SUITS-INSTITUTION, PLACE OF INSTITUTION AND PARTIES TO THE SUIT

I SUITS – INSTITUTION :

Section 26 of CPC deals with institution of suits. Section 15 of CPC deals with Court in which suits to be instituted. Section 18 of CPC deals with Place of institution of suit where local limits of jurisdiction of Courts are uncertain. Order-1 Rule-1 to 13 CPC deals with Parties to the suits.

Pre-civil suit – The disposal of civil suit is to be done according to law and provision made in Civil Procedure Code and it should not be decided on whims of Court. (**Alka Gupta Vs. Narendra Kumar Gupta, AIR 2011 SC 9)**

The word **'Court'** is used to designate those forums which are set up in an organised state to exercise judicial powers of the State to maintain and uphold rights and punish wrongs, that is, for administration of justice and the word 'Court' would denote “Ordinary Courts of Civil judicature”. The judicial power of the Government is exercised by establishment of hierarchy of Courts, to decide disputes between its subjects and the subjects and State. The powers, which these Courts exercise, are judicial powers; the functions which they discharge, are the judicial functions; and the decision which they reach and pronounce, are judicial decisions. **[(Union of India Vs. M/s. Mysore Paper Mills Ltd., AIR 2004 Kant 1 (FB) : 2004 (13) AIC 325 (Kant)]**

Institution of suit

No suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Courts gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the Civil Court. In fact, it is not suggested who else can try. The question whether, in fact, there is waiver or not would necessarily depend on facts of each case, and is liable to be tried by the same Court if raised. **[Vasant Ambadas Pandit Vs. Bombay Municipal Corporation, AIR 1981 Bom 394 at 396 (1981) 83 Bom LR 248 : 1981 Mah LR 706 : 1981 Bom CR 793 (FB)]**

Civil Procedure Code, 1908-Section 26-Institution of suit-Every litigant has right to elect and continue to elect additiona and alternate pleas as may bne available in law – However, this right of choice and election does not mean that litigation should be permitted to tend to vexatious leel-Not onlysuit was contested on totally alse and untenable defewnce but it was fully loaded with attiutde of being vexatious -Appeal dismissed with cost of Rs.25,000/- ***(Anthony Edward D 'Aguiary Blache Alfred D 'Aguiar & Ors., 2013 (4) CCC 343 (Bom)***

One of the basic principles of law is that every right has a remedy, every suit is cognizable unless it is barred, there is an inherent right in every person to bring a suit of a civil nature and unless suit is barred by statute, one may at one's peril bring a suit of one's choice. **[Ramesh Dwarkadas Mehra Vs. Indravati Dwarkadas Mehra, 2001 (4) Bom CR 417 (Bom)]**

Rights in suit in civil cases :- Section 9 of the Civil Procedure Code, is merely a declaratory section which gives a right of suit in all civil cases to a citizen and has no connection either with the constitution of the City Civil Court or of the other Courts. **(Indumatiben Chimanlal Desai Vs. Union of India, 1970 Mah LJ 238 : 1969 Bom LR 340)**

Court in which suits to be instituted – Every suit shall be instituted in the Court of the lowest grade competent to try it.

II Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

It is a settled position in law that where the principal power or main right to grant relief is conferred upon the Court or upon an authority, such Court or authority has also powers to grant those and such reliefs which are incidental to the main relief.

Under Section 20(c) of the Code, a suit can be filed in a Court within the local limits of whose jurisdiction of cause of action, wholly or in part, arises. It is now well settled that in case of a contract, the cause of action arises in the following places:

(1) The place where the contract has been entered into.

(2) The place where the contract has been performed or is required to be performed under the terms thereof.

(3) The place where, in terms of the contract any payment has to be made. **[B.C.Paul & Sons Vs. Union of India, AIR 1978 Cal 423 : (1978) 2 Cal LJ 241]**

Part of cause of action:-In the case of breach of contract in view of Section 20(c) of the Code, suit can be filed where the part of the cause of action arose.

Intention of parties – Regarding contract between Indian and foreign companies, intention of parties will be guiding factor on question of jurisdiction. **(National Thermal Power Corporation Vs. The Singer Company and others, AIR 1993 SC 998)**

Where jurisdiction to try suit, conferred upon more than one Court then the parties by their consent may limit the jurisdiction to one of two Courts. **[New Moga Transport Co. Vs. United India Insurance Co. Ltd., AIR 2004 SC 2154 : 2004 (4) SC 677]**

Bar to jurisdiction-Determination and effect of :-

Under Section 9 of the Code of Civil Procedure, the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred.

Section 24 of the Act creates an express bar in respect of a particular kind of suits, namely, suits for recovery of wages in certain eventualities. The obvious intention was that a poor employee was not to be driven to file a suit for the payment of the deficit of his wages but that he could avail himself of the machinery provided by the Act to get quick relief. It does not, in terms, bar the employer from instituting a suit when his claim is that he has been called upon to pay wages and compensation to persons who are not governed by the notification under the Minimum Wages Act.

Right to Worship – A right to worship is a civil right, interference with which raises a dispute of a civil nature though as noticed earlier disputes which are in respect of rituals or ceremonies alone cannot be adjudicated by

Civil Courts, if they are not essentially connected with civil rights of an individual or a sect on behalf of whom a suit is filed. [Ugam Singh and another Vs. Kesrimal and others, AIR 1971 SC 2540 : 1971 (2) SCJ 539 : 1970 (3) SCC 831 : 1971 (2) SCR 836]

Scope of Jurisdiction in respect of suits of civil nature-

The plain reading of Section 9 of the Civil Procedure Code and the Explanations I and II reading conjointly indicates that a suit in which the right to property or to an office is contested is a suit of a civil nature, no matter whether such right depends purely on the decision of questions of religious rites or ceremonies and no matter whether the office attracts fees or not. **[Riyazuddin Ahmed Vs. Tayyab Razak, 2001 (3) Mah LJ 434 (Bom)]**

Rights in suit in civil cases -

Section 9 of the Civil Procedure Code, is merely a declaratory section which gives a right of suit in all civil cases to a citizen and has no connection either with the constitution of the City Civil Court or of the other Courts. (Indumatiben Chimanlal Desai Vs. Union of India, 1970 Mah LJ 238 : 1969 Bom LR 340)

The jurisdiction of a Court may be classified into several categories. The important categories are : (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by Statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is nullity.

Section 16 C.P.C. deals with such cases and jurisdiction of competent Court where such suits can be instituted. Under the said provision, a suit can be instituted where the property is situate. No Court other than the Court where the property is situate can entertain such suit. Hence, even if there is an agreement between the parties to the contract, it has no effect and cannot be enforced.

III PARTIES TO THE SUIT

Word 'party' in a suit means litigant. In other words 'party' in this sense refers to a person who has part to play in the proceeding of the suit. In the absence of any contrary provision, the above meaning of the word can be accepted. **(Jasminebibi Vs. Commissioner of Waqfs, AIR 1983 NOC 125 Cal)**

Scope and applicability - Order -1 Rule 1 C.P.C. provides that several persons may join in one suit, though their causes of action are separate and distinct provided that – (i) if right of relief arises out of same transaction or act or series of transactions or acts; and (ii) the case is of such nature that in separate suits filed by them, common question of law and fact would arise where each set of the plaintiffs sets up a claim in which other set of plaintiffs are not interested, there cannot be said to be jointness in the interest claimed by them for several causes of action. **(L.Knappa Vs. Sunam Ram, AIR 1977 HP 23 at 27)**

But it is not necessary that all issues arising in a suit should be common to all the parties. It is sufficient if even one of them is common to them. **(Sita Ram Vs. Rajendra Chandra, AIR 1956 Assam 7)**

A joint trial of the three suits based on the evidence to be taken would be the proper course under the circumstances. **(Prem Lata Nahata and another Vs. Chandi Prasad Sikaria, AIR 2007 SC 1247)**

Where plaint suffers from defect of misjoinder of parties or misjoinder of causes of action, it does not make the suit barred by law or liable to rejection.

