsible for any loss occasioned to the property by his willful default or gross negligence.

Rule-4: Enforcement of receiver's duties

Where a receiver - (a) fails to submit his accounts at such periods and in such form as the Court directs; or (b) fails to pay the amount due from him as the Court directs; or (c) occasions loss to the property by his willful default or gross negligence, the Court may direct his property to be attached and may sell such 3 property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

Rule-5: When collector may be appointed receiver

When the property is land paying revenue to the government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the collector, the Court may, with

> the consent of collector, appoint him to be receiver of such property. 5. After a detailed examination of the several cases bearing on the subject, **Hon'ble justice Sri Ramaswamy** has enunciated five principles which have been coined by him as the “Panch Sadaachar” which should be born in mind by the Courts while exercising equity jurisdiction in appointing receivers.

26. The status of a receiver has been appropriately explained in the leading case of **Jagat Tarini Dasi vs. Naba Gopal Chaki** in the following words “The receiver is appointed for the benefit of all concerned, he is the representative of the Court, and of all parties interested in the litigation, wherein he is appointed. He is the right arm of the Court in exercising the jurisdiction invoked in such case for administering the property; the Court can only administer through a receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the receiver, and the proceeds received and controlled by him alone”.

In **Maharaja Jagal Singh vs Sawai Bhavani Singh AIR 1993 SC 1721** held that the receiver is an impartial person appointed by the court to collect and receive the rents, issues and profits of land or personal estate, pending proceedings where the court does not deem it reasonable that either party collect or receive the same.

27. **Mulji Umershi Shah vs Paradisia builders pvt ltd AIR 1998 BOM 87.** Held that appointment of receiver can be made on the application of either parties to the litigation as well as suo motu and absence of application shall not preclude the court from passing such order if it is just and convenient.

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WORKSHOP-III

APPRECIATION OF EVIDENCE IN CIVIL CASES

TOPIC:- Appreciation of evidence in civil suits.

Paper presented by
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THE CONCEPT OF 'PREPONDERANCE OF PROBABILITIES': How a fact is to be proved in Civil case?

The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. **Narayan Ganesh Dastane Vs. Sucheta Narayan Dastane, 1975 AIR 1534.** This is for the reason that under the Evidence Act, section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent manought, under the circumstances of the particular case, to act upon the supposition that it exists.

The belief regarding the existence of a fact that thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact- situation will act on the supposition that the fact exists, if no weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact.

As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities , the second to weigh them though the two may often intermingle. The impossible is weeded out at the first stage , the improbable at the second.

Withing in the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on promissory note " the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue.

1.The degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear."--- ***Lord Denning.***

2.But whether the issue is one of cruelty or of a loan on promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved.

3.IN civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

ADMISSSIONS IN CIVIL CASES: Order 8 Rule 5 CPC:
Order XII Rule 6 CPC:

Order XV Rule 1 CPC : (Judgment on admissions)

In case **R.K. Markan vs. Rajiv Kumar Markan, 2003 AIHC 632 (633) Delhi**, wherein it was observed as under :-“For passing a decree on the basis of admission of the defendants in the pleadings, law is well settled that the admission has to be unequivocal and unqualified and the admission in the written statement should also be taken as a

whole and not in part....”

It was also observed in case **Razia Begum v. Sahebzadi Anwar Begum, 1958 SC 886** that order 12 Rule 6 should be read along with proviso to Rule 5 of Order 8 CPC. In this case it was observed that the court is not bound to grant declaration prayed for on the mere admission of the claim by the defendant, if the court has reason to insist upon a clear proof apart

from admissions. See also : **Uttam Singh Dugal and Co. Ltd. vs. United Bank of India 2000 (4) R.C.R. (Civil) 89; M/s Puran Chand Packaging Industrial Pvt. Ltd. vs. Smt. Sona Devi and another, 2009 (2) C.C.C. 39.**

APPRECIATION OF DOCUMENTARY EVIDENCE IN CIVIL CASE:-

THE HONBLE SRI JUSTICE RAMESH RANGANATHAN AND HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY, in **P.Madhusudhan Rao vs Lt.Col.Ravi Manan,** CIVIL REVISION PETITION NO.4515 OF 2014, Date of judgment on12-03-2015, clearly illustrated the rules for interpretation of a document with an aid of rulings of the Hon'ble Supreme Court of India.

The Supreme Court in **Delhi Development of Authority Vs. Durga Chand, 1973 AIR 2609** has also noticed Odgers Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Odgers Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India. These Rules are listed hereunder:

1.The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.

2.The intention may prevail over the words used

3.words are to be taken in their literal meaning

4.literal meaning depends on the circumstances of the parties

5.When is extrinsic evidence admissible to translate the language?

6.Technical legal terms will have their legal meaning.

7.Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:

8.Same words to be given the same meaning in the same contract.

9.Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier;
while in a will, earlier clause is to be preferred to the later.

10.Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.

11.If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative

12.In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred

13.the special will exclude the general

14.Rule of expression unius est exclusion alterius

15.Rule of noscitus a sociss

16.Ejusdem generic rule will apply both the contract and statute

17.place of Punctuation in interpretation of documents

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The

most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention. (As to appreciation of documentary evidence in civil case, also See: **Avadh Kishore vs. Ram Gopal, AIR 1979 SC 861; Collector, Raigarh vs. Harisingh Thakur, AIR 1979 SC 472.)**

Order 13 Rule 4 sub rule 1 CPC:-

Admission of documents under Order 13 Rule 4 of Civil Procedure Code does not

bind the parties and unproved documents cannot be regarded as proved

nor do they become evidence in the case without formal proof.

Case law:- **Ferozchin Vs. Nawab Khan, AIR 1928 LAHORE 432. Hari Singh Vs. Firm Karam Chand, AIR 1927 Lahore 115**

Sudir Engineering Company Vs. Nitco Roadways Ltd, 1995 (34) DRJ 86

1.Mere admission of document in evidence does not amount to its proof.

2.Admission in evidence of a party's document may in specified cases exclude the right of opposite party to challenge its admissibility. The most prominent examples are when secondary evidence of a document within the meaning of Sections 63-65 of the Evidence Act is adduced without laying foundation for its admissibility or where a document not properly stamped is admitted in evidence attracting applicability of section 36 of Stamp Act.

3.But, the right of a party disputing the document to argue that the document was not proved will not be taken away merely because it had

not objected to the admissibility of the document. The most constructive example is of a Will. It is a document required by law to be attested and its execution has to be proved in the manner contemplated by Section 68 of the Evidence Act read with Section 63 of the Succession Act.

4.'***Admission of a document in evidence is not be confused with proof of a document***'.

5. Sait Taraj Khimechand Vs. Yelamarti Satvam:- The mere marking of an exhibit does not dispense with the proof of document.

Two stages relating to documents:-

1.One is the stage when all the documents on which the parties rely are filed by them in Court.

2.The next is when the documents formally tendered in evidence.

See:- ***Baldeo Sahal Vs. Ram Chander &Ors, AIR 1931 Lahore 546.***

APPRECIAITON OF EVIDENCE

IN A SUIT BASED ON PROMISSORY NOTE:

Scope of The Presumption: Burden Of Proof In Promissory Note Cases:

The Hon'ble Supreme Court in **Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay [AIR 1961 SC 1316],** speaking through his lordship **K. Subba Rao, J.** considering the scope of the presumption had laid down the law thus:

"Section 118 lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia, that the negotiable or endorsed for Consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The phrase "burden of proof" has two meanings- One, the burden of proof as a matter of law and pleading and the other the burden of

establishing a case; the former is fixed as a question of law on the basis of the pleading and so unchanged during the entire trial whereas the latter is not constant but shifted as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be directed evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was reflected for a particular consideration should produce the said account books. If such a relevant evidence is withheld by the plaintiff, S.114, Evidence Act enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instrument Act."

See important ruling on Promissory notes: **G. Vasu vs Syed Yaseen Sifuddin**

Quadri: Citation: AIR 1987 AP 139

APPRECIATION OF EVIDENCE

IN A SUIT FOR DECLARATION AND CANCELLATION OF DOCUMENT:-

In Civil Appeal Nos. 2811-2813 OF 2010, [Arising out of SLP [C] Nos.6745- 47/2009], **Suhrid Singh @ Sardool Singh Vs. Randhir Singh & Ors, the Hon'ble Supreme Court of India** held as follows:-

"where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to `A' and `B' -- two

brothers. `A' executes a sale deed in favour of `C'. Subsequently `A' wants to avoid the sale. `A' has to sue for cancellation of the deed. On the other hand, if `B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by `A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If `A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If `B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17 (iii) of Second Schedule of the Act. But if `B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section7 (iv) (c) of the Act. Section7 (iv) (c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section7."

COUNTER CLAIMS IN SUIT:

In the case of **Ramesh Chand Ardawatiya Vs. Anil Panjwani** which may be of some relevance. Upon considering the ratio of earlier cases in the case **of Sangaram Singh Vs. Election Tribunal, Kotah AIR 1955 SC 425, Arjun Singh Vs. Mohindra Kumar AIR 1964 SC 993 andLaxmidas Dayabhai Kabrawala Vs. Nanabhai Chunilal Kabrawala AIR 1964 SC 11,** it was held that a right to make a counter claim is statutory and a counter claim is not admissible in a case which is admittedly not within the statutory provisions. It is further observed that :

"Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule 6-A would be a counter- claim against the claim of the appellant preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter- claim may be filed by way of a subsequent pleading under Rule 9.

