

## **INTERLOCUTORY APPLICATIONS**

The Civil Rules of Practice and Circular Orders, Chapter I – Preliminary – Rule 2 (J) defines:

“Interlocutory application” means an application to the Court in any suit, appeal or proceeding already instituted in such Court, other than a proceeding for execution of a decree or order.

Chapter V: deals with (A) Interlocutory proceedings - Rule 53 to 55, 58 and 59 of Civil Rules of Practice further deals with about the form, contents, separate application for each distinct prayer and service of notice to other parties and every interlocutory application shall be supported by an affidavit and true copies of application, affidavit and the documents shall be furnished to the opposite party or counsel.

### **ENQUIRIES AND ORDERS IN INTERLOCUTORY APPLICATIONS:**

Temporary injunctions, Attachment before Judgments, Appointment of Commissioners and Receivers

## **TEMPORARY INJUNCTIONS**

The Law relating to injunctions in India is by and large governed by the principles laid down by the Courts of Chancery in England.

In India the Charter 13<sup>th</sup> George 1 established Mayor Courts to try, hear and determine all civil suits etc., in Madras, Bombay and Calcutta and those Courts were established and Supreme Courts at Calcutta, Madras and Bombay were set up and the Supreme Courts in presidency Towns had been granting injunctions taking into consideration the principles of law laid down by the Courts of chancery of England. In India at present Sections 36 to 42 of the Specific Relief Act, 1963 corresponding to Sections 52 to 57 of the Specific Relief Act, 1877 Order 39 Rules 1 to 5 corresponding to Sections 92, 93, 95 and 96 of C.P.C., Act VIII of 1859 and also Sections 492 to 497 of C.P.C. Act XIV of 1882 may be mentioned as certain of the statutory provisions dealing with the law relating to injunctions.

**Statute Law relating to injunctions in India:-** Sections 52 to 57 of the Specific Relief Act, 1877 dealt with the different forms of injunctions. The Governor

General gave the assent to the said Act, Act No. 1 of 1877 on 7-2-1877. The above Act was repealed by the Specific Relief Act, 1963 and the President of India gave his assent to the said Act, Act No. 47 of 1963. Sections 36 to 42 of the Specific Relief Act, 1963 correspond to Sections 52 to 57 of the Specific Relief Act, 1877. Section 43 of the Specific Relief Act, 1963 as it stood prior to the passing of the Repealing and Amending Act of 1974 had amended Section 32 of the Arbitration Act (10 of 1940) and now the power to issue injunctions in the matters of arbitration agreements are to be dealt with under different provisions of the Arbitration Act, 1940.

Order 39 of the Code of Civil Procedure, 1908 read with Section 94 (c) of the same code deals with the granting of temporary injunctions. Suitable injunctions or interim orders of the like nature can be granted where an easement is actually disturbed or in the case of proceedings before the insolvency Courts or in the case of proceedings under the Guardians and Wards Act, 1890 or in the case of certain proceedings under Companies Act or in the case of proceedings under certain State Acts or the rules framed thereunder or in different proceedings, under the Code of Criminal Procedure, 1973 or even by High Courts and Supreme Court in appropriate proceedings, certain statutes in certain proceedings, like the election proceedings specifically prohibit the granting of injunctions.

An injunction is a Judicial process whereby a party is ordered to refrain from doing or to do particular act or thing. In the former case it is called a restrictive injunction and in the later a mandatory injunction. Injunction may be either final remedy obtained by a suit or a preliminary and interlocutory relief granted while the suit is pending. In the first case it is a decree in the second an order or writ. Whatever be its forms, decree or order, the remedy by ordinary injunction is wholly preventive, prohibitory or protective.

An injunction is a writ framed according to the circumstances of the case commanding an act which the Court regards as essential to Justice or restraining an act which it esteems contrary to equity and good conscience.

An injunction is a remedial writ which Court issues for the purpose of enforcing their equity jurisdiction. Injunction is writ commonly used by Courts of equity as incident to enforcement of its commands and decrees.