There is fetter in the Court's power to permit a third party to join with the plaintiffs for effectively and completely adjudicating upon and settle all questions involved in the suit provided that the plaintiffs have no objection to it. If the plaintiffs opposes it, a third party cannot join them. **(Noor Mohd. Vs. Anand, AIR 1981 Guj 132)**

Since plaintiff is a dominus litus plaintiff's willingness to accept another person as co-plaintiff is material. Similarly, a third party not willing to be impleaded as plaintiff, cannot be forced to be added as plaintiff. **[National Spices Vs. Andhra Bank, AIR 1988 NOC 79 : (1987) 2 Ker LT 132]**

Persons from amongst defendants also cannot be transposed and added as plaintiffs without the consent of the existing plaintiffs or if it alters nature of suit. **(Kalyan Singh Vs. Kagdi Ram, AIR 1977 HP 73)**

It was power to order transposition of parties. **(Basudeo Vs. Shesh Narayan, AIR 1979 Pat 73)**

Non-impleadment of a necessary party in a suit, renders suit not maintainable. **[Mumbai International Airport Pvt. Ltd., Vs. Regency Convention Centre & Hotels Pvt. Ltd., AIR 2010 SC 3109 : 2010 (7) SCC 417 : 2010 (6) SCALE 273]**

In a partition suit, all co-sharers must be impleaded in the suit. **[T.Panchpa Kesan Vs. Pertia T.Naicker, (1972) 2 Mad LJ 590 : 85 Mad LW 941; Lal Mohd. Vs. Imajuddin, AIR 1964 Cal 548, Lakshamamma Vs. Someswar, AIR 1953 Hyd 170]**

In **matrimonial cases** on the ground of adultery, the alleged adulterer must be joined with the respondent spouse. **(Sikha Vs. Dina, AIR 1982 Cal 370; Udai Narain Vs. Kusum, AIR 1975 All 94)**

Plaintiff has right and prerogative to choose and implead in his suit such person as defendant against whom he seeks relief. (Ibid)

Necessary party is one in whose absence, no effective decree can be passed. Proper party is one whose presence is necessary for complete adjudication of the dispute. **(State Bank of India Vs. Krishna Pottery Udyog Association and others, AIR 1994 HP 90)**

Order -1 Rule- 8 C.P.C. provides an exception to general rule that all interested persons should be made parties to the suit. In a case where there are numerous persons having same interest in one suit, the rule enables a party to represent such numerous persons in common cause of action. **(Rama Seshiah Vs. M.Ramayya, AIR 1957 AP 946)**

The essential conditions for application of this rule are – (i) the parties are numerous, (ii) they have same interest, (iii) necessary permission be obtained and (iv) notice must be given or published as mentioned in the rule. The Rule 8 applies only to the representative suits. **(Saraswati Vs. Durga, AIR 1982 MP 147)**

Dismissal of suit:- Dismissal of suit on the plea of non-joinder is not permissible unless such plea has been specifically taken and elaborated in the written statement. **(Laxmi Shankar Harishankar Bhati Vs. Yashram Vsasta, AIR 1993 SC 1587)**

Suit for partition – Requirement of necessary party – The question of non-joinder of necessary parties in a suit for partition can be raised at any time as it goes to the root of the matter. It is well settled that a suit for partition is not maintainable in the absence of some of the co-sharers. **(Shanmugham and others Vs. Saraswathi and others, AIR 1997 Mad 226 at p.229)**

Non-joinder of parties – Where either a necessary or a proper party is not impleaded in the array of parties, it is said to be non-joinder of a party. As mentioned above, a necessary party is one without impleading whom no effective decree can be passed. And the proper party is the person whose presence is convenient for the correct decision of the case. Simple non-joinder of a party is not fatal except in case of a non-joinder of necessary party. **(V.D.Deshpande Vs. S.K. Dattatraya Kulkarni, AIR 1976 Bom 190 at 205 : 77 Bom LR 617)**

A defect of non-joinder can be corrected if during the pendency of suit the plaintiff gets added the left out necessary or proper party under Order I, Rule 10 of the Code, if a suit is bad for non-joinder of a proper party, the Court may deal with matter in controversy so far as regards the rights and interest of the parties actually before it. **(Arya Ayurvedic Trust Vs. Board of Revenue, AIR 1976 All 17 at 19 : 1975 All WC 513)**

Plea of the non-joinder of the necessary party, ought to be taken in the written statement and cannot be taken in an application for grant of temporary injunction. **(Mahaveer Dass Vs. M/s. Ganeshmal Jeevraj, AIR 1992 Raj 29)**

Plea of non-joinder of necessary parties cannot be raised for the first time in appeal. **(Addepalli Venkata Laxmi Vs. Ayinampudi Narasimha Rao and others, AIR 1994 AP 72)**

Dismissal of suit on the plea of non-joinder is not permissible unless such plea has been specifically taken and elaborated in the written statement. **(Laxmi Shankar Harishankar Bhatt Vs. Yashram Vasta, AIR 1993 SC 1587)**

When objection to non-joinder is not taken in written statement, trial Court has not taken up issue, it is presumed that objection regarding non-joinder is deemed as waived. **(K.C.Laxamana Vs. K.C.Chanrappa Gowda, AIR 2009 Kant 112)**

Mis-joinder of parties – Mis-joinder means wrongful joining in an action. It may be mis-joinder of plaintiffs or of defendants. This rule relates to parties only and not to mis-joinder of causes of action. Where right to sue exists with all the plaintiffs, there is no mis-joinder of plaintiffs but if some of the plaintiffs have no right to sue there is a mis-joinder of plaintiffs. But mere mis-joinder of plaintiffs is not fatal to the suit. Similarly, in the case of defendants is some of the persons who are neither necessary nor proper parties are also impleaded in the suit, it is a case of mis-joinder of defendants. Objection as to mis-joinder of defendants is also not fatal. **(S.N.Singh Vs. Brahmanand, AIR 1950 Cal 479)**

A suit for partition without impleading the sharers there of would be liable to be rejected. **[(Nambi Narayan Rao Vs. Nambi Rajeswar Rao, AIR 2008 NOC 1606 (A.P.)]**

Suit for divorce- Impleadment of party- Where the divorce was sought on ground of adultery, such a person against whom allegation of adultery was made, was held to be impleaded as party. **(Smt. Putuli Das Vs. Ding Nah Talukdar, AIR 2008 Gau 74)**

Discretion of Court to implead party:- Wide discretion of the Court, thereunder, should be exercised only to implead the necessary and proper parties. **(Lakshmi Narain Vs. The District Judge, Fatehpur and others, AIR 1992 All 119 : 1992 AWC 210)**

Discretion under Order I, Rule 10(2) of Code, can be exercised by Court either suo motu or on application of plaintiff/defendant, or on application by a person, not a party to suit. **[Mumbai International Airport Pvt. Ltd., Vs. Regency Convention Centere & Hotels Pvt. Ltd., AIR 2010 SC 3109 : 2010 (7) SCC 417 : 2010 (6) SCALE 273]**

Impleadment of legal representatives:- Where the legal representatives in a suit for partition were not brought on record under Order XXII, CPC, they can be brought on record under Order I, Rule 10, CPC, because failure to bring parties on record as legal representatives does not preclude the plaintiff to bring them on record as defendant on a different ground. **[(Singamsetty Chikala Ramanna Vs. Singamsetty Saraswathamma, 2002 (2) Civil LJ 46 (A.P.)]**

The driver is not a necessary party in accident claim. **[Union of India Vs. Ghulamnabidar, AIR 2008 NOC 2640 (J&K)]**

The power of addition of party is vested in the Court. **[Hirasingh Sardar Singh Parmar Vs. Smt. Ram Kuwarbai Parmar, AIR 2008 NOC 2655 (Bom)]**

Non-joinder of parties – Suit by manager of joint family – Failure to join a person who is a proper but not a necessary party, does not affect the maintainability of the suit nor does it invite the application of Section 22 of the Indian Limitation Act. The rule that a person who ought to have been joined as a plaintiff to the suit and is not made a party, will entail dismissal of the suit, if the suit as regards him be barred by limitation when he is joined, has no application to non-joinder of proper parties. **(Devidas and others Vs. Shrichailappa and others, AIR 1961 SC 1277 : 1962 Nag LJ 191 : 1961 (3) SCR 896)**

Power of Court to implead as party:-The difference between the provisions contained in Order I, Rule 10 and Order XXII, Rule 4, is apparent. Order I, Rule 10 does not deal with substitution of legal representatives of a deceased. It confers power on the Court at any stage of the suit to implead or add a person as party or to strike down a person improperly joined if the Court finds it necessary for determination of the real matter in dispute.

On the other hand, Order XXII, Rule 4 confers right on the plaintiff to bring on record the heirs and legal representatives of a deceased. If the right to sue does not survive, the suit shall come to an end or shall abate. **(State of Kerala Vs. Madhavakurup Ramachandran Pillai, AIR 1999 Ker 359 at p.361)**

Impleadment of new parties after passing preliminary decree in suit for partition is permissible. **(Kashed Ali Sardar Vs. Ms. Hamida Bibi, AIR 2012 Cal 165)**

Order I, Rule 10 of Code, conferred wide discretion on Court as to impleadment of parties to suit, however, such discretion to be exercised in accordance with provisions of law. **[Competition Commission of India Vs. Steel Authority of India, 2010 (10) SCC 744 : 2010 (9) SCALE 291 : 2010 (6) Supreme 609]**

Necessary party – Determination of – The question to be considered is whether right of the party shall be affected if he is not added as a party. **(Terai Tea Co. Pvt. Ltd., Vs. Kumkum Mittal and others, AIR 1994 Cal 191)**

While permitting transposition from the category of defendants to that of plaintiff, plaintiff's consent must be obtained. **(Dalbir Singh Vs. Lakhiram, AIR 1979 Punj 10, Nuruddin Vs. Gani, 1978 Kash LJ 125)**

Defendant has no right to seek transposition. **(Mathura Bai Vs. Daryanamal, AIR 1995 MP 202)**

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REFERENCE OF DOCUMENTS TO EXPERT'S FOR OPINION

What ever may be stage of the examination of witness if document is found to have been duly proved, the Court may be exhibit and admit the same.