See:- Nanduri Yogananda Lakshminarasimhachari Vs. Sri Agastheswaraswamivaru AIR 1960 SC 622; and **Civil Appeal No..6344 OF 2009 in Gayathri Womens Welfare Association vs. Gowramma & Anr;**

Relinquishment of Claim under Order II Rule 2 & 'Res Judicata' :

The Supreme Court in **Alka Gupta vs. Narender Kumar** dealt with the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908 while also dealing with the concept of 'Res Judicata'. The Court further held that a suit cannot be dismissed by the Courts simply because they are dissatisfied with the conduct of the Plaintiff.

A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

See rulings: Gurbux Singh v. Bhoora Lal [AIR 1964 SC 1810]; Greenhalgh v. Mallard [1947 (2) All ER 257]; Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra [1990 (2) SCC 715]; Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100);

RE-OPENING EVIDENCE AND

INHERENT POWERS OF THE COURT :

The Supreme Court in **K.K. Velusamy v. N. Pallanisami** has examined the power of the Courts with regard to re-opening the evidence and recalling witnesses. The Court while examining the relevant provisions of the Code of Civil Procedure, 1908 has culled out the principles for invoking the inherent powers of the Court.

The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide **Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410**]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

The Hon'ble Apex Court however agrees that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (See :Padam Sen vs. State of UP-AIR 1961 SC 218; Manoharlal Chopra vs. Seth Hiralal - AIR 1962 SC 527; Arjun Singh vs. Mohindra Kumar - AIR 1964 SC 993; Ram Chand and Sons Sugar Mills (P) Ltd. vs.

Kanhay Lal - AIR 1966 SC 1899;Nain Singh vs. Koonwarjee - 1970 (1) SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India- AIR 1976 SC 1152; Jaipur Mineral Development Syndicate vs. Commissioner of Income

Tax, New Delhi - AIR 1977 SC 1348; National Institute of Mental Health & Neuro Sciences vs. C Parameshwara - 2005 (2) SCC 256; and Vinod Seth vs. Devinder Bajaj - 2010 (8) SCC 1). We may summarize them as follows:

(a)Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is `right' and undo what is `wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b)As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co- extensive with the need to exercise such power on the facts and circumstances.

(c)A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d)The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e)While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f)The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

APPRECIATION OF EVIDENCE –

A CIVIL SUIT BASED ON WILL -HOW TO PROVE A WILL?

In **Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others,** the Honourable Apex Court held that as follows; "There is also a large body of case law about what are suspicious circumstances surrounding the execution of a Will which require the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine. A Will has to be proved like any other document except for the fact that it has to be proved after the death of the testator. Hence, the person executing the document is not there to give testimony. The propounder, in the absence of any suspicious circumstances surrounding the execution of the Will, is required to prove the testamentary capacity and the signature of the testator. Some of the suspicious circumstances of which the Court has taken note are (1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2)Shaky signature; (3)A feeble mind which is likely to be influenced; (4)Unfair and unjust disposal of property. Suffice it to say that no such circumstances are present here."

In **Apoline D' Souza v. John D' Souza [(2007) 7 SCC 225]**, the Hon'ble Supreme Court held that the question as to whether due attestation has been established or not will depend on the fact situation obtaining in each case. Therein, it was held :

" Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation of the will is a mandatory requirement."

"In **P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar** it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind."

APPRECIATION OF EVIDENCE IN A SUIT BASED ON GIFT DEED:-

What factors are to be appreciated in a suit based on Gift deed under Hindu Law?

i)Relinquishment of one's proprietory right in the property. Yet it should be without any consideration.
ii)Merely registering the gift deed does not afford to pass the title of the property.

iii) Creation of right of any person must be completed by acceptance. iv) A gift is totally different from a surrender by a Hindu widow where she does not in fact or in law purport to transfer any interest in the property surrenders.

v)In addition to that in the case of **Karunamoyee vs Maya Moyi,** it was observed that the widow simply withdraws herself from the estate and the reversioner steps into the inheritance as a matter of law."

vi)Yet, in the case of **Narbada Bai vs Mahadeo**, it was held that in case of transfer of the whole estate, the reversioner takes the same subject to the liability for her maintenance. It is thus vividly known that the reversioner is responsible for her debts, if she relinquishes the same.

vii)Where delivery of possession is enough to complete the transaction of a gift, is abrogated under section 123 of the Transfer of Property Act. However, the restrictions on power to enter into the transaction of gift under personal law exist without any change.

See:- **1. Giano vs Puran And Ors.,AIR 2006 P H 160; 2. Ramjeet Mahto And Ors. vs Baban Mahto And Ors. ,2003 (4) JCR 268 Jhr; 3. Smt. Takri Devi vs Smt. Rama Dogra And Ors., AIR 1984 HP 11.**

APPRECIATION OF EVIDENCE

IN SUITS BASED ON GPA / SALE AGREEMENT/ WILL:

Validity of Sale by Execution of General Power of Attorney / Agreement to Sell / Will :

The Supreme Court in an order passed in Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana & Anr. has discussed the ill effects of transfer of property by means of a General Power of Attorney / Will / Agreement to Sell, and the practical problems the same is causing.

By an earlier order dated 15.5.2009 [reported **in Suraj Lamp & Industries Pvt.Ltd. vs. State of Haryana & Anr. - 2009 (7) SCC 363],** the Hon'ble Apex Court had referred to the ill - effects of what is known as General Power of Attorney Sales (for short `GPA Sales') or Sale Agreement/General Power of Attorney/Will transfers (for short `SA/GPA/WILL' transfers). Both the descriptions are misnomers as there cannot be a sale by execution of a power of attorney nor can there be a transfer by execution of an agreement of sale and a power of attorney and will. As noticed in the earlier order, these kinds of transactions were evolved to avoid prohibitions/conditions regarding certain transfers, to avoid payment of stamp duty and registration charges on deeds of conveyance, to avoid payment of capital gains on transfers, to invest unaccounted money (`black money') and to avoid payment of `unearned increases' due to Development Authorities on transfer.

Scope of an Agreement of sale:-

Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in **Narandas Karsondas v. S.A. Kamtam and Anr. (1977) 3 SCC 247**, observed:

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act.
See **Rambaran Prosad v. Ram Mohit Hazra [1967]1 SCR 293.**

Scope of Power of Attorney:-

A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In **State of Rajasthan vs. Basant Nehata- 2005 (12) SCC 77**, this Court held :

"A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

Scope of Will

A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

APPRECIATION OF EVIDENCE IN A SUIT FOR PARTITION: Presumption of Joint Hindu Family :

The Supreme Court in **Appasaheb Peerappa Chandgade vs Devendra Peerappa Chandgade** has ruled on the presumption regarding joint family property under the Hindu law. The Supreme Court after considering various precedents on the subject, held that there is no presumption of joint family property, and whoever alleges the existence of the same must prove it through evidence. The Supreme Court
further added that if it is shown that the properties were acquired out of the family nucleus, the initial burden is discharged by the person who claims joint Hindu family, and the burden shifts to the party alleging self-acquisitionto establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence.

In the case of **Srinivas Krishnarao Kango v. Narayan Devli Kango and Ors.**, their Lordships held that proof of the existence of a joint

family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. Therefore, so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus. Same proposition has been followed in the case of **Mst. Rukhmabai v. Lala Laxminarayan and Ors**.

Similarly, in the case of **Achuthan Nair v. Chinnammu Amma and Ors.**, their Lordships held as follows:

Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law.

Also see**:- Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe and Ors.,; Surendra Kumar v. Phoolchand (dead) through LRs and Anr.**

Family Arrangement : Essentials :

In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1)The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2)The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence:

(3)The family arrangement may be even oral in which case no registration is necessary;

(4)It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum pre pared after the family arrangement had already been made either for the purpose of the record or for in formation of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of s. 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5)The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole 9 owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6)Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and

equitable the family arrangement is final and binding on the parties to the settlement.

The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently. In Lala Khunni Lal & Ors. v. Kunwar Gobind Krishna Narain and Anr.(1) the statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council.

DEVOLUTION OF PROPERTY UNDER S. 8 OF THE HINDU SUCCESSION ACT : WHETHER JOINT OR SELF ACQUIRED PROPERTY?

The Supreme Court in a subsequent judgment entitled **Yudhishter vs. Ashok Kumar reported as AIR 1987 SC 558**. In the aforesaid judgment, it was held as below:

"10. This question has been considered by this Court in Commr. Of Wealth Tax. **Kanpur v. Chander Sen (1986) 3 SCC 567;** (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father‟s property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity. ..... This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. ..... In that view of the matter, it would be difficult to hold that property which devolved on a

Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-à-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellant authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house." (emphasis added)

See:- in Pratap v. Shiv Shanker has recapitulated the law relating to the devolution of property under S. 8 of the Hindu Succession Act. While following the dicta laid down by the Hon'ble Supreme Court of India, the Court held that property devolving under S. 8 of the Hindu Succession Act would be self acquired property of an individual vis-a-vis his sons.

RIGHT TO PROPERTY OF AN ILLEGITIMATE CHILD :

The Supreme Court in Revanasiddappa & Anr. vs Mallikarjun & Ors. has examined the question whether an illegitimate child is entitled to a share in coparcenary property or his share is only limited to the self-acquired property of his parents under Section 16(3) of the Hindu Marriage Act? While examining the various judicial pronouncements on the subject the Court took a different view from earlier decisions and has accordingly referred the matter for reconsidered by a larger Bench of the Court.

DEVOLUTION OF COPARCENARY PROPERTY TO HINDU FEMALES :

The Supreme Court in Ganduri Koteshwaramma Vs. Chakiri Yanadi has discussed the law relating to intestate succession by Hindu females and the effect of the amendment to the Hindu Succession Act. While dealing with the effect of the amendment in the Hindu Succession Act, in a suit for partition of ancestral property, the Supreme Court has observed as under;

" 1956 Act is an Act to codify the law relating to intestate succession among Hindus. This Act has brought about important changes in the law of succession but without affecting the special rights of the members of a Mitakshara Coparcenary. The Parliament felt that non-inclusion of

daughters in the Mitakshara Coparcenary property was causing discrimination to them and, accordingly, decided to bring in necessary changes in the law...." (See:- The statement of objects and reasons of the 2005 Amendment Act)."