An injunction is an order of the Court granted for the purpose of restraining the doing, continuance or repetition by the person enjoined, his servants or agents of some wrongful act which constitutes an infringement of a legal or equitable right as for instance, a breach of contract.

An injunction is merely a process by which Court enforces equity. An injunction is an order of an equitable nature restraining the person to whom it is directed from performing a specified action in certain exceptional cases which will be considered hereafter requiring him to perform a specified act.

Injunctions are often classified into prohibitory or mandatory injunctions according as whether they restrain or require the performance of the act which is in question.

An injunction is a specific order of the Court forbidding the commission of a wrongful course of action already began.

Injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case.

The object of granting an interlocutory injunction is to preserve the matter pending the trial. Even a mandatory injunction can be granted on an interlocutory application but such power should be exercised by the Court sparingly and with great care and caution. The jurisdiction to grant preventive relief may primarily rest upon contractual obligations between the partners the violation of which will be prevented to avoid irreparable injury and vexatious or interminable litigation. Injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession as against the true owner of the property.

An injunction is an equitable remedy and he who seeks equity must do equity. Hence a party who asks for an injunction must be able to satisfy the Court that his dealing of the matter had been fair, honest and free of any fraud or illegality and had not acted in an unfair or inequitable manner. An equitable remedy will not be granted unless an applicant praying for the relief is fair and honest. He who comes into equity must come with clean hands. The different provisions of the Specific Relief Act in India relating to injunctions are based on the well established. Principles of equity laid down by Chancery Courts in England.

The discretion in granting or refusing injunction must be exercised judicially and not arbitrarily. Discretion when applied to a Court of law means discretion guided by law. It must be governed by rule and not humour. It must not be arbitrary, vague or fanciful but legal and regular. Where the granting of injunction or refusing it depends upon questions of fact and also conflicting evidence the relief is to be refused.

For granting temporary injunction petitioner has to establish that he has a legal right and there is invasion of such right.

An injunction is a specific order of the Court forbidding the commission of a

wrong threatened or the continuance of a wrongful course of action already begun.

An injunction is an order of the Court to a person to the effect that he shall do, or stop doing some particular act. If the injunction forbids the commission or continuance of an act it is said to be prohibitory, whereas if it calls for a positive action to overcome some omission, it is described as mandatory.

An injunction could be of two kinds, namely, temporary and perpetual as laid down under Section 36 of the Specific Relief Act.

The interlocutory injunctions are those which continue until the hearing of the cases upon the merits, or generally until further order.

A temporary injunction, may as it very often does, consists of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application and the other granted while finally disposing of the main application to ensure generally till the disposal of the suit. While the former is generally classed as **ad interim injunction**, the latter is generally called "**temporary injunction**".

The perpetual injunction can only granted by the decree made at the hearing and upon the merits of the suit.

The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in status quo until the hearing or further order.

Neither on principle nor on authority there is any bar to the Courts granting ad interim injunction till the disposal of the application for the temporary injunction, if subsequent developments or altered circumstances warrant such grant even though it has refused to grant the same earlier on the materials then on record. If, however, the materials on record stand as they stood when the ad interim injunction was refused earlier, a grant of ad interim injunction on such materials may not be permissible as that might amount to impermissible review of the earlier order.

**Temporary injunctions are regulated by the Code of Civil Procedure:**

- Order XXXIX of the Code of Civil Procedure, 1908 deals with temporary injunctions and interlocutory orders.

Order XXXIX, Rule 1 reads, --

"1. Where in any suit it is proved by affidavit or otherwise:

(a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party of the suit, or wrongfully sold in execution of a decree, or

(b) That the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors,

(c) That the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

- The burden of establishing the three ingredients for granting of temporary injunction is on the plaintiff.

Except in exceptional circumstances normally an ex parte injunction cannot be granted.

The factors to be considered for granting ex parte interim injunction were specified as follows:

"(a) where irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the Court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the Court will consider whether the plaintiff had acquiesced for some time and in such circumstances it will not grant ex parte injunction;

(e) the Court would expect a party applying for ex parte injunction to show utmost good faith in making the application;

(f) even, if granted, the ex parte injunction would be for a limited period of time; and

(g) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court."