As per Section 67 of the Indian Evidence Act a document is required to be proved in the manner provided by Section 45, 47 or Section 73 of the Act or by internal proof afforded by its own contents. Section 47, provides different methods of proving the handwriting of person. Under section 67 if a document is signed by a person or written wholly or in part by any person, the signature of the person or handwriting of that person must me provided to be his handwriting. If sections 47 and 67 of the Evidence Act are read together what can reasonably be deduced is that the signature of a person on a document can be proved either by examining the person in whose presence the signature was affixed, or else by examining another person who is acquainted with the handwriting of the executant of the document or the person alleged to have written the document and is able to prove his signature by his opinion. When Sections 45 and 47 of the Evidence Act are read together, what can be deduced is that of proving the handwriting and signature the opinion of the expert and of the persons acquainted with the handwriting of that person are relevant. **(State of Gujarat Vs Gaurang Mathurabhai Leuva and others, 2000 (1) Crimes 285 (Gj) : 1999 (3) Guj LR 2325).**

The genuineness of document can be proved either by direct or by indirect evidence. The proof of genuineness is also the proof of the authorship of document.

The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes providing in Sections 45 and 47 of the Indian Evidence Act.

It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be considerable value where the disputed document purports to be a link in a chain of correspondence,

some links in which are provided to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender limited though it may be, as also his knowledge of the subject matter of the claim of correspondence, to speak to its authorship.

In an appropriate case the Court may also be in a position to Judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. **(Mobarik Ali Ahmad Vs. The State of Bombay, AIR 1957 SC 857 : 1958 Mad LJ (Cri) 42 1958 SCJ 111 : 1958 SCR 328).**

The power of Court to compare signatures should be sparingly used, opinion of a handwriting expert is relevant as per Section 45 of the Evidence Act but it is not exclusive, an expert witness in an adversary can provide information to judge on matters calling for expertise. **(Chandran Udayar Vs. Kasivel, 2009 (3) LW 611 (Mad).**

In P.Sood & Co. v. Peerchand Misrimalaji Bhansali, a Division Bench of the High Court held that when the defendant denied the signature in the written statement, the plaintiff should take steps to ascertain the genuineness of the disputed signature by sending the same to a handwriting expert. **(2005 (3) CTC 12. See also N.Chinnasamy v. P.S. Swaminathan, 2007 (1) CCC 228 (Mad).**

When the document namely, the sale agreement was disputed by the defendant the onus was shifted to plaintiff only to prove that the sale agreement is a genuine document.

Application by defendant-respondent for sending the pro-note to Forensic Expert to ascertain the age of the ink used in the pro-note. Held in suit for recovery of money or pro-note the burden of proving the pro-note would lie upon the plaintiff. No useful purpose would be served in sending the document for expert's opinion as regards the age of the ink used. Impugned order set aside, revision petition is allowed. **(Sundaramoorthy v. R.Palanisamy, 2009 (1) CTC 728 (Mad).**

When in suit for declaration filed on basis of promissory note, defendant denied execution of promissory note and his signatures thereon therefore document required to be sent to expert of comparison. {**(Velaga Sevaram Krishna v. Velaga Veerabhadra Rao 2009 (2) ACJ (NOC) 304 (AP)}.**

Inspection of document:-

Since manipulation of documents cannot be ruled out outside Court, hence private expert for inspection and comparison of document in presence of Court can be summoned.

Though it is discretion of Court to rely upon opinion of handwriting expert but when it is alleged that suit promissory note is forged one, then Court ought to have sent such document for identification of handwriting. **(Budumuru Vijayanandh v. Smt. Potnuru Bhagyalakshmi AIR 2005 AP 35.**

Hand writing expert opinion :-

Civil Procedure Code, 1908-Section 15-Indian Evidence Act, 1872- Section 45 Hand writing expert opinion-About signatures-As matter of routine course Courts should bot indulge in seeking experts opinion-Thereafter blindly accept opinion/report of expert. ***(Morha vimala v.Gouthu Rajulu & anr., 2015(3) CCC 184 (A.P).***

The importance of opinion of expert is discussed in Bhavanam Siva Reddy & others Vs. Bhavanam Hanumanthu Reddy and another reported in 2017 – Vol.4 ALT -682 wherein it is observed as follows:-

14(g). 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.

***14*(h). RELEVANT PROVISION DEALING WITH OPINION EVIDENCE :**

(I) Section 45 of the 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.

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

(**III) 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.

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

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

(VI) 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.

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

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

(IX) 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.

Section.47-speaks of relevancy of opinion of person acquainted with the handwriting of the person-by whom any document was written or signed-in question-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.

(**XI) Section.73**-deals with Comparison 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.

(**XII)** 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.

(**XIII)** The amended provisions in reference to the above for electronic evidence are covered by Section- **47-A-opinion** as to digital signature, 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.

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

1. Thus coming to relevancy and evidentiary value of expert opinion and evidence, the Latin general maxim is that-"EXPERTO CREDE" to mean an Expert is to be generally believed. It is because the testimony of an expert as to general scientific facts and doctrines which are unintelligible to the lay-men, will serve to elucidate the facts in issue. However the general rule is that the evidence of an expert has to be tested as any other evidence.

Thus the privilege of drawing inferences including in case of expert opinion evidence is given to the Courts to appreciate with reference to facts and circumstances of the case and from other evidence available on record for overall appreciation to arrive a right conclusion on a fact is proved or not proved or disproved.

(XVI) It is needless to say that it is not essential always to prove facts in dispute by expert opinion evidence where there is other reliable material or the disputed facts are matters of common knowledge, which does not require expertise. That is the reason why Section 73 envisages the situation to form own opinion by Court from its comparison, though not ordinarily to resort to it without aid of opinion, particularly in handwriting or finger prints or foot prints comparison etc.,

(XVII) Thus, where the opinion evidence of an expert is of necessity for the Court to form an opinion in the concerned matter to decide the leis, it can take it in aid and appreciate his evidence from the reasons in support of opinion. This power is in addition to the power of Court under Sections-311-A Cr.P.C amended by Act 25/05 which came into force with effect from 23-6-2006 to direct the arrested accused to subscribe his specimen signature or handwriting. It is also in addition to the power of Court under Sections-54 Cr.P.C directing medical examination of the accused brought for remand at that time or later at the request of the accused. This power is also in addition to the power of Medical Officer acting at the request of the police officers under Sections-53-A&54 of the Cr.P.C for examination of the accused or under Sections-164-A of the Cr.P.C. for examination of the victim of rape- as per Cr.P.C amended by Act 25/05 which came into force with effect from 23-6-2006.

(XVIII)The cases in which testimony of an expert is admissible are of two types:1). W hen the conclusions to be drawn by the Court depends upon the existence of facts which are not of common knowledge and which are peculiarly with in the special knowledge of men whose experience and study enables them to speak with authority up on 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 with in 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.

(XIX) 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). P ractical 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 expert's opinion would ultimately depend upon the soundness of the reasons on which it is founded-held in Uma kant Bajpayee vs. State of U P , 1993 17 All CriR 14.

*(XX) I**n Bommidi purnesh vs. Union of India , 1967 A I R(A P) 338 the A.P. High Court at Page No.348** held that the expert must give evidence based on his opinion and reasons-with opportunity to cross examine by the parties assailing the correctness of the opinion, with out which, mere report or certificate of an expert is of no evidence.*

(XXI) ***In Mohd. Vs. State of U.P., 1976 A I R(SC) 69*** *the Apex Court held that where the expert had given no reasons in support of his opinion, nor was it shown that he possesses special skill, knowledge and experience in the science of identification of finger prints, it is unsafe to rely on such unreasoned opinion, even it is a developed science and the report is otherwise admissible and relevant-u/s.45 Evidence Act.* ***In Anwaruddin Vs. Shakoor, 1990 A I R(SC) 1242 at para-10 and also in Darsan Singh Vs. State of Haryana, 1977 A I R(SC) 364*** *it was held that where the expert evidence is obscure and oscillating, it is not proper to discredit eye witness evidence even it is not consistent to the expert evidence.*

(XXII) ***Difference between handwriting and finger prints comparison and opinion concerned:***

(i) ***In Bhagvan Kaur vs. MK.Sharma, 1973 A I R(SC) 1346*** *it was held that the science of handwritings comparison is inconclusive, the evidence of handwriting expert, unlike that of finger prints expert, is generally of a frail character and its fallibilities have been quite often noticed. The Courts should therefore be wary to give too much weight to the evidence of handwriting expert. Conclusions based upon mere comparison of handwriting be indecisive and yield to positive evidence.*

(ii) ***In State of Maharastra vs. Sukhdev Singh, 1992 CrL J 3454*** *it was held that the quality of a handwriting expert's opinion would depend upon the soundness of the reasons on which it is founded. The Court can not afford to overlook the fact that the science of identification of handwritings and comparison is an imperfect and frail one as compared to the science of identification of finger prints and Courts have therefore been wary in placing implicit reliance on the evidence of a handwriting expert without corroboration, though there is no hard and fast rule to insist corroboration for placing reliance on the evidence of a handwriting expert. It is the discretion of the Court depending upon the facts and overall circumstances of each case.(iii) A witting may be proved to be in the hand writing of a particular individual-from admission of the writer-if t is available no other kind of evidence is neccessary-Section-58. If not so, (1) by the evidence of a person acquainted or familiar(not a scientific expert) with the hand writing of that individual-Section-47 or (2) by a testimony of an (a scientific expert) expert competent to do the comparison of disputed with admitted or proved handwritings on scientific basis-Section-45 or (3) by the opinion formed by the Court on comparison made by itself-with writings made in the presence of Court or admitted or proved to be the writings of the person with the disputed writing, for that where an expert's opinion is called for by the Court, the Court must see for itself and with the assistance of the expert, then come to its own conclusion-whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert, but to say that the Court may accept the fact proved only when it had satisfied itself on its own*

observation that it is safe to accept the opinion either of the expert or other witness.- Section-73. ***Fakruddin vs. State of MP., 1967 A I R(SC) 1326, Raanjit vs. State of Maharastra, 1965 A I R(SC) 881, Rahim Khan vs. Kurshid Ahmed, 1975 A I R(SC) 290, Sohanlal vs. Lala Mangilal, 1981 A I R(All) 62, S.K.Roy vs. M.M.S.A.Matvali, 1936 A I R(P C) 15, R.K.Rao vs. B.S.P.Rao, 1962 A I R(A P) 178 & Vadrevu vs. Vadrevu, 1960 A I R(A P) 359.***