SUIT FOR PERMENANT INJUNCTION:

As is clear from Section 37 (2) of Specific Relief Act, 1963 (hereinafter referred to as the Act), a perpetual injunction can only be granted by the decree made at the hearing and upon the merit of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an - act which would be contrary to the right of the plaintiff. Section 38 of the Act further provides the circumstances where the perpetual injunction may be granted in favour of the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. In contractual matters when such obligation arises, the Court has to seek guidance by the rules and provisions contained in Chapter II of the Act dealing with specific performance of contracts. Sub- Section (3) of Section 38 in clauses (a), (b), (c) and (d) further illustrates the circumstances where a perpetual injunction may be granted by the Court. The mandatory injunctions are contemplated under Section 39 of the Act where it is necessary to prevent the breach of an obligation and the erring party may be compelled to perform certain acts. Section 40 provides for granting damages in lieu of or in addition to injunction. Section 41 provides circumstances where the injunction should be refused. Section 42 provides for grant of injunction to perform a negative agreement. It was made clear at the beginning that the Law of Injunction is vast and expansive jurisdiction and It forcefully illustrates the power of equity in spite of the fetters of codification to march with the times and adjust the beneficial remedies to altered social conditions and the progressive needs of the humanity.

LATEST CASE-LAW:-

SERVICE OF NOTICE: PRESUMPTION

M.K. Tirupathi Rao versus Deputy General Manager, Syndicate Bank, Industrial Relations Section, Zonal Office, Hyderabad. 2016 (3) ALT 363 (DB)

Under section 14 of Indian Post Office Act,1898 and under section 16 of Evidence Act,1872, when a registered letter is sent to a person and when it is returned by Postman with the endorsement 'absent', the endorsement made on the registered cover is a prima facie evidence of taking the said letter to the address of the person noted on the registered cover and that the noting thereon is prima facie proof of absenece of addressee. (See :- para 32 and 41). Presumption as to service of registered letter- in view of provisions of section 114 Illustration (f) of Evidence Act,1872 and Section27 of General Clauses Act, 1897, there is a presumption that the addressee has received the letter sent by registered post.

2016 (3) ALT 399

M.A. Fatheem Uddin vs. Shaik Nayeem and another

HELD:- If the defect in election petition is curable, an opportunity shall be given to cure the defect.

DECLARATION SUITS: 2016 (3) ALT 92
G.Lalitha Bai and others vs. G.R.Jaya Rao and other

Under Section 35 of the Specific Relief Act,1963, a declaratory decree is not only binding on the pareties to the suit but also the persons claiming

through them as representatives in interest even though they were not parties to the suit.

ADMISSIONS:-

Under section 21 of Evidence Act,1872, admissions may be proved as against the person who makes them or his representatives in interest.

Admissions , though not conclusive proof, they estop the person who made such admissions or the representatives in interest to contend otherwise, in view of section 31 of Evidence Act,1872.

ESTOPPEL:

The principle of estoppel is rule of evidence whereas doctrine of res judicata is rule of procedure.

PRESEUMPTION AS TO OWNERSHIP:

Presumption as to ownership of property is in favour of the person who purchased it till it is rebutted by adducing any satisfactory evidence.

TESTS FOR DETERMINING BENAMI NATURE:

The source from where the purchase money came and the motive why the property was purchased benami are the most important tests for determining whether the sale standing in the name of one person is in reality for the benefit of another. Intention of the parties is the essence of benami transaction.

PRE- TRIAL DECREE:-

2016 (3) ALT 132

Sarala Jain and others vs. Sangu Ganadhar and others

Held:- When the plaintiff sought for appointment of Advocate Commissioner to survey schedule property with the help of Surveyor and fix boundary stones to his land, appointment of Advocate Commissioner by

trial court for demarcating schedule property and to fix boundary stones to the land of respondents amounts to granting pre-trial decree.

No Judicial Order on memo:- 2016 (2) ALT 557
Syed Yousuf Ali vs. Mohd. Yousuf and others

HELD:- No judicial order can be passed by Court on a memo filed by a party.

Stamp duty on possessory contract of sale:-

Held:- When the document on the face of it is a possessory contract of sale and when plaintiff in th suit claims delivery of possession thereunder, stamp duty on such a document executed nly on stamp paper worth of Rs.100/- is liable to be paid as if it is a sale under Explanation to Article 47-A of Schedule 1-A of Stamp Act.

RESERVATION IN PROMOTIONS OF MEMBERS OF SCHEDULE CASTES AND SCHEDULE TRIBES

Union of India rep., by the Secretary (Establishment), Ministry of Railways,Railway Board, New Delhi. And others. vs. B. Lakxmi Narayana,

2016 (2) ALT 367 (DB)

HELD:

As the Tribunal has merely followed the law laid down by the Supreme Court in M. Nagaraj1, in allowing the O.As, the orders of the Tribunal, to the extent it declared the action of the Railways in providing reservation in promotion without fulfilling the parameters laid down in M. Nagaraj1 to be illegal, do not necessitate interference. **The fact however remains that, despite the amendment to the Constitution by insertion of Articles 16(4-A) and (4-B) nearly fourteen years ago, the members of**

the Scheduled Castes and the Scheduled Tribes still face uncertainty on
whether or not they are entitled for reservation in promotion, and to be extended the benefit of consequential seniority. This predicament, they find themselves in, is for no fault of theirs but is on account of the failure of the Union of India to gather data, and form its opinion, on the parameters laid down by the Supreme Court in M. Nagaraj1. The prevailing uncertainty can only be put an end to if the petitioner-Railwayis directed to undertake the aforesaid exercise, and take a decision, within a specified time frame.

The Writ Petitions are, accordingly, disposed of directing the petitioner-Railways to undertake and complete the exercise of gathering data, and forming its opinion on the parameters laid down by the Supreme Court in M. Nagaraj1, with utmost expedition and, in any event, not later than six months from the date of receipt of a copy of this Order. As this stalemate cannot be permitted to effect railway administration, and the services it renders to the public at large, it is open to the petitioner-Railways to make in-chargearrangements in the interregnum, making it clear to those, who are given charge of the posts, that this arrangement is temporary and would continue only till the exercise of formation of opinion, on the need to provide reservation in promotion, is completed. The miscellaneous petitions pending, if any, shall also stand disposed of. No costs.

2016 (2) ALT 14 (DB)

Tamilnadu Mercentile Bank Ltd., rep. By its Branch Manager

Versus

M/s Sunita Industries, rep., its Propretor, Laxminarayana Goel (died) per Lrs and others

Held:-

Admission in written statement:-

Admission made in written statement are judicial admissions. They are conclusive in nature in view of Section 58 of Evidence Act and therefore need no further proof.

Secondary evidence:-

When, in the absence of any objection by otherside, photostat copies of documents are received and admitted in evidence assigning exhibit number by Court, it amounts to applying mind by Court and impliedly permitting thparty to adduce secondary evidence even though no specific order is passed permitting to adduce secondary evidence.

Termination of contract:-

Contract of insurance is contract of indemnity as defined under section 124 of Contract Act and when once contract is terminated, liability under the contract ceases to exist.

Angalakurthy Venkata Narayanamma vs. Molakapalli Lakshmamma and others 2016 (1) ALT 394

Natural family property:

A person adopted by another family, ceases to be manner of his natural family, and unless any property is already vested prior to his adoption either in partition or otherwise, he cannot claim a share in the natural family property.

Composite family:-

In order to constitute a composite family, there must be a custom or an agreement between two families.

Family custom:-

A family custom is a category of special custom, and it should have the attributes of antiquity, certainty and uniformity.

Adverse possession:-

Payment of land revenue would not constitute adverse possession. Entries in revenue records are only for fiscal purpose.

APPRECIATION OF DOCUMENTARY EVIDENCE IN CIVIL CASE:-

THE HONBLE SRI JUSTICE RAMESH RANGANATHAN AND HONBLE SRI JUSTICE M.SATYANARAYANA MURTHY, in **P.Madhusudhan Rao vs Lt.Col.Ravi Manan,** CIVIL REVISION PETITION NO.4515 OF 2014, Date of judgment on 12-03-2015, clearly illustrated the rules for interpretation of a document with an aid of rulings of the Hon'ble Supreme Court of India.

The Supreme Court in **Delhi Development of Authority Vs. Durga Chand, 1973 AIR 2609** has also noticed Odgers Rules and quoted them with approval and as the observation of the Supreme Court have the force of law of the land, it may be taken Odgers Rules (known as golden rules of interpretation) have been judicially recognized and may be adopted as Rules for interpretation of the documents in India. These Rules are listed hereunder:

1. The meaning of the document or of a particular part of it is therefore to be sought for in the document itself.

2. The intention may prevail over the words used

3. words are to be taken in their literal meaning

4. literal meaning depends on the circumstances of the parties

5. When is extrinsic evidence admissible to translate the language?

6. Technical legal terms will have their legal meaning.

7. Therefore the deed is to be construed as a whole. Apart from the said seven rules listed by Odger, it would be convenient to list the following rules for the sake of convenience are called additional rules and given number in continuation:

8. Same words to be given the same meaning in the same contract.

9. Harmonious construction must be placed on the contract as far as possible. However, in case of conflict between earlier or later clauses in a contract, later clauses are to be preferred to the earlier; while in a will, earlier clause is to be preferred to the later.