### **CASE LAWS ON TEMPORARY INJUNCTIONS:**

- Temporary injunctions are such as are to continue until a specified time or until the further order of the Court and they may be granted **at any stage of suit** and are regulated by the Code of Civil Procedure, 1908.
- Courts generally issue injunctions where the right sought to be protected is clear and not where it is doubtful. (**Union of India vs. Amrik Singh, AIR 1963 Punj. 104**)
- A temporary injunction cannot be granted to establish a new state of things differing from the state of things which existed on the date when proceedings

were instituted. (**Nandan Pictures Ltd., vs. Art Pictures Ltd., AIR 1956 Cal 428**)

- The Court cannot grant an injunction unless the Court is competent to try the suit.

**Injunction by Original Court:-** An injunction can be granted where there is a material injury infringing a clear legal right. (**Straight Vs Bura L.R.5 Ch.AP.165: Alilandammal Vs.Venkatachala Mudali, 6 M.H.C.R.112**).

The Court of first instance can grant temporary injunctions (Order 39 Rules 1&2) or perpetual injunctions (Sec 36&37 of the Specific Relief Act,1963) or mandatory injunctions (Sec.39 of the Specific Relief Act,1963) depending upon the facts and circumstances of each case.

An injunction granted pendente lite until the disposal of the suit or further orders will end in any case on the disposal of the suit or any earlier date on which further orders may be passed. The words until further orders do not extend its duration beyond the date of decree. (**Balbahadur Vs Bala,AIR 1924 Mad.178**)

In **Nawab Mir Barkat Ali Khan vs. Nawab Zulinquar Jahh Bahadur and others (AIR 1975 A.P. 187 at 190)**, the Division Bench of the Andhra Pradesh High Court on the aspect of granting or refusing to grant a temporary injunction held as follows:

*"It is well settled that the grant or refusal of a temporary injunction is covered by three well established principles viz., (1) Whether the petitioners have made out a Prima facie case (2) Whether the balance of convenience is in their favour i.e., whether it could cause greater inconvenience to them if the injunction is not granted than the inconvenience which the opposite party or persons claiming through the opposite party would be put to if the temporary injunction is granted (3) Whether the petitioners would suffer irreparable injury with the first condition as sine qua non atleast two conditions should be satisfied by the petitioner conjunctively and a mere proof of one of the three conditions does not entitle the petitioners to obtain a temporary injunction in their favour."*

**Injunction by appellate Court:-** An appellate Court will have the same powers just like a Court of original jurisdiction in the case of granting injunctions. (**Kanhai vs Bidday, 1 All 549**)

In **Yenamandala Venkatarayudu vs. Vegi Ananthaxmi (1975 (2) An. WR 476 at 478)**. His Lordship Punnayya J. held on this aspect:

*"Where an appeal is preferred against the order passed by the trial Court in*

*an interlocutory application either granting or refusing to grant temporary injunction pending disposal of the suit, it is not desirable ordinarily for the appellate Court to grant ex parte interim injunction against the respondent in the appeal or to pass ex parte order staying the operation of the injunction order passed by the trial Court unless there are special circumstances warranting the appellate Court to do so. Duty is cast on the appellate Court to consider well whether it is absolutely necessary to pass such ex parte injunction or ex parte stay order. The appellate Court should not pass such ex parte orders in a routine way."*

**Discretion must be judicial and arbitrary:** While granting or refusing an injunction, the Courts have to take into consideration all the circumstances of the case. Normally the discretion exercised by the trial Court will not be interfered with by a Court of appeal unless such erroneous exercise of jurisdiction resulted in grave mis-carriage of justice. **(Shadi vs. Anrup Singh, ILR 112 All 436)**