(iv) ***In Rama Narayana vs. State of U P , 1973 A I R(SC) 2200****, the opinion evidence of a hand writing expert which is relevant, may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view expressed by the expert. If after comparison of the disputed and the admitted or proved writings by the Court itself, it is considered safe to accept the opinion of expert, then the conclusions so arrived at can not be assailed on mere ground that a comparison of handwriting is generally considered as hazardous and inconclusive and the opinion of the handwriting expert has to be received with considerable caution.*

(v) ***In Murarilal vs. State of MP , 1980 A I R(SC) 531****, in cases where the reasons for the opinion evidence of a hand writing expert are convincing and there is no other reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There can not be any inflexible rule on a matter, which in the ultimate analysis, is no more than a question of testimonial weight. It is merely a rule of caution and not an absolute rule of law. There is nothing in law to prevent the Court from recording conviction on expert's evidence alone. The value of the expert evidence, however, varies with the circumstances of each case and the reasons given by him in support of his opinion. Its value is to be judged with the same yard stick with which the evidence of any other witness is appraised. It is to be seen how far it fits in to the surrounding circumstances and the natural probabilities of the case.*

(vi) ***In Jaspal Singh vs. State of Punjab,1979 A I R(SC) 1979*** *it was held that the science of identifying thumb impressions is an exact science and does not admit of any mistake or doubts and also in* ***Th.Thevar vs. State,1985 MadL J(Cri) 384****.*

(vii) ***In Mahmood vs. State of U P , 1976 A I R(SC) 69*** *it was held that where the finger prints of the accused were found on the handle of the gandasa which was found lying near the dead body at the scene of occurrence, even if it is proved that the handle of gandasa bore the finger prints of the accused from the expert opinion evidence found reliable, it would not be suffice to say unmistakably that he killed the deceased.*

(viii) ***In Mohanlal vs. Ajit Singh, 1978 A I R(SC) 1183*** *it was held that where the finger prints found are smudged, it is for the expert to say whether similarity on 8 or even less identical characteristics can be established.*

(ix) ***In Chandran vs. State, 1987 1 KerLT 391*** *regarding finger prints endure over period of time up on touched surface, the atmospheric conditions and the nature of surface where the prints adhere are of high importance. Finger prints will usually remain viscid for several days when left upon glass, steel or other smooth and non-porous surfaces.*

(x) ***In Mandrup vs. State, 1975 CrL J 1277 & State of MP vs. Sitaram, 1978 MP L J 197*** *it was held that comparison of ridge characteristics above six generally sufficient for identification of the finger prints.*

(xi) ***In Emperor vs. Virammal,1923 A I R(Mad) 178, Harendranath Sen. vs. Emperor, 1931 A I R(Cal) 441 & Fakir vs. Emperor, 1936 A I R(Bom) 151*** *it was held that it is going too far to say that Courts must insist corroboration to the expert opinion evidence on finger and thumb impressions, but for saying the Courts have to evaluate on the evidence and come to its conclusions in appreciation instead of acting on the opinions by taking it for granted. Conviction can even be based on it with out corroboration where it point outs that the marks of the accused and at the scene of offence are tallied and expert where says that it is impossible to tally many characteristics of any two different persons marks when taken and compared.*

(xii) ***In Pathumma vs. Veersha,1988 KerLT 798*** *it was held that finger prints offer most positive means of identification as that never changes from cradle to grave and for that matter even plastic surgery cannot change the arches and whorls that graced the fingers and thumbs at birth.*

(xiii) ***In Gade Lakshmi Mangaraju @ Ramesh vs. State of A P , 2001 A I R(SC) 2677 it was held at paras 19-21*** *that presence of fingerprints at the scene of offence is positive evidence. Out of two accused fingerprints of one found at the scene of offence are tallied on comparison and such evidence showing his presence at the scene of offence when he did not dispute, the other accused cannot dispute that evidence.*

(XXIII) Coming to contemporary relevancy, the full Bench of this Court in ***Bande Siva Shankara Srinivasa P rasad Vs. Ravi Surya P rakash Babu (died) per L.Rs. and O thers, 2016 2 A LT 248,*** *in answering a reference on the question of requisites to seek expert opinion by Court mainly on contemporary relevancy of the admitted or available signatures with disputed signature which are available and if not from any long gap how to consider if not contemporary relevancy is pre-requisite to direct comparison by expert and to give opinion. The same is answered saying Court has discretion to seek or not to seek expert opinion depending upon on individual facts and circumstances and it no where a bar in sending the disputed handwriting or signature for comparison to expert merely because there is time gap between the admitted and disputed handwriting or signature even its long gap, however, desirable*

of gap up to 3 years for the Court impress upon the parties to secure if possible though there is no hard and fast rule about this aspect therefrom as to capable of comparison or not that too expert opinion is advisable in nature to appreciate like in other evidence and in this regard the Division Bench of this Court already held in ***Janachaitanya Housing Limited Vs. Divya Financiers, 2008 3 A LT 409*** *and there is conflict of opinion with the same very earlier expression of a single Judge expression in* ***Annapurnamma Vs. B.Sankara Rao, 1960 A I R(A P) 359*** *for the ratio the 2 judgments operate in different fields and did not impugn upon each other.*

[15] In this regard it is also necessary to mention that, Court though got power to compare under Section 73 of the Evidence Act, a handwriting that equally apply to thumb impression from its wording, Court is not an expert. The Apex Court in ***State Vs. Pali Ram, 1979 2 SCC 158,*** *categorically held that the Courts when not experts cannot take the ordeal for comparing the handwriting or signatures or thumb impressions without any expert opinion to its aid. This Court feels it apt to reproduce Para 30 of the above expression as follows: "Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert."*

[16] In fact in the earlier expression of the Apex Court in ***Fakhruddin Vs. State of M.P., 1967 A I R(SC) 1326****, the Apex Court observed that both under Section 45 and Section 47 the evidence is an opinion evidence. In the former by a scientific comparison and in the latter on the basis of familiarity, resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. O ne such means open to the court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one ease and to appraise the value of the opinion in the other case.*

[17] On the relevancy and evidentiary value of expert opinion under Section 45 of the Evidence Act, the Apex Court in ***Murali Lal Vs. State of M.P., 1980 1 SCC 704,*** *observed that: "Expert testimony is made relevant by section 45 of the Evidence Act and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person "specially skilled" "in questions as to identity of handwriting" is expressly made a relevant fact. There is nothing in the Evidence Act, as for example*

like illustration (b) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the court in assuming that a handwriting expert's opinion is unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tells us that "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we set an artificial standard of proof not war -ranted by the provisions of the Act. Further, under Section 114 of the Evidence Act, the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts of the particular case. It is also to be noticed that Section 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. So corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and last rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider ail other relevant evidence and decide finally to accept or reject it."

[18] ***In Neelalohithadasan Nadar Vs. George Mascrene, 1994 Supp2 SCC 619,*** *the Apex Court held that under the Evidence Act two direct methods of proving the handwriting of a person are: (a) by an admission of a person who wrote it; (b) by the evidence of some witness who saw it being written by that person. Apart from these, there are some other methods of proving the handwriting by opinion. They are by the evidence of a handwriting expert (Section 45); by the evidence of a witness acquainted with the handwriting of the person who is said to have written the disputed writing (Section 47) and opinion formed by the Court itself on comparison made of the disputed writings with the admitted or specimen writings (Section 73).*

[19] No doubt from the above, for the handwriting expert's opinion there is no rule of requirement of corroboration nor any rule of same can be acted solely as basis but to decide with reference to it for its circumstances and other evidence. O pinion of handwriting expert mainly to be supported by reasons contemplated under Section 51 of the Evidence Act. It is needless to say once there is other reliable evidence of the attestor or other direct witness to the transaction covered by the document, the handwriting or signature if in dispute to prove, if it is credible, handwriting expert's opinion running contra to it cannot be a basis to disbelieve other cogent evidence.

Thus each case depends upon own facts and from the nature of evidence available on record for appreciation by the Court of prudence and commonsense, with experience of men and matters.

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Appreciation Expert's Evidence

Types of Witness: - Witnesses are of two types-

(1) Common witness

(2) Expert witness

(1) **Common witness:-**

A common witness is witness of fact or occurrence witness and is one who testifies to the facts observed by himself. The witnesses presence at the scene of offence are generally common witnesses. For example, in case of accident, the person who witnessed the accident becomes a common witness.

(2) Expert Witness:-

A expert witness is a person who possess essential academic background, professional training and experience in the concerned subject and is capable of drawing opinion and conclusion from the facts observed by himself, or noticed by others, e.g. doctor, ballistic expert, serologist, handwriting expert, Radiologist, etc.