10. Contra Proferendum Rule-If two interpretations are possible, the one favourable to the party who has drafted the contract and the other against him, the interpretation against that party has to be preferred.

11. If two interpretation of a contract are possible the one which helps to make the contract operative to be preferred to the other which tends to make it inoperative

12. In case of conflict between printed clauses and typed clauses, type clauses are to be preferred. Similarly, in conflict between printed and hand written clauses, hand written clauses are to be preferred and in the event of conflict between typed and hand written clauses, the hand written calluses are to be preferred

13.the special will exclude the general

14. Rule of expression unius est exclusion alterius

15. Rule of noscitus a sociss

16. Ejusdem generic rule will apply both the contract and statute

17. place of Punctuation in interpretation of documents

From the Rules stated above, when the language used in a document is unambiguous conveying clear meaning, the Court has to interpret the document or any condition therein taking into consideration of the literal meaning of the words in the document. When there is ambiguity, the intention of the parties has to be looked into. Ordinarily the parties use apt words to express their intention but often they do not. The cardinal rule again is that, clear and unambiguous words prevail over the intention. But if the words used are not clear or ambiguous, intention will prevail. The most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if, the intention is so collected will not secure with the words used. The answer is the intention

prevails. Therefore, if the language used in the document is unambiguous, the words used in the document itself will prevail but not the intention.

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WORKSHOP III

REFERENCE OF DOCUMENTS TO EXPERTS FOR OPINION

TOPIC: Reference Of Documents To Experts For Opinion

Paper presented by

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Introduction:

Law of evidence allows a person, who is a witness to state the facts related to either to a fact in issue or to relevant fact, but not his inference. It applies to both civil and criminal law. The opinion of any person other than the judge by whom the fact has to be decided as to the existence of the facts in issue or relevant facts are as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons- for this would invest the person whose opinion was proved with the character of a judge. The rule however, is not without its exceptions. “If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns”.

The expert witness is, thus, an exception to the exclusionary rule and is permitted to give opinion evidence. The Judge is not expected to be an expert in all the fields-especially where the subject matters involves technical knowledge. He is not capable of drawing inference from the facts which are highly technical.

In these circumstances he needs the help of an expert- who is supposed to have superior knowledge or experience in relation to the subject matter. This qualification makes the latter’s evidence admissible in that particular case **though he is no way related to the case**. Because an expert has an advantage of a particular knowledge vis-à-vis a judge who is not equipped with the technical knowledge and hence not capable of drawing an inference from the facts presented before him.

Who is an expert?

Section 45 defines an expert is a person who is especially skilled in a given field. An expert is a person who devotes his time and study to a special

branch of learning. The Supreme Court of United State of America defined an expert is a person who possesses knowledge and experience not possessed by mankind in general. The Courts in India in their judgments described an expert is a person who has **acquired special knowledge, skill or experience** in any art, trade or profession. Such knowledge need not be imparted by any University. He might have acquired such knowledge by practice, observation or careful study. The expert operates in a field beyond the range of common knowledge.

When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons especially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions are relevant facts . Such persons are called experts. In simple, an expert is one who is skilled in any particular art, trade or profession being possessed of peculiar knowledge concerning the same.

Expert Evidence - Indian Evidence Act:

Expert evidence is covered under Ss.45-51 of Indian Evidence Act. **S.45 of the Act allows** that when the subject matter of enquiry related with science or art, as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to form correct judgment. It allows an expert to tender evidence on a particular fact in question and to show to the court that his findings are unbiased and scientific.

S.46 of the Act states that facts, **not otherwise relevant, are relevant** if they support or are inconsistent with the opinion of experts when such opinions are relevant.

S.47 of the Indian Evidence Act exclusively deals with the opinion as to the handwriting. The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. The expert opinion is not confined to handwriting alone. The opinions in relation to customs are also admissible according to S. 48 of Indian Evidence Act.

Our Hon'ble High Court of A.P in **Bhavanam Siva Reddy and others v**

Bhavanam Hanumantha Reddy another*, eloborately discussed the law on the subject of* reference of documents to experts as follows:

Relevant provisions dealing with opinion evidence:

(1)**Section 45 of the Indian Evidence Act** speaks that- for the **Court to form an opinion** the **opinion** of an expert is **relevant**. This section is thus an exception to the general rule as regards exclusion of opinion evidence.

(2)**Section 51 says that** whenever the opinion of **any living person** is relevant, the grounds on which such opinion is based are also relevant.

(3)**Section 46 makes facts**, not otherwise relevant, are relevant- (1). If they support or are inconsistent with the opinions of experts, when such opinions are relevant.

(4)**Regarding opinion evidence**-the other relevant sections are Sections.47- 50, 73 & 67, among which-

(5)**Section.50-speaks** of relevancy of opinion **on relationship**-for the Court to form an opinion.

(6)**Section.49-speaks of relevancy** of opinion on **usages** and **tenets** of any body of men or family- for the Court to form an opinion.

(7)**Section.48-speaks of relevancy** of opinion on existence of custom or right in general or relating to a considerable class of persons-for the Court to form an opinion.

(8)**Sections-47, 73 & 67 speak** on handwriting opinion evidence and proof.

(9)**Section.67-speaks** of requirement of proof of handwriting of person alleged to have signed or written the document in question-for the Court to appreciate the evidence.

(10)**Section.47-speaks** of relevancy of opinion of person acquainted with the handwriting of the person-by whom any document was written or signed-inquestion-for the Court to form an opinion. The acquaintance may be from- he has seen when that person writes or he has received the documents purporting to be written by that person or when in the ordinary course of business the documents purporting to be written by that person have been habitually submitted to him.

(11)**Section.73-deals with Comparision of signature, writing or seal** with admitted or proved ones reads that in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(12)The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare- the words or figures so written with any words or figures alleged to have been written by such person: This section applies also, with any necessary modifications, to finger impressions.

(13)The amended provisions in reference to the above for electronic evidence are covered by

(1)Section-47-A-opinion **as to digital signature**,

(2)Section-67-A **proof as to digital signatures**, Section-73-A proof **as to verification of digital signatures** which are (not to mention about Sections-65-A, 65-B, 81-A, 85-A, 85-B, 85-C, 88-A, 90-A & 22-A)relating to electronic records.

(14)Sections 45-51 nowhere speak of requirement of corroboration to the opinion evidence. Section 134 of Evidence Act says no particular number of witnesses shall in any case be required for the proof of any fact.

Expert as a witness:

The phrase expert testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special knowledge simply testifies as to the impressions produced in his mind. Expert evidence is often sought in the matters of **handwriting, age, on weather, general conduct of a business etc**.

A person having special knowledge of the value of land by experience though not by any profession can be treated as an expert. A witness in order to give an opinion must be competent (Peritus)-i.e., an Expert in the field and the subject matter must be one in respect of which an opinion is allowed. What a person thinks in respect of the existence or non-existence of fact is opinion. Whatever is presented to the senses of a witness and of which he receives direct knowledge **without any process of thinking and reasoning is not opinion.** Expert is the person who specifically or specially skilled or practiced on any subject. Expert evidence is thus the direct evidence of an expert in the field from what he perceived by the senses of perception or in any other manner. According to **Russell-any person who is skilled or has adequate knowledge in a particular field is called Expert**.

The Hon'ble Supreme Court in the case of *Ramesh Chandra Agrawal vs Regency Hospital Ltd. & Ors* delineated the requirements of expert evidence under Section 45 of the Evidence Act. The Court stated that the first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience **of the lay person**. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even **esoteric**, the central role of expert cannot be disputed.

The credibility of the expert witness and his competency to give opinion and the reasons given supporting it are the material aspects in the appreciation of evidence by the Court concerned:

(i)**The test to determine competency of an expert** is (a) **Educational background in the field, (b) Practical knowledge in the field, (c) Careful analysis in arriving to the conclusion opined & (d) Ability to explain the expertise and how he arrived to the conclusion opined**.

(ii)**The test to determine credibility** of an expert is (a). Basis of opinion- The opinion must be based on facts and reasons there from to support the conclusion. How far to rely there from is a matter of appreciation in evidence by the Court. The expert furnishes the data with reasons to his opinion there from and the Court decides there from and from other material in evidence if any.

(iii)**The correct approach for the Court** would be to weigh the reasons on which the expert report is based and the quality of experts opinion would ultimately depend upon the soundness of the reasons on which it is founded.

Cases in which Expert Evidence can be admitted:

According to Sec. 45 of Indian Evidence Act, expert evidence is admissible when the court has to form an opinion **upon a point of foreign law**, **or of science** or **art** or **as to identity of handwriting** or **finger impression**. It will be seen that this section speaks of expert evidence on matters of "science or art", and does not specifically mention "trade" or "skill". The word "science" is a broad term and it is not always easy to determine what is or not a subject of scientific inquiry. A general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.

In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent knowledge of its nature.

Expert opinion can be secured only through the order of the Court and **not voluntarily by the party to the suit**. If the opinions are on the points of foreign law, or of science, or of art, which are already in existence, by the time the suit is filed, they can be relied upon, as being relevant to the controversy in the suit but the opinion to be procured during the pendency of a suit in relation to the

document which is subject matter of the suit, cannot be secured, **except with the leave of the Court, or with intervention of the Court.** Once the report of an expert is proved and admitted in evidence, the same can be read as part of the statement of the author of the report. It is not necessary that the report of the expert should be corroborated by his statement before Court before taking the same into the consideration. **Once the expert's opinion is accepted by the** Court, it ceased to be the opinion of the expert and becomes the opinion of the Court.

The cases in which testimony of an expert is admissible are of two types:

1)**When the conclusions to be drawn by the Court** depends upon the existence of facts which are not of common knowledge and which are peculiarly within the special knowledge of men whose experience and study enables them to speak with authority upon the subjects in question.