**Scope:** The main object of granting temporary injunction is to maintain the status quo pending litigation. **(Sinclair Refining Co., vs. Midland Oil Co., 55 F. 2D 42; Kalyanpur Lime Works Ltd., vs. State of Bihar, AIR 1951 Patna 226; Black Point Syndicate Ltd., vs. Eastern Concession Ltd., (1898) 79 LT 658; Berman vs. Wreck, 175 S.O. 269; Selcho & Righter Co., vs. Western Printring Co., 112 F. 2D 430)**

- The granting or refusing of a temporary injunction is covered by three well established principles (1) Whether the petitioner has made out a prima facie case (2) Whether the balance of convenience is in his favour (3) Whether the petitioner will suffer irreparable injury if temporary injunction is not granted. **(Nawab Mir Barkat Ali Khan vs. Nawab Zulfekhar Jah Bahdur, AIR 1975 AP 187; S.R.K. Murthy vs. Narayana Das, AIR 1982 AP 384; N.V. Chowdary vs. Hindustan Steel Works Construction Ltd., AIR 1984 A.P. 110; Madhavan Pillai vs. Inez Rosario, AIR 1971 Ker. 27)**
- Where an order was passed by vacation civil judge in an interlocutory application filed under Order 39 Rules 1 and 2, an appeal against such an order lies only to High Court even though Courts are reopened after vacation. **(Anantham vs. Benjamin, 1991 (2) ALT 572)**
- Trespasser is not entitled to injunction against true owner. **(Osmania University vs. Rajeshwara Rao, 1989 (3) ALT 192)**
- Order granting interim injunction without notice to opposite party and without recording reasons is void. **(A.P. State Financial Corporation vs. Nagaraju, 1988 (1) ALT 969)**
- Arbitrators do not have any powers under the Arbitration Act to grant interim

orders for the protection of the subject matter of the dispute. **(Vashdev vs. Bipin Kumar & Co., 1988 (1) CCC 42)**

- The grant of injunction is covered by the provision of Specific Relief Act. The principles laid down by this Court on the laws of interpretation of the provisions of Order 39, Rules 1 and 2 and Section 151, C.P.C. Where a suit is barred by any law, in such a suit ad interim injunction cannot be granted. **(Shri Priya Ballabh vs. Manoj Kumar, 1988 (2) CCC 1040)**
- Normally in appeals against orders of temporary injunction appellate Court does not interfere. Possession of a trespasser cannot be protected under Order 39 Rules 1 and 2 C.P.C. **(Mohd. Aslam Shawl vs. Gulam Homd Shangru, 1988 (2) CCC 1135)**
- The provisions of Order 39, Rule 3, C.P.C are not mandatory but directory and any non-compliance thereof, though a serious matter, does not invalidate the ex parte injunction. **(Puri vs. Puri, AIR 1994 J &K 25)**
- Where the plaintiffs have been using the common – passage for a long time and the defendants constructed a wall obstructing the common passage, it was held to be a fit case to grant Interim Mandatory Injunction. **(Dilip Kumar Sutaria vs. Kartik, AIR 2000 Mad. 512)**
- In **Airport Authority of India vs. M/s. Paradise Hotel & Restaurant (AIR 2002 Gau. 146)**, it was held that an order of temporary injunction is appealable and not revisable.

**Temporary Injunction to continue until specific time:** A temporary injunction can be granted either during the pendency of the suit or the pendency of the appeal, the latter being a mere continuation of the suit. Temporary injunctions are to continue until a specific time or until the further order of the Court and may be granted at any stage of a suit. **(See Section 37 of the Specific Relief Act, 1963)**