(a) **Opinions of experts:-**

When the Court has to from 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 specially 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. **(Vide Section 45 of the Indian Evidence Act, 1872)**

CASE LAWS:-

I.*In Bhavanam Siva Reddy & others Vs. Bhavanam Hanumanthu Reddy and another reported in 2017 – Vol.4 ALT -682 wherein it is observed as follows:-*

14(a). O P I N I O N EV I DEN CE:

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.-See-Section-45-Evidence Act.

14(b). ***Meaning of Opinion****- 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.*

14(c). As a general rule the opinion or belief of third person is not relevant and admissible as the witnesses are allowed to state facts alone of what they themselves saw or heard. However, cases in which the question involved is beyond the range of common experience and knowledge or Court has no special study and necessary experience on the subject and is not in a position to form a correct opinion, in such cases help of an expert in that field is necessary-held in ***Sitaram Srigopal vs. Daulati Devi, 1979 A I R(SC) 1225.***

2) There is no infringement of Article 20(3) of the Constitution if an accused is compelled to give his handwriting, or finger or palm print for comparison. **(Devendra Vs. J.M.F.C., Mhow, 2002 (3) MPHT 229 (235) : 2002 (3) MPLJ 337 (MP).**

3) Evidence of only competent, experienced and skilled finger – prints expert can be reliable. **(Mohan Lal V. Ajit Singh, AIR 1978 SC 1183 : 1978 Crl.LJ 1107 : (1978) 3 SCC279 :1978 SCC (Cri) 378 : 1978 SC Cr.R.359 : 1978 CrLR (SC) 268)**

4) It is the duty of Court to find with the aid of handwriting expert whether the writings in dispute are of the same person. (**Fakhruddin V State of Madhya Pradesh, AIR 1967 SC 1326 : 1967 Cri LJ 1197 : (1967) 2 SCJ 885 L 1967 A CrR222).**

5) The handwriting expert's opinion is not conclusive to prove writing. (**State of Gujarat V. Vinaya Chandra, AIR 1967 SC 778: 1967 Cri LJ 668 : (1967) 1 SCR 249 : (1967) 1 SC WR 391).**

6) The testimony of handwriting expert need not be corroborated if opinion formed by the expert is convincing. **(Murali Lal V. State of M.P., AIR 1980 SC 531 : (1979) 3 SCC 612 : 1979 SCC (Cr) 662 : 1979 UJ (SC) 781).**

7) Expert evidence to be viewed with caution. {**(1961) IMLJ 33; 1984 Cri LJ 1289, AIR 1980 SC 531**}

8) When the experts differ, ultimately the Court has to form its own opinion on the basis of the entire evidence brought on record. The Court also would be competent to compare the signatures and the writings under section 73 of the Evidence Act. **(Mrs. Maria Piedade D'souza V. M.Narayanaswamy, AIR 1984 NOC 139 (kant), (1983) 2 kant LJ 135).**

9) Opinion of expert as to difference of ink in respect of dissimilarities between forged ticket and genuine one. No chemical examination of ink done by expert. Held, option even if admissible, not safe basis to find forgery in lottery tickets. (**Chatt Ram V. State of Haryana, AIR 1979 SC 1890 : 1979 Cri LR (SC) 590: 1979 Cri LJ 1411).**

10) Expert testimony is made relevant by Section 45 of the Evidence Act and where the Court has to form an opinion as to identity of handwriting, the opinion of a person 'specially skilled' in questions as to identity of handwriting is expressly made a relevant fact. **(Murarilal V. State of M.P., AIR 1980 SC 531 : 1979 Cri.App R (SC) 419).**

11) The opinion of a handwriting expert even if it may be said to be reliable nature, is not conclusive on the point that the signatures alleged to have been forged, were really made by the accused. Hence, the opinion of the expert is only corroborative and not substantive piece of evidence. **(Pyare Lal V. State, 1978 Cr LJ (NOC) 194 (All).**

12) The Expert evidence is only a piece of evidence and the weight to be given to it has to be Judge along with other evidence as evidence of this nature is ordinarily not conclusive. Such evidence therefore, cannot be taken as substantive piece of evidence but is there in corroborate the other evidence. **(Balakrishna Das Vs. Radha Devi AIR 1989 Allahabad – 133).**

13) It is not well settled that expert opinion must always be received with great caution and perhaps more so with additional caution of its opinion of a handwriting expert. It is unsafe to base a conviction solely on expert opinion without substantial corroboration. Opinion evidence, is by its very nature, weak and inform and cannot of itself form the basis for a conviction. **(Magan Bihari Lal Vs. State of Punjab, AIR 1977 SC 1091: 1977 CriLJ 711 : 1977 Pun LJ (Cri) 87 : (1977) 2 SCC 210 : 1977 All Cri C 129)**.

14) The opinion of a hand writing expert even if it may be said to be reliable nature, is not conclusive on the point that the signatures alleged to have been forged, were really made by the accused. Hence, the opinion of the expert is only corroborative and not substantive piece of evidence**. (Pyare Lal Vs. State, 1978 CrlL (NOC) 194 (All).**

15) 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 this criteria to the facts proved by the evidence of the case. The scientific opinion evidence. It intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. **(State of Himachal Pradesh Vs Jai Lal, 2000 (1) East Cri C 83 (SC).**

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This is my humble submission of the topic " (1) Suits-Institution, Place of Institution and parties to the suit (2) Res judicata and res subjudice, on pleadings, plaints and Written Statements (3) Appointment of Advocate-Commissioner (4) Appointment of Receivers (5) Reference of documents to experts for opinion and (6) Appreciation of expert's evidence " designated to me.

I thank one and all,

Bibliography:

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3) All India Civil Law Digest 2012 to 2017
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III ADDITIONAL DISTRICT JUDGE,
SRIKAULAM

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

Section 11 of C.P.C. deals with Res-judicata :

11. 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 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.

Scope and object :-

The doctrine of res judicata is based upon two Roman maxim " *nemo debet bis vexari, si constet curiae quod sit prouna et eadem causa" i.e., "* **no man should be vexed twice over the same cause of action**" - *Raja V.Sarvangnaya Kumara Krishna Yachendra Bahadur Vs Province of Madras, AIR, 1947 Madras 5 at 15*, and " *interest republicae ut sit finis litiuum"* i.e., **it is in the interest of the State that there should be an end to litigation.**

The first maxim looks to the interest of the litigant, who should be protected from a vexatious multiplicity of suit, because otherwise a man possessed of wealth and capacity to fight may harass his opponent by constant dread of litigation. The rule is intended not only to prevent a new decision but also to prevent a new investigation so that the same person may not be dharassed again and again in various proceedings upon the same question. **(Basdevanand Giri Vs. Shantanand alias Mahu Makhu (AIR -1942 (All 302 at 305)).**

The second maxim is based on ground of public policy that there should be an end to litigation.

Res Judicata – Applicability of : -

Civil Procedure Code, 1908-Section 11 - res judicata ***-****Applicability of -HELD-Questions invlolved in latter suit an in earlier suit must be identical-Parties must be same-Issues in latter suit must be directly and substantially in issue in earlier suit.* ***K.Satyamma (died) per LR A-5 v.Smt.Bhoodevi, 2015(2)CCC615 (A.P): 2015(3)ALT 540:2015(5)Andh L.D 137.***

CASE LAWS

Civil Procedure Code, 1908-Section 11 - res judicata **-**Applicability-Earlier suit for injunction since not based on title but for on previous possession, same no way operates as res judicata to maintain present suit, so also any finding therein in deciding present suit for entitlement by plaintiff to declaration and possession or not, including on claim of adverse possession by defendent -Earlier suit for injunction practically no way operates as res judicata to maintain present suit for relief of declaration of title and recovry of possession. ***(G.Narayan Reddy v.P.Narayana Reddy, 2016(1) CCC 245(AP): 2016(3) ALT 12.***

Civil Procedure Code, 1908 -Section 11 - res judicata **–** To arrtact the doctrine of res judicata there must have neen conscious adjudication fo an issue-Principle o res judicata is applicable between two stages of the same litigation only if the question or issue invloved had been decided at earlier stage of the same litigation. (***Earch Boman Khavar v. Tukaram Shridhar Bhat and Anr., 2014 (1) CCC 27 (SC))***

Civil Procedure Code, 1908-Section 11-r/w Order II, rule 2- Res Judicata-Tenants filing suit for injuction from dispossession-Im the process disputing title of landlord, though indirectly-Suit dismissed-No appeal filed-Decree attaining finality-Would operate as res judicata as regards question of titled in furture litigation. (***Sri Gangai Vinayagar Temple & Anr. v. Meenakshi Ammal & Ors., 2014 (4) CCC 247 (SC))***

Res judicata-Subject matter of suit same **-** Civil Procedure Code, 1908-Section 11, read with Order VII, Rule 11-Res kidocata – Subject matter o suit same-Parties same – Cause of action in both suits different – HELD-It cannot be said that suit hit by principle of res judicata. ***(Sabdal Singh & Anr. v. Shivraj Singh Thakaur & Ors.2016 (2) CCC243 (M.P)***

Res judicata – This finding operates as res judicata and cannot be reagitated in this writ petition by the respondents. [S.Kamalamma and others Vs. Joint Collector-cum-Settlement Officer, Chittoor and others, 2017(3) ALT 299]

Res judicata or estoppel – There is no res judicata or estoppel for the present proceedings from earlier criminal case filed for some other cheques filed and the case for the offences under Section 138 of the Act ended in conviction. **[PTNVR Sudharshan Vs. State of Telangana, represented by its Public Prosecutor, High Court of Judicature at Hyderabad and another, 2018(1) ALT(CRL) (A.P.)123(S.B.)]**

Res judicata -Bar of - It is well settled that in order to decide the question, the question whether a subsequent proceedings is barred by res judicata, it is necessary to examine the question with reference to the : (i) forum or the competence of the Court; (ii) parties and their representatives; (iii) matters in issue; (iv) matters which ought to have been made ground for defence or attack in the former suit; and (v) the final decision.