2)**When the conclusions to be drawn by the Court depends both upon the facts** stated as well as the knowledge of the facts themselves not within the range of ordinary intelligence. In the first class of cases the facts are to be stated by the expert and the conclusion is to be drawn by the Court. In the second class of cases the expert states the facts and give his conclusions in the form of opinion which may be accepted or rejected by the Court from appreciation of evidence.

Reference of documents to experts for opinion:

The application for sending the disputed signatures to an expert for comparison with the admitted signatures cannot be ordered as a matter of course, but it has to be considered keeping in view the facts and circumstances of a particular case. An exercise, to be undertaken under Section 45 of the Evidence Act, visa-vis, a document, must be comprehensive and total. A party cannot be permitted to split the purposes in the context of examination through an expert under Section 45 of the Evidence act. In other words, if several parts of the documents are to be subjected to expert opinion, the relief must be claimed in relation to all.

Different applications cannot be permitted to make in relation to each and every facet of the document. In a way, it can be said that such a course is prohibited under Order II CPC, in so far as, it governs the course of applications also. No document need be sent to an expert on mere filing of an application requesting the Court to send it to an expert and it is only when the trial Court is not in a position to come to a just conclusion, it must feel it necessary to send

such document to an expert. The learned Judge while refusing to permit the document to be sent to an expert at that stage, still left it open to send the disputed signatures of the party therein to a handwriting expert as contemplated under Section 45 of the Evidence Act, if the Court is unable to come to a conclusion even after looking into the document.

Our Hon'ble High Court of A.P in ***Nookala Sridevi v. D. Krishnarjuna Rao***held that the Court can refer documents to experts if satisfied that said document require opinion of expert. It need not arrive at any conclusion by looking into it before referring it to expert.

The signature marked on Xerox copy can never constitute the basis, therefore order granting permission **to send Xerox copies of documents** to the hand writing expert was liable to be set aside. The application for sending document to hand writing expert need not be filed soon after written statement is presented. The party can file application even at the stage of arguments. **[*Guru Govindu v. Devarapu Venkataramana, AIR 2006 AP 371].***

Where earlier application for sending promissory notes to the expert was dismissed, the subsequent application for permission to send said promissory note to the **Security Press to obtain opinion** as regards date of manufacture of revenue stamps affixed on it was barred by *res judicata*. **[*Vajjala Sree Rama***

Murthy v. Tadepath Narayana Murthy, **2006 AIHC** (NOC) 343(AP) : **AIR** 2006 AP 315].

Determination of age of the ink - Expert's opinion:

There are divergent opinions with regard to expert opinion for determination of age of the ink in a document. Recently our Hon'ble High Court of A.P in **T.Rajalingam @ Sambam Vs State of Telangana and Another**, opinioned that age of ink and writings can be determined and if so done, can be admitted in evidence and as such expert opinion as to determine age of writing of ink can be possible and to admit is relevant.

On contrary, in another Judgment Polana Jawaharlal Nehru Vs

Maddirala Prabhakara Reddy, our Hon'ble High Court held that the science relating to forensic examination of Handwriting, especially in relation to the **fixation of the age of the ink, is not perfect.**

In cases of this nature any reference of a document to the Handwriting Expert just for the purpose of finding out **whether the ink was 5 years old** at the time of institution of the suit or 3 years old at the time of institution of the **suit, is not likely to bring any fruitful result.**

(1)**"Expert's evidence as to handwritings is opinion evidence and before acting on such evidence, it is usual to say if it is corroborated by either clear direct evidence or by circumstantial evidence"** which was observed by **our Honourable Supreme Court of India in Shashi Kumar Banarjee and others** Vs. **Subodh Kumar Banerjee** since deceased and after him his legal representative and others, Respondents in **AIR 1964 SC 530;**

(2)**"Conviction based on Expert's evidence is not safe"** which was observed by **our Honourable Supreme Court of India** in **Magan Bihari Lal Vs. The State of Punjab in AIR 1977 SC 1091;**

(3)**"Opinion of Expert compared with present signatures by ignoring contemporary signatures, there is bound to differs"** which was observed by our Hon'ble Supreme Court of India in **Nimmagadda Padmanabha Rao Vs. Smt. Kosaraju Satyavathi 2006 (5) ALT 586;**

(4)**"Expert's evidence is only a opinion evidence is well established when there is enough evidence let in by party in proof of certain document and the Court is satisfied with the said evidence – Absolutely no necessity for court to consider the opinion of Expert"**which was observed by our Hon'ble Supreme Court of India in **Lagadapati Dhanalaxmi and other Vs. Lagadapati Anjaneyulu 2009 (5) ALT 812;**

(5)**"Evidence given by Expert on handwriting can never be conclusivebecause it is, after-all opinion evidence" which** was observed by our Hon'ble Supreme Court of India in **Eswara Prasad Misra Vs. Mohammad Isa** in **AIR 1963 SC 1728, at Page 1729**;

(6)**"In a pronote case where the defendant took a plea that it was forged, it is the duty of the Plaintiff to prove the pronote and pronote need not be sent to Expert for comparison of signatures thereon with the signatures taken from him in open Court NEARLY AFTER SIX YEAR AFTER execution as done in the case as there is every possibility of the defendant to disguise the specimen signatures taken from him in open Court. Contemporary**

signatures is necessary." which was observed by our Hon'ble Supreme Court of India in **M.Satyanarayana V.P. Indira Devi in 2011 (1) ALT 646;**

No doubt Expert's evidence is a valid one, credible, trustworthy and unimpeachable but in view of the evidence of P.W.1 to 3 no importance shall be given to expert's evidence, the same was held in **2002 (6) (ALT) P. 103 (AP); AIR 1994 AP 102 (DB)**

Sec. 45 of Evidence Act – Unless contemporary signatures are available for comparison with disputed signature. No useful purpose would be served by sending them to Expert, Court has no power to compel party to produce document anterior to litigation in view of ruling reported in **2004 (5) ALD P.98 = 2004 (6) ALT P.813.**

For Expert opinion of Telugu signature and Telugu writing, document has to be refer to Telugu knowing expert only as per ruling reported in **2004 (5) ALD P.93.**

When father is disputing his paternity, father and child blood samples alone need to be send. mother's DNA is immaterial held in Veeran vs. Veera Varmalle AIR 2009 MD 64.

DNA report prevails over sec.112 of Indian Evidence Act, but prior to granting for such test, it is better to see that the non access has been proved to certain extent.

CONCLUSIONS:

An expert is not a witness of act and his evidence is really of **an advisory character.** The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, **is eligible, convincing and tested** becomes a factor and often an important factor for consideration along with other evidence of the case.

Courts **cannot laydown any hard and fast rules** controlling the discretion of the court to send the disputed documents/writings for the opinion of the expert or to examine him in support of such opinion. On sending the document to handwriting expert and on receiving report, parties, on showing

sufficient cause, may call upon the court to permit them to examine hand-writingexpert or any witness in support or rebut the said opinion. Sec 45 of the Indian Evidence Act for sending the disputed signature or writings to the handwriting expert for comparison and opinion and same shall be left open to the discretion of the court. For exercising such discretion when exigencies so demand, depending upon the facts and circumstances of the each case.

Expert opinion is a weak piece of evidence and its value is corroborative and **doesn't supercedes the ocular, impregnable evidence**. It never be counted as conclusive proof with one exception that the expert's evidence on DNA Report is a conclusive one and it never shattered under Law.

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WORKSHOP-III

RES JUDICATA AND RES SUB JUDICE, ON PLEADINGS, PLAINTS AND WRITTEN STATEMENTS

TOPIC: Res Judicata And Res Sub Judice, On Pleadings, Plaints And Written Statements

Paper presented by

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1.The doctrine of res judicata is based on three maxims:

1.*Nemo debet bis vexari pro una et eadem causa*

no person should be vexed twice for the same cause

2.*Interest reipublicae ut sit finis litium*

it is in the interest of the state that there should be an end to a litigation

3.*Res judicata pro veritate occipitur*

a judicial decision must be accepted as correct

4. the doctrine of res judicata has been explained in the simplest manner by Das Gupta J. in the case of **Satyadhyan Ghosal vs. Deyoranjin Devi AIR 1960 SC 941** in the following words

“ the principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once res judicata , it shall not be adjudged again.

5. The doctrine of res judicata is of universal application held in the historic decision **of Daryao vs. State of U.P AIR 1961 Supreme Court 1457.**

6. Doctrine of res judicata is mandatory.

7. It is not every matter decided in a former suit that will operate as res judicata in a subsequent suit. To constitute a matter as res judicata u/sec.11 the following conditions must be satisfied.

a) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and

substantially in issue either actually or constructively in the former suit.

b) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

c) Such parties must have been litigating under the same title in the former suit.

d) The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

e) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.

8. The doctrine of res judicata of universal application . It is a fundamental concept in the organisation to every jural society. The rule, therefore, should apply even to criminal proceedings.

9. A compromise decree is not a decision by court . A court does not decide anything nor can it be said that the decision of a court implicit in it. Hence, the doctrine of res judicata does not applied to a concerned decree held in **Prithvi Chand's case 1993 (3) SEC 271.**

10. When a suit dismissed for default rule of res judicata does not apply as it is not decided finally held in State of UP vs. Jagadish Sharan Agarwal AIR 2008 SC 817.

11. A withdrawal of suit does not operate as res judicata in filing a subsequent suit for the same cause of action. Because the basic principle of res judicata being final adjudication on merits, there can be no bar of res judicata if the suit is withdrawn.

12. Principles of res judicata and its application in the same proceedings were discussed in the suit **Earach Boman Khavar vs. Tukaram Shreedhar Bhat and another AIR 2014 SE 544.**

Res judicata means matter once adjudicated, cannot be re-adjudicated. The doctrine of res judicata technically means that a matter is issue which has already been tried by competent court, then another trial

between the same parties in respect of the same matter shall not be allowed. It is a very important doctrine in civil Justice system, it emphasis that a subject matter of the suit which has already been decided, is deemed to be decided forever, and cannot be reopened by the same parties.

Section 11 of Civil Procedure Code - Res judicata:- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit' between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II : 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.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent Suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been Subsequently-raised.

2. Purposes of *Res sub-judice*

The section -10 intends to protect a person from multiplicity of proceedings and to avoid a conflict of decisions. It also protects the litigant people from unnecessary harassment. It also aims to avert (avoid) inconvenience to the parties and gives effect to the rule of res judicata.

Section 10 of Civil Procedure Code deals with res sub judice - Stay of suit:- No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating 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 continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation: The pendency of a suit in a foreign Court does not preclude the courts in India from trying a suit founded on the same cause of action.

The object of the rule contending in sec.10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief.

Conditions:

For the application of this section, the following conditions must be satisfied.

(i) There must be two suits, one previously instituted and the other subsequently instituted.

(ii) The matter in issue in the subsequent suit must be directly and susbstantially in issue in the previous suit.

(iii) Both the suits must be between the same parties or their representatives.

(iv) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court in India or in any court beyond the limits of India established or continued by the Central Government or before the Supreme Court.

(v) The court in which the previous suit is instituted must have jurisdiction to grant the relief claimed in the subsequent suit.

(vi) Such parties must be litigating under the same title in both the suits.

As soon as the above conditions are satisfied, a court cannot proceed with the subsequently instituted suit since the provisions contained in Section 10 are mandatory, and no discretion is left with the court. The order staying proceedings in the subsequent suit can be made at any stage.

Exceptions to the rule of res subjudice

a) A suit pending in a Foreign Court

b) Summary suit:-

In a summary suit the trial really begins after the court grants leave to the defendant to contest the suit, and thus, the word trial in sec.10, in the context of a suit under order-37 cannot be interpreted to be entire proceedings starting with the institution of the suit.

c) Interim orders:-

the rule of res subjudice does not affect the jurisdiction of the court to pass the interim orders. Wherein in a suit further proceedings are stayed, if the interlocutory matters are decided and the suit is kept ready to proceed further as soon as the stay of further proceedings seizes to be operative from a stage which could have arrived to ripen the case, by disposing of interlocutory matters in between, without effecting the merits of in the case would be in aid of judicial process.

Contravention: Effect

A decree passed in contravention of Section 10 is not a nullity, and therefore, cannot be disregarded in execution proceedings. Again, as stated above, it is only the trial and not the institution of the subsequent suit which is barred under this section. Thus, it lays down a rule of procedure, pure and simple, which can be waived by a party. Hence, if the parties waive their right and expressly ask the court to proceed with the subsequent suit, they cannot afterwards challenge the validity of the subsequent proceedings.

Section 12 of C.P.C. deals with Bar to further suit.- Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

According to Order II Rule (2) Relinquishment of part of claim- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not after words sue in respect of the portion so omitted or relinquished.

According to Order IX Rule (9) where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fir, and shall appoint a day for proceeding with the suit.

According to Section 144 (2) of C.P.C. No suit shall be institute for the purpose of obtaining any restitution or other relief which could be obtained by application under section 144(1).

As per the Judgment of the Hon'ble High Court of A.P. for the State of Telangana and A.P. in Senior Regional Manager, Food corporation of India, Hyderabad VS Y. Thirupalu and another which was reported in **2017(6) ALD 239 (DB) = 2017 (5) ALT 437** in which the Hon'ble High court held that in order to constitute ***res judicata*** the following, among other, conditions must be satisfied.

a)There must be two suits – One former suit and the other subsequent suit;

b)the matter, directly and substantially in issue, must be the same either actually or constructively in both suits

c)the matter, directly and substantially in issue in the subsequent suit, must have been heard and finally decided by the court in the former suit

d)the parties to the suits, or the parties under whom they or any of them claim must be the same in both the suits; and

e)the parties, in both the suits, must have litigated under the same title.

As per Order XXII Rule 4 of C.P.C. Procedure in case of death of one of several defendants or of sole defendant:- Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants along or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

According to Order I Rule 10 (2) of C.P.C. Court may strike out or add parties: The court may at any stage of the proceedings, either upon or without the application or either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether 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, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Now the point for consideration is that whether the dismissal of the petition under Order XXII Rule 4 operates as resjudicata for the petition filed Under order I Rule 10 after the dismissal of the petition under Order XXII Rule 4 – The point was explained by the Hon'ble Supreme court in **Pankajbhai Rameshbhai Zalavadia Vs Jethabhai Kalabhai Zalavadia (Deceased) through L.Rs and others which was reported in AIR 2018 Supreme court 490** in which the Hon'ble Apex court held that " there is no bar for filing the application under Order I Rule 10, even when the application under Order XXII Rule 4 of the code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties Under Order I Rule 10 of the code read with Section 151 of the code".

As per the Judgment of the Hon'ble Supreme Court in **Ramachandrasingh Vs Savithridevi** which was reported in 2003 (8) Scale 505 " fraud and Justice never dwell together" where it is established that a Judgment is obtained by playing fraud on court, principles of resjudicata do not apply {2001(5) ALD 828 (DB)}.

Finding about Title given incidentally or collaterally in injunction – suit does not operate as resjudicata in title suit – 2002 (2) ALD 753.

Criminal courts finding would not operate as resjudicata in respect of civil courts proceedings – **AIR 1971 SC 385 = AIR 1967 SC 1156 = AIR 1958 AP 371.**

3.Res Judicata and Estoppel

Res-judicata based upon public policy that litigation should end.

Estoppel is part of law of evidence where a man can't change his stand once taken.

Res-judicata prevents someone from saying SAME thing in different litigations,

Estoppel stops him from saying DIFFERENT things at different times, either in the same suit or different suits.

Res-judicata bars the suit itself

Estoppel only stops a certain piece of evidence from being taken on record, while the trial continues.

Res-judicata ousts the Jurisdiction of the Court

Estoppel stops the mouth of a party.

Res-judicata derives from a Court Decision

Estoppel from facts asserted by parties.

The relevant provision under the Indiana constitution is under Article 20(2)

–" No person shall be prosecuted and punished for the same offence more than once". The relevant provision Under Evidence Act is Section 44. The relevant provision under Cr.Pc is Section 300.

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WORKSHOP-III

SUITS INSTITUTION, PLACE OF INSTITUTION AND PARTIES TO THE SUIT

TOPIC: Suits Institution, Place Of Institution And Parties To The Suit

Paper presented by

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Institution of Suit and its Essentials: Portrayal of the Principles and Procedural Rules under the Code of Civil Procedure, 1908

The basic aim of a legal system of a country is to impose duty to respect the legal rights conferred upon the members of the society. The person making a breach of that duty is said to have done the wrongful act. On the basis of nature and gravity of such wrongful acts, those are separated under two categories: Public Wrong and Private Wrong. Public wrong is deemed to be committed against the society and the Private wrong, against individuals. The gravity of the former is greater than that of the latter. The first category is termed under the Law as ‘crime’ governed by the Criminal Laws (Substantive and Procedural) and the second category, as ‘civil wrong’ governed by the Civil Laws. Under the Criminal Law the action is taken by the state in its name and the accused has to pay fine to the State’s fund and is punished by imprisonment or sentenced to death and in such cases the proceeding is started either by lodging the FIR or by lodging complaints (in case of Complaint cases) as provided by the Criminal Procedure Code, 1973. In case of civil wrong, the remedy is the compensation either liquidated or unliquidated damages; the remedial measures ensured to the people is based on the Latin maxims damnum sine injuria (damage without injury), injuria sine damnum (injury without damage) and ubi jus ibi remedium. According to the first two maxims if the legal right of a person is violated he will get the remedy, even in case where no actual damage is caused to him; but where he has no legal right,

then if any actual damage is caused to him, he cannot be entitled to get the remedy. The ubi jus, ibi idem remedium (where there is a right there is a remedy), speaks of the remedial measure available in the formerly mentioned cases. Such remedial measures are enforced through the institution of suit. The Code of Civil Procedure, 1908 is the procedural or the adjective law of India in civil matters. Sections 26 and Sections 35-35B read with Orders I (Parties to the Suit), II (Framing of the Suit), IV (Institution of the Suit), VI (Pleadings) and VII (Plaint) provide the procedural principles and rules regarding institution of suits.

The word ‘suit’ has wider application. There is a little difference between the suits under the CPC 1908 and the other civil suits. This is under the CPC the suits is instituted by the presentation of the plaint which has particular format and in other suits like the suit for divorce, the same is instituted by mere presentation of the petition by or on behalf of either spouse. It should be mentioned that ‘suit’ is different from the ‘writs’. Suit is instituted to enforce the legal rights (not the political and religious) only; but the ‘writs’ are concerned with the enforcement of the Fundamental Rights guaranteed by Part III of the Indian Constitution.

Only the High Courts and the Supreme Court have the Writ jurisdiction governed by the IndianConstitution.

This paper seeks to explore the process of institution of suits and its essentials which are governed by the CPC 1908.