A consent decree does not operate as *res judicata.* ***(Baldeodas Showla and others Vs.Filmistan Distributors (India) Private Limited and others (1988(2 SCC-201.***

Before a **plea of *res judicata*** can be given effect, the following conditions must be proved :- (1) that the litigating parties must be the same ; (2) that the subject matter of the suit also must be identical ; (3) that the matter must be finally decided between the parties ; and (4) that the suit must be decided by a Court of competent jurisdiction.

The **best method to decide the question of *res judicata*** is first to determine the case of the parties as put forward in their respective pleadings of their previous suits and then to find out as to what had been decided by the judgments which operate as *res judicata.*

Pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment. **(*Syad Mohd. Salie Labbai (Dead) by L.Rs and others Vs. Mohd. Hanifa (Dead) by L.Rs and others* (AIR-1976 SC 1569).**

Constructive res judicata – Application of :- The first suit was for an injunction and not for possession of the demised property. The first suit was dismissed on the technical ground that since the plaintiff was not in de facto possession, no injunction could be granted and a suit for a mere declaration of status without seeking the consequential relief for possession could not lie. Once it was found that the plaintiff was not in actual physical possession of the demised property, the suit had become infructuous. The cause of action for the former suit was not based on the allegation that the possession of the plaintiff was forcibly taken.

The cause of action for the former suit was based on an apprehension that the defendants were likely to forcibly dispossess the plaintiff. The cause of action for that suit was not on the premise that he had in fact been illegally and forcibly dispossessed and needed the Court's assistance to be restored to possession. Therefore, the subsequent suit was based on a distinct cause of action, not found in the former suit and hence the High Court was right in concluding that the suit was barred by Order II, Rule 2(3) of the Code of Civil Procedure. [Shri Inacio Martins, deceased through ***L.Rs. Vs. Narayan Hari Naik and others, AIR 1993 SC 1756 : 1993 (3) SCC 123 : 1993 (2) SCR 1015 : 1993 (2) JT 723 : 1993 (2) LW 1].***

Civil Procedure Code, 1908-Section 11- Issue relating to res-Judicata- It is a mixed question of law and fact and is to be proved by producing copies of pleadings and issues of the earlier suit-This power cannot be exercised readily just by raising plea of res judicata. **Vijay N.V.Mrs. Kavitha Kanaparthi, 2015(1) CCC 404 (Karnt.)**

Dismissal of suit in default

A dismissal of suit for default of plaintiff will not operate as res judicata against a plaintiff in a subsequent suit on the same cause of action. **[Shivshankar Prasad Sah and another Vs. Baikunth Nath Singh and others, AIR 1969 SC 971 : (1969) 1 SCWR 748 : (1969) 1 SCC 718 : 1969 Cur LJ 377 : (1970) 1 SCJ 101 : 1970 BLJR 1]**

Subsequent suit not barred on the principle of res judicata- Before filing the written statement by the defendant, the suit was settled out of the Court, as such, the matter was not finally heard and decided, the subsequent suit is not barred on the principles of res judicata. **[Shanmughasundaran Vs. Janagaragam, AIR 1976 Mad 19 (AIR 1967 SC 591; AIR 1966 SC 1332 – Relied on)]**

Res judicata – Suit dismissed for default:

Civil Procedure Code, 1908-Section 11- Res judicata – Suit dismissed for default-Cannot operate as res judicata.**(Jacinta De Silva v. Rosarinho Costa & Ors., 2014(2)CCC 9 (SC))**

Res judicata-Subject matter of suit same:-

Civil Procedure Code, 1908-Section 11, read with Order VII, Rule 11-Res kidocata – Subject matter o suit same-Parties same – Cause of action in both suits different – HELD-It cannot be said that suit hit by principle of res judicata. ***(Sabdal Singh & Anr. v. Shivraj Singh Thakaur & Ors.2016 (2) CCC243 (M.P)***

Second application 'for' Receiver barred by – Res judicata:-

It was not open to the trial Court to have allowed, even entertained a fresh application for appointment of a Receiver in the year 1992 when a similar application of the petitioner plaintiffs was dismissed on contest and on merits bny teh same Court in the year 1986 through the medium of a reasoned and speaking order. The maintainability of the second application for the same relief was patently barred on teh principals of *res judicata* ***(Nityananda Ghosh an dothers v. Smt. Alo Rani Ghos and others, AIR 2000 Cal 89 at 89).***

In execution proceedings, Section 11 of the Code of Civil Procedure does not apply in terms but the rule of constructive *res judicata* has always been applied. A mixed question of law and fact determined in the earlier proceedings between the same parties cannot be questioned in a subsequent proceedings between them. **(*Kant Ram Vs Smt. Kazani, AIR-1972 SC-1427).***

The **test of *res judicata*** is the identity of title in two litigations and not the identity of the actual property involved in the two cases. **(*Raj Lakshmi Dasi Vs Banmali Sen, AIR -1953).***

Res-Sub-Judice :

It is well settled that where a decree on the merits is appealed from, the decision of the trial Court loses its character of finality and what was once *res judicata* again becomes ***res subjudice*** and it is the decree of the appeal Court which will then be *res judicata.*

The application for interlocutory relief can be considered, even the trial of suit is stayed. **(*S.Sawhney Vs. Muralidhar,* AIR-2008, NOC 652 (Raj).**

Where there are two suits for partition of some ancestral property between parties having same genealogy, the both suits can be tried together so that all issues as to share in property may be decided without any contradiction in judgment in two suits and without causing any bar of *res judicata* to any suits. **(*Smt A.Devi Vs S.K.P. Singh, (*AIR – 2008, NOC 1257 (Pat).**

Where the earlier suit was for permanent injunction and subsequent one was for declaration of title and partition, it was held that the scope of subsequent suit is wider than earlier one, as such stay cannot be granted. **(*Harjeet Singh Maini Vs Paramjit Singh Maini,* AIR-2008, NOC 1463 (Del).**

Where the both suit relates to the different cause of action the principle of *res sub-judice would not be applicable.* **(*Mohd. Iqbal Vs. M/s Kale Khan M.Haneef,* AIR – 2008 NOC 2536 (MP).**

* * *

APPOINTMENT OF ADVOCATE-COMMISSIONER

ORDER XXVI, Rule 9 to 10, 10 (A) 10 (B) 10 (C) C.P.C deals with appointment of Advocate-Commissioner:-

Order 26 Rule – 9 of C.P.C. - *Commissions to make local investigations*

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property or the amount of any mesne profits of damages or annul net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that, where the State Government has made rules as to the person to whom such commission shall be issued, the Court shall be bound by such rules.

The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 *inter alia* for ***elucidating any matter in dispute.*** There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of "**elucidating any matter in dispute**" in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate-commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of "elucidating any matter in dispute" to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the leis.

No doubt before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties.

No doubt an Advocate – Commissioner cannot be appointed for making an enquiry about factotum of possession of the property in dispute, which is nothing but fishing of information and not elucidating any matter in dispute.

There are circumstances in which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the property from threat of changing or obliterating the existing physical features to destroy valuable evidence on ground, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties.

The important Case Laws are discussed as follows:-

I) In Bandi Samuel and another V. Medida Nageswara Rao reported in 2017 (1) ALT 493 wherein it is held that:-

Appointment of Commissioner in terms of part III i.e. matter ***Incidental proceedings*** of CPC is provided by section 75 of the Code.

75. **Power of Court to issue Commissions**:

Subject to such conditions and limitations as may be prescribed, the Court may issue a commission(a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to make a partition; (e) to hold a scientific, technical, or expert investigation; (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; (g) to perform any ministerial act. With this, Section 75, it would be appropriate now to refer Order XXVI Rule 9 of CPC, which provides appointment of Commissioner for local investigation.

The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of elucidating any matter in dispute in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate- commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of elucidating any matter in dispute to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties.

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In **Bandaru Mutyalu Vs. Palli Appalaraju 2013 (6) ALT 26**, it was held that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared and the object of local investigation under Order XXVI, Rule 9 of the Code which cannot belittled for that conclusion placed reliance upon Sanjay Son of Namdeo Khandare Vs. Saheb Rao Kachru Khandare ; Ponnusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam ; Mahendranath Panda Vs. Purnanada & Others ; C.Veeranna v. C.Venkatachalam and Savitramma v. B.Changa Reddy.

In J. Satyasri Rambabu Vs. A. Anasuya reported in 2005 (5) ALT 702, this Court at paragraph No.6 held as under: It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property, particularly in a suit for injunction since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fact rule. Having regard to the facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property.