2. ‘Suit’: Meaning within the purview of the Civil Procedure Code, 1908: The term ‘suit’ has not been defined in the Civil Procedure Code, 1908. According to Chamber’s 20th Century Dictionary (1983), it is a generic term of comprehensive signification referring to any proceeding by one person or persons against another or others in a court of law wherein the plaintiff pursues the remedy which the law affords him for the redress of any injury or enforcement of a right, whether at law or in equity. In the Black’s Law Dictionary (7th Edition) this term is defined as the proceeding initiated by a party or parties against another in the court of law. According to some other views, ‘suit’ includes appellate proceeding also; but it does not include an execution proceeding. Ordinarily, suit under the CPC is a

civil proceeding instituted by the presentation of a plaint.

3. Institution of Suit: the Provisions under the Civil Procedure Code, 1908:

Section 26(1), CPC says that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Sub-section (2) provides that in every plaint, facts shall be proved by affidavit. The procedural framework relating to the institution of a suit is give below:

i. Preparing the plaint

ii. Choosing the proper place of suing

iii. Presentation of the plaint

A brief concept of the relevant provisions of CPC 1908 regarding the essentials of institution of suit is given under Figure 1.

Parties to the suit (Order 1)

Framing of the Suit (Order 2)

Institution of Suit (Section 26 and Order 4)

Costs (Sections 35 -35B)

Institution of Suit at a Glance: The Provisions under the CPC

3.1. Preparation of the Plaint:

‘Plaint’ is not defined in this Code. It may, however, be described as ‘a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing’. Order 7 is related to the format of Plaint. According to Rule 1 the particulars to be contained in a plaint are:

a) the name of the Court in which the suit is brought;
b) the name, description and place of residence of the plaintiff;
c) the name, description and place of residence of the defendant, so far as they can be ascertained;
d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

e) the facts constituting the cause of action and when it arose;
f) the facts showing that the Court has jurisdiction;
g) the relief which the plaintiff claims;
h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and
i) a statement of value of the subject matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits

Other rules regarding the contents of a plaint:

a) In money suits the pliant shall state the precise amount of amount claimed (Rule 2).

b) Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers (Rule 3).

c) Where the plaintiff sues in a representative character, the plaint shall show not only that has an actual existing interest in the subject matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it (Rule 4).

d) The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand (Rule 5).

e) Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed (Rule 6).

f) Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extend as if it had been asked for. And the same rule shall

apply to any relief claimed by the defendant in his written statement (Rule 7).

g) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly (Rule 8).

h) Where the Court orders that the summons be served on the defendants in the manner provided in rule 9 of Order V, it will direct the plaintiff to present as many copies of the plaint on plain paper as there are defendants within seven days from the date of such order along with requisite fee for service of summons on the defendants (Rule 9).

3.1.1. Return of Plaint:

Rule 10 (1) says, ‘Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented to the court in which the suit should have been instituted.’

3.1.2. Rejection of Plaint:

According to Rule 11 the plaint shall be rejected in the following cases:—

a) where it does not disclose a cause of action;
b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
c) 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;
d) where the suit appears from the statement in the plaint to be barred by any law;
e) where it is not filed in duplicate;
f) where the plaintiff fails to comply with the provision of Rule 9.

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.

According to Rule 12 where a plaint is rejected, the Judge shall record an Order to that effect with the reasons for order. Rule 13 clarifies that the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

3.1.3. Amendment of Pleading of the plaintiff (Plaint):

The Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just (Rule 17, Order 6).

3.2. Choosing the proper place of suing:

A defect of jurisdiction goes to the root of the matter and strikes at the authority of a court to pass a decree. A decree passed by the Court in such cases is a coram non judice. So choosing the proper court is the next which depends on the contents of the pliant. Section 9 of CPC has declared that the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of a court is decided by the legislature; parties by the framing of the plaint cannot interfere into the extent of this jurisdiction. They can choose one of some of the courts having same jurisdiction. In **Ananti v. Chhannu,**the Court has laid down the correct law on this point:

The Plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen.

3.3. Presentation of the Plaint: Commencement of the Suit:

Section 26 and Order 4 contain the provisions relating to the institution of a suit. Rule 1 of Order 4 goes as:

(1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Order VI and VII, so far as they are applicable.

(3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).

Section 26 provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Order 4 Rule 1 lays down the procedure for institution of suit; but does not speak of any ‘other manner’ for the purpose. The amendment makes it clear that unless the plaint is filed in duplicate it will be deemed to be incomplete. Sub-rule (3) has been inserted in order to curtail unnecessary adjournments for due compliance of the provisions of sub-rules (1) and (2) after the filing of the plaint.

The plaint may be presented either by the affected person himself, or by his advocate or by his recognised agent or by any person duly authorised by him. A proceeding which does not commence with a plaint is not a suit within the meaning of Section 26 and Rule 1 of Order 4.

I. Time and Place of Presentation:

Generally, the presentation of a plaint must be on a working day and during the office hours. However, there is no rule that such presentation must be made either at a particular place or at a particular time. A judge, therefore, may accept a plaint at his residence or at any other place even after office hours, though h is not bound to accept it. But if not too convenient, the judge must accept the plaint, if it is the last day of limitation. Thereafter, the

particulars of a suit will be entered by the court in a book kept for the said purpose, called the Register of Civil Suits. After the presentation, the plaint will be scrutinised by the Stamp Reporter. If there are defects, the plaintiff or his advocate will remove them. Thereafter the suit will be numbered.

II. Registration of Suits:

Rule 2 of Order 4 provides that the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

III.Place of institution of suits:

sec.15 to 20 of the code of Civil Procedure regulate the forum for institution of the suits.

Sec.15 requires the plaintiff to file a suit in the court of the lowest grade competent to try it.

Sec.16 to 18 deals with the suits relating to immovable property.

Sec.19 applies to suits for compensations for wrong to persons or to movable property.

Sec.20 is a residuary section and covers all the cases not dealt with by sec. 19 to 20.

sec.21 recognizes the well established principal that the defect as to territorial or pecuniary jurisdiction can be waived.

Sec.21(a) bares a substantive suits for setting aside a decree passed by court on the ground of want of territorial jurisdiction.

The object underline sec.15 is to fold.

a. to see that the courts of higher grades shall not be over burden with the suits.

b. to afford convenience to parties and witnesses who may be examine in such suits.

Place of institution of suits depends upon the pecuniary , territorial and subject matter of the suits. In **Balagonda vs. Ramagonda 1969 in (71) Bombay LR 582** held that if in case if it appears to court that the valuation is falsely made in the plaint for the purpose of avoiding the jurisdiction of the proper court , the court may require the plaintiff to prove that the valuation is proper.

As per sec.21 (1) No objections has to territorial jurisdiction as to place of institution has to be allowed by appellate or revision court unless the following 3 conditions are satisfied.

a. the objection was taken in the first instance.

b. it was taken at the earliest possible opportunity and in cases where issues are settled at or before settlement of issues; and

c. there has been a consequent failure of justice.

These above principals also applies to execution proceedings.

4. Essentials of the Institution of Suits:

There are four essentials of a suit:
i. Opposing parties, i.e., parties to the suit;
ii. Subject-matter in dispute;
iii. Cause of action; and
iv. Relief

4.1. Parties to suit: Order 1:

In a civil suit, the presence of both the plaintiff, who files the suit, and the defendant, who is sued, is necessary. In each case there are two categories; first one is the necessary party and the other is proper party. A

necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding.

Where the number of plaintiff/defendant is one, no dispute arises regarding their representation; but some uniform rules become mandatory if this number crosses this limit. Order 1 contains these rules. These are enumerated below.

· Joinder of parties: Rules 1, 2, 3, 3A:

All persons may be joined in one suit as plaintiffs or defendants as the case may be, where-

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/ against such persons, whether jointly or severally or in the alternative; and

b. If such persons brought separate suits, any common question of law or fact would arise (Rules 1, 3).

Example: Where A assaults B, the latter may sue A for tort, as individually affects him. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. Thus, if A assaults B and C, or A and B assaults C or A and B assaults C and D, the question of joinder of parties arises.

The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes (Rule 6). When the plaintiff is in doubt regarding the joinder of persons from whom he is entitled to obtain redress, he may join two or more such defendants (Rule 7). It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him (Rule 5). As per Rule 12(1), where there are more plaintiffs than one, any one or more

of them may be authorised by any other of them to appear, plead or act for such other in any proceedings; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. Sub-rule (2) says, the authority shall be in writing signed by the party giving it and shall be filed in court.

· Misjoinder and non-joinder: Rules 9 and 13:

As per Rule 9 no suit can be defeated by reason of the misjoinder and non-joinder of parties unless such party is a necessary party. Rule 13 says that all objections regarding the misjoinder and non-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement.

· Representative Suits: Rule 8:

i. Meaning: In a suit if 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, or for the benefit of, all persons so interested; such a suit is called the ‘representative suit’.

ii. Object: To facilitate the decision of questions in which a large number of persons are interested without recourse to the ordinary procedure.

iii. Conditions: As per Rule 8(1), Where there are numerous persons having the same interest in one suit,—

(a) 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, or for the benefit of, all persons so interested;

(b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

iv. Formalities to be followed:

a. In such case, the permission of the Court must be obtained [sub-rule (1)].

b. The plaint must show that the suit is representative in character.

c. The court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct [sub-rule (2)].

d. Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the court to be made a party to such suit [sub-rule (3)].

e. No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3) of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the court has given, at the plaintiff's expenses notice to all persons so interested in the manner specified in sub-rule (2) [sub-rule (4)].

f. Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the court may substitute in his place any other person having the same interest in the suit [sub-rule (5)].

g. 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 [sub-rule (6)].

h. For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf, or for whose benefit, they sue or are sued, or defend the suit, as the case may be [Explanation].

· Power of the Court to order separate trials:

Where it appears to the Court that any such joinder may embarrass or delay the trial, the Court may order separate trials or make such other order as may be expedient in the interest of justice (Rules 2, 3A).