In Mallikarjuna Srinivasa Gupta Vs. K.Sheshirekha 2006 (4) ALT 162, in which case, a suit was filed for declaration of title and an application was filed contending that the defendant therein encroached a portion of the site. The stand of the defendant therein was that he has not encroached any portion of the site as alleged by the plaintiff. In the circumstances, this Court held as follows: By mere looking into the sale deed or the lay out, it is not possible to determine the rights, unless it is verified whether any portion of the building is constructed in Plot No.62. Therefore, it is essential to consider the request of the petitioner for appointment of Advocate Commissioner for the purpose mentioned therein.

In Varala Ramachandra Reddy Vs. Mekala Yadi Reddy and others 2010 (4) ALD 198 , it was held that an Advocate Commissioner can be appointed in an injunction suit for local inspection of the suit site and to demarcate the suit schedule property with the help of the Surveyor.

In Shaik Zareena Kasam v. Patan Sadab Khan 2011 (4) ALT 541, this Court at paragraph No.10 held as under:

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 was also held referring to **Mallikarjuna Srinivasa Gupta and Varala Ramachandra Reddy** supra, that 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

In Donadulu Uma Devi v. Girika Katamaiah @ Basaiah 2013 (1) ALT 548 it was held AT PARA 12 that when there is a dispute or issue with regards to identity of a property in a litigation it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a qualified surveyor which will not amount to collecting evidence which is prohibited.

In K.Dayanand And Another vs P. Sampath Kumar- CRP No.3760 of 2014, DT.11-11-2014, after considering the dicta observed in the rulings reported in G. Nagabhushanam Vs. T.Eswaramma ; Thalla Sulochana Vs. Thalla Issac and Another ; Yenugonda Bal Reddy Vs. Manemma and Others ; Dammalapati Satyanarayana & Others Vs. Datta Venkata Ramabhadra Raju @ D.V.R. Raju and Others ; J. Satyasri Rambabu supra; Shaik Zareena Kasam supra; ECE Industries Limited Vs. S.P. Real Estate Developers Private Limited & Others ; 1997 (1) A.P.L.J. 61 (SN); Varala Ramachandra Reddy Vs. Mekala Yadi Reddy & Others ; Haryana Waqf Board and others Vs. Shanti Sarup and others and Donadulu Uma Devi supra,

it was held that there is no absolute bar on appointment of Commissioner in a suit for injunction also as per the law laid down in the above referred judgments nor the provisions of Section 75 and Order XXVI Rule 9 do impose such a prohibition.

The Supreme Court in **Gurunath Manohar Pavaskar & others vs. Nagesh Siddappa Navalgund and others** , has held that the learned trial Judge may appoint an Advocate- Commissioner for the purpose of taking measurement and demarcation of the disputed suit land.

The Supreme Court in Haryana Waqf Board and other Vs. Shanthi Swaroop and others (2008) 8 SCC 671, at paragraphs 4 to 8 held as under: "Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.

II) **In Gautam Chand Chordia and others v. Smt.Majida Hasany, Warangal Dis. Rep. By her General Power of Attorney Smt.Aliya Siddiqui and others reported in 2017 (3) ALT 418 (D.B)** wherein it is held that:-

Though Order XXVI Rule 9 CPC, *per* does not envisage notice to the opposite party, in our opinion, the order containing unilateral direction without notice to the other side is perceived as somewhat unusual and contrary to the convention and practice, for it cannot be said that an Application for appointment of an Advocate Commissioner for noting down the physical features of the property and fixing the boundaries does not brooke delay in issuing notice to the other side and hearing them. Further, the Court shall not appoint a Commissioner as a mater of course unless it is satisfied that the ingredients of Order XXVI Rule 9 CPC are satisfied. The Court can arrive at proper satisfaction in this regard only if it hears both sides. Even if the Court is satisfied that the circumstances, which warrant appointment of a Commissioner, exist it must necessarily speak its mind through its order.

* * * * *

APPOINTMENT OF RECEIVERS

ORDER XL, Rule-1 of C.P.C, deals with 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 tyhe suit has nto a present right so to remove.

The important Case Law on Appointment of Receiver is discussed in T.Krishnaswamy chetty Vs. C.Thangavelu chetty reported in AIR 1955 Madras 430 : wherein it is held that :-

A receiver"*, in the language of High, "is an indifferent (American expression for impartial) person between the parties to a cause, appointed by the Court to receive and preserve the property or fund in litigation "pendente lite', when it does not seem reasonable to the Court that either party should hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as an officer of the Court, exercising his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest. Being an officer of the Court, the fund or property entrusted to his care is regarded as being in '**custodia legis'**, for the benefit of who-ever may finally establish title thereto, the Court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than these conferred upon him by the order of his appointment, or such as are derived from the established practice of Courts of equity.*

"A receiver" *is frequently spoken of as the* ***"hand of the Court"****, and the expression very aptly designates his functions, as well as the relation which he sustains to the Court." J. L. High. A Treatise on the Law of Receivers, Third Edition (1894), Callaghan & Co., Chicago page 2).*

A Receiver has been defined by Kerr as follows :

"A receiver in an action 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 seem reasonable to the Court that cither party should collect or receive, or for enabling the same to be distributed among the persons entitled." (Kerr on the Law and Practice as to Receivers appointed by the High Courts of Justice or order of Court, Twelfth Edition, Walton and Sarson, Special Edition for India, N. M. Tripathi & Co. (1932) P. L).

Two classes of receivers *can be appointed by Courts, viz., (a) under the statutes and (b) under the Civil Procedure Code, the Specific Relief Act and the Original Side Rules of the High Court.*

(a) Several statutes in India like the Provincial Insolvency Act (5 of 1920) (Sections 20, 57, 59 and 68), the Presidency Towns Insolvency Act (3 of 1909) (Section 16) the Transfer of Property Act (4 of 1882) (Section 69-A), the Trustees' and Mortgagees' Powers Act (28 of 1866) (Sections 12 to 19) and the Indian Companies Act (7 of 1913) (Sections 118, 119, 129 and 277E) authorise Courts for appointing receivers under the particular circumstances set out therein.

The second class of Receivers *are included in these in which appointment is made to preserve the property pending litigation to decide the rights of parties. The powers to appoint a Receiver in such cases are comprised in the Civil Procedure Code of 1908 (Sections 51, 94 and Order 40), the Specific Relief Act of 1877 (Section 44), and the Original Side Rules of High Courts relating to Receivers.*

The five principles which can he described as the **"panch sadachar'** of our Courts exercising equity jurisdiction in appointing receivers are as follows :

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised-for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding *: --* ***'Mathusri v. Mathusri, 19 Mad 120 (PC) (Z5); -- 'Sivagnanathammal v. Arunachallam Pillai', 21 Mad LJ 821 (Z6); --'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (27); 'Tirath Singh v. Shromani Gurudwara Prabandhak Committee', AIR 1931 Lah 688 (28); --'Ghanasham v. Moraba', 18 Bom 474 (7.9); --'Jagat Tarini Dasi v. Nabagopal Chaki', 34 Cal 305 (Z10); -- 'Sivaji Raja Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); -- 'Prasanno Moyi Devi v. Beni Madbab Rai', 5 All 556 (Z12); -- 'Sidheswari Dabi v. Abhayeswari Dahi', 15 Cal 818 (213); -- 'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); -- 'Bhupendra Nath v. Manohar Mukerjee', AIR 1024 Cal 456 (Z15).***

(2) *The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. --* ***'Dhumi v. Nawab Sajjad All Khan', AIR 192.3 Uh 623 (Z16); -- 'Firm of Raghubir Singh' Jaswant v. Narinjan Singh', AIR 1923 Lah 48 (217); -- 'Siaram Das v. Mohabir Das', 27 Cal 279 (Z18); -- 'Mahammad Kasim v. Nagaraja Moopanar', AIR 1928-Mad 813 (Z19); -- 'Banwarilal Chowdhury v. Motilal', AIR 1922 Pat 493 (220)****.*

(3*) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt.*

The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. -- *"**Manghanmal Tarachand v. .Mikanbai', AIR 1933 Sind 231 (221); -- 'Bidurramji v. Keshoramji', AIR 1939 Oudh 31 (Z22); -- 'Sheoambar Ban v. Mohan Ban', AIR 1941 Oudh 328 (223)**.*

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. -- ***'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); -- 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25~.); -- 'Mathuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); -- 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27)***. Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) *T*he Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc.

To sum up as stated in -- **'Crawford V. Ross', 39 Ga 44 (Z28),** "The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending."

In 'Dozier v. Logan', 101 ga 173 (Z29) Atkinson J. said *"T*he appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the creditors is exposed to manifest peril,"

Therefore, this exceedingly delicate and responsible duty will be discharged with the utmost caution and only when the 'panch sadachar' or five requirements embodied in the words just and convenient (Order 40, Rule 1) are fulfilled by the facts of the case under consideration -- (**'Ramachandrayya v. Nethi Iswarayya', AIR 1952 Hyd 139 (Z30)).**

CASE LAWS:-

Custodia legis during pendency of suit:

Suit for injunction for restraining appellant from interfering with possession of suit property, which came in possession in pursuance of agreemnt. The Supreme Court directed applicants (Palintiffs to act as custodia legis during pendency of suit as Receivers on behalf of Court. (Brig Sawai Bhawani Singh v. Indian Hotels Co.Ltd., 1997 (2) /civil LJ 176 (SC) : AIR 1997 SC 2183 at 2183 : 1997 (1) SCC 260; Standard Chartered Bank v. Shiv Shanker Gupta **AIR 2005 Del 74.**

Scope:

A receiver is appointed only when it is found to be just and convenient to do so. Appointment of a Receiver pending suit is a matter which is with in the discretionary jurisdication of the court. Ordinarily a Receiver would not be appointed save and except on a *prima facie* finding that the plaintiff has an excellent chance of success in the suit and – or a case has been made out which may deprive the defendant of a defacto possession.