· Power of the Court to give judgment in case of joinder of parties: Rule 4:

Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

· Special Powers of the Court: Rule 10, 10A, 11:

i. While trying a suit, the court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion that question of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the court may specify (Rule 8A).

ii. The Court may make corrections to the pleadings of both parties if it seems to be wrong before the Court (rule 10).

iii. The court may, in its discretion, request any pleader to address it as to any interest which is likely to be affected by its decision on any matter in issue in any suit or proceeding if the party having interest which is likely to be so affected is not represented by any pleader (Rule 10A).

iv. The Court may give the conduct of a suit to such persons as it deems proper (Rule 11).

4.2. Subject-matter in dispute:

‘Subject-matter’ means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. This term includes the course of action. According to sub-rules (4) and (5) of Rule 1, where the court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. Where the plaintiff (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

Examples: a) Where the suit is instituted for the recovery of immovable property with or without rent, the subject-matter is that immovable property.

b) Where the suit is instituted for the compensation for wrong done to one movable property, the subject-matter is that movable property.

More specifically on the basis of the subject-matter the jurisdiction of a Court is determined in some cases. For example, a Presidency Small Causes Court has no jurisdiction to try suits for specific performance of a contract, partition of immovable property, foreclosure or redemption of a mortgage etc. Similarly, in respect of testamentary matters, divorce cases, probate proceedings, insolvency proceedings etc. only the District Judge or Civil Judge (Senior Division) has jurisdiction.

4.3. Cause of action: Order 2, Rules 3, 6 and 7:

Cause of action may be defined as ‘a bundle of essential facts, which is necessary for the plaintiff to prove before he can succeed.’ A cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. Every fact constituting the cause of action should be set out in clear terms. A cause of action must include some act done by the defendant since in the absence

of such an act no cause of action can possibly accrue. If a plaint does not disclose a cause of action, the Court will reject that plaint.

· Joinder of Causes of Action:

Order 2, Rule 3 provides for the joinder of cause of action. According to this Rule, save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant(s), may jointly unite such causes of action in the same suit.

· Power of the Court:

Where it appears to the Court that the joinder of causes of action in ne suit may embarrass or delay the trial or is otherwise in convenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice (Rule 6).

· Objections as to misjoinder:

All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

4.4. Relief: Order II, Rules 1-2, 4-5:

Relief is the legal remedy for wrong. According to Rule 1 of Order 2 every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Rule 2 provides for the following conditions to be complied with:

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) ...Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3)... A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted...

· Object of this Rule:

This rule is based on the cardinal principle that a defendant should not be vexed twice for the same cause. The object of this salutary rule is doubtless to prevent multiplicity of suits.

· Conditions for the application of this Rule:

i. The second suit must be in respect of the same cause of action as that on which the previous suit was based.

ii. In respect of that cause of action, the plaintiff was entitled to more than one relief.

iii. Being thus entitled to more than one relief, the plaintiff without the leave of the Court omitted to sue for the relief for which the second suit has been filed. Such leave need not be express and it may be inferred from the circumstances of the case. It can be obtained at any stage. The question whether leave should be granted, depends on the circumstances of each case.

· Illustrations:

i. A lets a house to B at a yearly rent of ₹ 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

ii. A advances loan of ₹ 2200 to B. To bring the suit within the jurisdiction of Court X, A sues B for ₹ 2000. A cannot afterwards sue for ₹ 200.

Rules 4 and 5 provide for the joinder of claims. Rule 4 states that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except-

a) claims for mesne profit or arrear of rent in respect of the property claimed or any part thereof;

b) claims for damages for breach of any contract under which the property or any part thereof is held; and

c) claims in which the relief sought is based on the same cause of action.

Rule 5 provides that no claim by or against an executor, administrator or heirs, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or the defendant sues or is sued as executor, administrator or heirs or are such as he was entitled to or liable for jointly with the deceased person whom he represents.

5. Institution of Special Suits:

There are some special suits in which the process of instituting the same differ a little from the general suits. Some important ones are mentioned below.

5.1. Suits by or against the Government: Sections 79-82:

In such case the authority to be named as plaintiff or defendant, as the case may be, shall be in the case of Central Government, the Union of India and in the case of a State Government, the State.

5.2. Suits by or against military or naval men or airmen: Order 28:

In such case if such officer actually serving under the Government cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend in his stead. The authority shall be in writing and shall be signed by the officer in accordance with Rule 2.

5.3. Suits by or against minors and persons of unsound mind: Order 32:

Such suits can be said to have been instituted in the name of the minor or the person of unsound mind by a person who in such suit shall be called the next friend of the minor or the person of unsound mind when a plaint is presented and not when a guardian ad litem is appointed.

5.4. Suits by indigent persons: Order 33:

In such case the person claiming himself as indigent must apply to the Court for the permission in order to sue as an indigent person.

5.5. Suit against dead person:

According to one view, a suit against a dead person (dead at the time of institution of the suit) is non est and of no legal effect. The other view is such suit is not void ab initio and can be continued against the legal representatives of the defendant if they have been brought on record in accordance with the law.

6. Interpleader Suit and General Suits: A Comparative Approach:

Section 88 and Order 35 are related to the Interpleader Suits. Section 88 defines it and Order 35 gives the description of procedural formalities.

Interpleader Suit

General Suit

a) In such suit the real dispute is not between the plaintiff and the defendant but between the defendants who interplead against the ordinary suit.

a) In general suits or ordinary the real dispute is between the plaintiff and the defendant.

b) If two or more persons adversely claiming some debt, sum of money or other property movable or immovable in dispute, from a person who does not claim any interest therein except the charges and costs incurred by him and is ready to pay or deliver the same to the rightful claimant, may file an interpleader suit.

b) In ordinary suit the plaintiff claims the relief or compensation from the defendant. The defendant can also apply for set-off and/or counter-claim.

c) In order to institute such suit there must be some debt, sum of money or other property movable or immovable.

c) An ordinary suit can be instituted in the cases other than those where some debt, sum of money or other property movable or immovable is related.

d) The Court may exempt the plaintiff from the suit if all liabilities have already been discharged by the plaintiff and may proceed to try the suit in the ordinary manner regarding the determination of the actual owner of the property in dispute.

d) In such suits neither the plaintiff nor the defendant can be exempted from the suit before the final order is passed.

7. Bar of Suits:

Sections 10, 11 and 12 provide certain limitation. The provisions of Sections 10 (Stay of suit / res sub judice) and 11 (res judicata) clarify that in these cases institution of suit is not barred; but the trial is barred by law. Section 12 puts a bar on the institution of suits in cases, where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

8. Costs: Section 35-35B:

As per Section 35(1) subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. Section 35A empowers the Court in imposing compensatory costs in case of false or vexatious claims or defences. Under Section 35 B the Court possesses the power to impose cost for causing delay.

9. Interpretation of the Provisions regarding the Procedure of Institution of Suits:

The provisions regarding the institution of suit are framed in a way which in accordance with the 'literal rule of interpretation' indicates strict adherence to such rules by the plaintiff; but the question may arise whether a plaint should be dismissed if the plaintiff fails to comply with all such strict rules. It depends on two matters ─ (i) the nature of such failure and (ii) the intention of the plaintiff. If the failure is too minor or of such a nature which cannot prejudice the other party and the course of justice then the Court may allow the amendment to the plaint/pleading. If the failure is not based on an unfair intention the Court may either make some corrections or may order to make those corrections by the plaintiff. The principle behind such views is that the rules of procedure are intended to be a handmaid to the administration of justice and they must be construed liberally and in such manner as to render the enforcement of substantive rights effective.

10. Conclusion:

There are so many major and minor principles of the institution of suits. The general principles, which can be extracted from the above discussion, are:

First, a suit under the CPC 1908 can be instituted only by the presentation of a plaint in duplicate whose facts are to be proved by an affidavit. Second, Section 26 contains the principle behind the institution of suit and Order I, II, IV, VI and VII are related to the procedural formalities. Third, the stages of institution of suit are: i) preparation of the plaint, ii) choosing proper place of suing, and iii) presentation of plaint. Fourth, the plaint must be prepared in accordance with the rules of Order VII. Fifth, the essentials of institution of suit are: i) parties to the suit, ii) subject-matter, iii) cause of action, and iv) relief. Sixth, in a suit the joinder of parties may be allowed by the Court if those are connected with the same transaction and the same question of law. Seventh, in case of every suit there are necessary parties and proper parties. Non-joinder and mis-joinder of necessary parties affect the course of justice. Eighth, in a suit if 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, or for the benefit of, all persons so interested; such a suit is called the ‘representative suit’. Rule 8 of Order 1 deals with the procedural formalities of such suit. Ninth, every suit shall be as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent litigation concerning them. Tenth, on the basis of the subject-matter in dispute in a suit, the jurisdiction of civil Courts varies. Eleventh, a cause of action is the foundation of a suit. It must be antecedent to the institution of a suit and on the basis of it the suit must have been filed. Twelfth, joinder of several causes of action can be permitted if the circumstantial facts allow the same. Thirteenth, the claim of the plaintiff can be adjusted to the set-off and counter-claim of the defendant. Fourteenth, where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

The discussion on the institution of suit under the CPC and its essentials proves that the procedural formalities have been made with much complexity to ensure proper justice and to restrain vexatious and false suits in the course of administration of justice; but these complexities sometimes causes delay in the disposal of some cases. Thus too much adherence to the procedural formalities makes the Courts over-burdened with a huge number of cases. So the Civil Procedure Code has incorporated Section 89 for the settlement of certain disputes outside the Court through arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation. To avoid unnecessary delay in the disposal of civil cases and to make balance between the number of suits instituted and disposed of, the Alternative Dispute Resolutions are in practice in India simultaneously with the general Civil Suits.