The plaintiff has not only to show a case of adverse and conflict claims of property but also emergency, danger or loss demanding immediate action. Element of danger is an important consideration and conduct of parties an important consideration. ***(Paramanand Patel vs. Sudha A. Chougule, AIR 2009 SC 1593)***

The receiver's appointment is conterminous with suit/appeal sand if suit or appeal is disposed of then the appointment is brought to an end. But at the same time the court has the power to continue the receiver after the final decree, if the exigencies of the case so require. **Subhadra Rani Pal Choudary vs. Shrirly Weigal Nain, 2005 (5) SCC 230: Shubh Shanti Services Ltd. vs. Manjula S.Agarwalla, 2005 (5) SCC 30.**

***Receiver – Scope of power* -**

A Receiver is an officer or representative of the Court and he functions under its directions. The Court may, for the purpose of enabling the Receiver to take possession and administer the property, by order, remove any person from the possession or custody of teh property; Sub-rule(2) of Rule 1 of rhe Order limits that power in rthe case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit, the Court can direct the Receiver to remove him from the possession of the property even if the plaintiff has nto a present right to remove him.

Where dispute arose between both parties having equal shares, relating to settlement of account after dissolution of partnership at will therfore a receiver can be appointed. (**A.V. Joseph v. Joshy T.Joseph, AIR 2012 Ker 56)**

***Preservation of the suit properties-Scope and applicability* –**

The purpose and object of appointment of Receiver is for preservation of the subject-matter invloved int eh suit pending determination of the rights of the parties thereto.

Under Order XL1, Rule 1, CPC, the primary thing the Court has to look into, is as to how best the suit properties could be preserved without being wasted. The responsibility of the Court becomes greater if competing partties have view between themselves to possess the suit properties. Receiver is appointed to create harmony and not to ferment disharmony. This is a well settled principle of law. The primary intention of Order XL, Rule 1 is to keep such harmony between the parties and may vest the property to safeguard interest of all parties.

Order XL, Rule 3, CPC prescribes the liability of the Receiver in respect of statement fo accounts, according to the direction of the Court and to pay the amount due from him as the Court may direct and be responsible for any loss occasioned to the property by his wilful default or gross negligence.

In terms of Rule 4 of Order XL, CPC , the Court may direct enforement of Receiver's duties if he fails to submit accounts as directed by Court or to pay the amount due from him, according to the direction of the Court or occasions loss to property by hsi wilful default or goss negligence. In exercise of such power, the Court may direct the Receiver's property to be attached and may sale such property and apply the proceeds to make good any amount due from him or any loss occasioned by him.

Receiver-Duration of appointement-

Neither Section 51(d) nor Order XI, of the Code fo Civil Procedure prescribes for the termination of the officer of receiver.

The law may briefly be stated thus: (1) If a Receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the act on. (2) If a Receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be Receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the Receiver's functions are terminated, he would still be answerable to the Court as its officer till he is finally discharged. (4) The Court has ample power to continue the Receiver even after the final decree if the exigencies of the case so require ***(Harilal Patni v. Loonkaran Sethiya and others, AIR 1962 SC 21 : 1962 (2) SCJ 418 : 1962 (1) SCR 868).***

Statutory Receiver:-

A Statutory Receiver is merely the legal representative of the property placed in his hands as such. In determining his liability the court will only determine the liability of the property. It is nto material whether the liability existed before or has accrued since his appointment. ***U.P State Sugar Corporation vs. Mahalchand M.Kothari, 2005 (1) SCC 348.***

While appointing the Receiver the High Court must take into account the overall necessity to balance the interests of both parties. ***(Kalpana Kothari vs. Sudha Yadav, (2002) 1 SCC 203).***

Appoitment of Receiver

Agreement to sell, specific performance of suit for application for appintment of the Receiver where property was in possession of the defendant then in a suit for specific pserformance of agreement to sell, Receiver not to appointed, if the defendant undertaken to maintain the *status quo* **(Hari Mohan Sharma and others v. C.S.R. Poultry Research and Breeding Farm, AIR 1993 Del 293 : 1993(1) CrC CC 542 : 1993 (25) DRJ 187).**

A receiver appointed by the Court is an officer of the Court and he acts on behalf of the Court. The possession of a Receiver of the properties in respect of which he is appointed as Receiver, is the possession of the Court. Whether a party to the proceeding or a third person is appointed as a Receiver, it makes no difference. The appointment of a Receiver acts as an injunction against the parties to the suit and they will not be entitled to interfere with the possession of the Receiver of the properties affected by such appointment . Though the rights of persons who are not parties to the proceedings are not affected by the order appointing a Receiver but when once a Receiver is put in possession of the properties in respect of which he is appointed as Receiver, the third parties who may even possess rights paramount to that of a Receiver or rather to that of the party obtaining a Receiver cannot exercise those rights without the leave of the Court.

The Receiver is nothing but a limb of the Court. As such interference with the possession fo the Receiver is interference with the possession of the Court. ***(Thaniappa v.T.Soorappa, ILR (1981) 1 Kant 586 quoted in deity Sri Shnanimahatma Swamy v. Sri C.Gangaiah , AIR 1994 Kant 303 at 308.***

Agreement to sell, specific performance of suit for application for appointment of the Receiver where property was in possession of the defendant then in a suit for specific performance of agreement to sell, Receiver not to be appointed, if the defendant undertakes to maintain the *status quo* ***(Hari Moahn Sharma and others v.C.S.R Poultry Research and Breeding Farm, AIR 1993 Del 293 : 1993 (25) DRJ 187).***

Receiver is an Officer of the Court-

The guiding principls governing the appointment and continuation in office of a Receiver may be referred to. A Receiver is an Officer of the Court. He is anot an agent of any party to the suit, even though his ultimate possession may ensure to the benefit or possession of the successful party on the termination of the suit. ***(Lakshmi Reddy v. Lakshmi Reddy, AIR 1957 SC 314 : 1957 SCR 195 : 1957 SCJ 248)***.

The Receiver is appointed for the benefit of all concerned. He is the representative of the Court as well as that of the parties interested int he litigation. ***(Jagat Tarini dasi v.Naba Gopal, ILR (1907) 34 Cal 305 at 317).***

The appointment of Receiver is made by the Court in the interest of justic. Receiver is an Officer or representative of the Court subject to its orders. His possession is the possession fo all the parties to the proceedings according to their respective titloes. Any money in his hands is *custodia legis* for the person, who can make a title to them. ***(Gopal Khattey v. Phulchand Ourshottamdas, AIR 1946 Cal 357 : 50 CWN 229 : Orr v. Muthia, (1894) 17 Mad 501 at 503 ; Administatro-General v. Prem Lall, (1895) 22 Cal 1011 at 1015 : 22IA 203; Dwijendra v. Joges, (1924) 39 CLJ 40: 79 IC 520 : AIR 1924 Cal 600).***

Appointment of Commissioner:

Where person appointed to take possession was described as receiver, and another was described as commissioner, be shall be treated as receiver for all practical purposes, because application was filed vide Order XL, Rule 1(b), CPC. ***(Kasireddy Lakshminarayana Reddy v. Vallappa Reddy Sumitra Reddy, AIR 2009 NOC 1152 (AP).***

Where person appointed to take possession was described as receiver, and another was described as commissioner, be shall be treated as receiver for all practical purposes, because application was filed vide Order XL, Rule 1(b), CPC. ***(Kasireddy Lakshminarayana Reddy v. Vallappa Reddy Sumitra Reddy, AIR 2009 NOC 1152 (AP).***

Discharge of Receiver:-

Receivers appointed by Court, required to submit periodical reports and once their assigned lack is completed, they are discharged. **(Amal Kr.Ghosh v.Basanta Kr.Almal , 2010(4) SCALE 651 : 2010 (4) Supreme 137 : 2010 (6) SLT 32).**

Consequences of removal or death of a Receiver-

In case after the appointment of the Receiver, a Receiver is removed from the office without recalling the order of appointment of Receiver, a new Receiver is to be appointed in the office.

In case a person appointed as Receiver dies before he is dicharged, in that event, his office becomes vacant. His legal representatives cannot cflaim any right to succeed to the office. However, they are not precluded from applying before the Court for appointement of themselves or any one of them as Receiver. Even though they cannot succeed to the office of the Receiver, yet the legal representatives of the person being Receiver are bound to account for the amiunts in the hands of the Receiver in case any loss is occasioned by teh Receiver and such money is due from such Receiver. The office of the Receiver is constituted by order of Court. It does not vest by succession. The legal representative of the deceased Receiver does not possess status of Receiver. **(Krishnaswami v. Narayanappa, AIR 1959 Mad 209 : 1956 (2) MLJ 429).**

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