- There cannot be an injunction against true owner at the instance of a trespasser or a person in unlawful possession. **(Nabakishore Sahoo vs. M/s. East India Arms Company, 1998 (3) Civ. L.J. 594 See AIR 1964 Cal. 235; AIR 1989 Ker. 188; AIR 1980 All. 209; AIR 1962 Mad. 149; AIR 1986 Kar. 77)**
- **Prima Facie case:-** The party seeking the aid of the Court for an injunction must establish that the act complained of is in violation of his right or is atleast an act which if carried into effect will necessarily result in a violation of the right. **(Mathew vs. Koshy, AIR 1966 Mys. 24)**
- Prima facie case means that it needs serious consideration, investigation or determination. It does not mean proof at this stage. It means bona fide dispute requiring determination without pre-judging the case. In order to find out whether there exists any prima facie case in favour of a party or not, it would be enough if it could be established that there was a seriously arguable question and it is not

necessary that the point be proved to the hilt at that stage. Showing a reasonable chance of success is enough. The apparent strength of the applicant's case is the guiding factor. Then Court has to consider the balance of convenience and irreparable loss aspects. When the Court is called upon to examine whether applicant has a prima facie case for the purpose of granting temporary injunction, the Court must perforce examine the merits of the case. But the findings on various questions like right, title or interest in the suit land would be merely incidental or ancillary for the purpose of assessing the prayer for temporary injunction, and not for anything else and the said findings shall not be of any avail or effect for any other purpose.

- Prima facie case not to be confused with prima facie title. **(Aukkha Singh vs. Mahal Singh, AIR 2003 Raj. 21)**
- **Balance of convenience**:- Balance of convenience may mean the convenience and inconvenience of the parties contesting an application for temporary injunction and the same may be equated with what had been left out after weighing the prima facie case of both sides.
- While granting or refusing to grant temporary injunction mere prima facie case is not sufficient and further the Court has to see the balance of convenience. **(Brajendra vs. Kashibhai, AIR 1946 Pat. 177; Kalyanpur Lime Works vs. State of Bihar, AIR 1951 Pat 226)**
- Where the public interest is involved in a litigation while appreciating the aspect of balance of convenience, the interest of the public also is to be considered. **(Abdul Qadeer vs. Municipal Board Moradabad, AIR 1955 All 414)**
- **Irreparable injury**:- Apart from the prima facie case and the balance of convenience the Court is also concerned with the irreparable injury while granting or refusing to grant the relief of temporary injunction. **(Gopalakrishna vs. Machayya, AIR 1969 Mys. 337; Nawab Mir Brkat Ali Khan vs. Nawab Zulfekhar Jah Bahadur, AIR 1975 AP 187; Narayan vs. Vidyanath, AIR 1975 Kar. 117)**
- In the case of granting temporary injunction the Court must be satisfied that there is a fair and substantial question to be decided regarding the rights of the parties and there is a bona fide contention between the parties. **(Chandidat Jha vs. Padmanand Singh, ILR 12 Cal. 459; Moran vs. River Steam Navigation Co., 14 BLR 352; Gomes vs. Carter, 1 Ind. Jur N.S. 411)**
- The granting of temporary injunction being a discretionary relief, the conduct of the parties also always has been considered an important relevant factor in deciding whether temporary injunction is to be granted or not in the circumstances of particular case. **(Johnson vs. Wyatt. 5 Beav 229 Gordon vs. Cheltenham Railway, AIR 1996 Del. 1)**

- Though it is not possible to lay down a rigid rule regarding the exercise of discretion by the Court while granting temporary injunctions, since the plaintiff by the interim injunction undoubtedly seeks to interfere with the rights of the opponent before the plaintiff's right is finally established, the injunction is not granted as a matter of course. Injunction restraining encashment of bank guarantee cannot be granted in the absence of fraud or likelihood of irretrievable injustice between the parties. **(General Electric Technical Service Company vs. M/s. Sons Ltd., AIR 1991 WC 1994)**
- The language of Order 39, Rule 1, C.P.C is wide enough to include an order in the form of a mandatory injunction upon an interlocutory application but such a power however has to be exercised in very rare cases and with due care and caution. **(Suranna vs. Somulu, AIR 1969 AP 368)**
- Where the defendant evades the service of notice and proceeds with certain constructions, it will be a fit case to grant mandatory injunction on an interlocutory application. **(Von Joel vs. Hornsey, (1895) 2 Ch. D 774; Daniel vs. Ferguson, (1891) 2 Ch. D. 27)**
- It is a well settled law that the Court can grant temporary injunction in the interest of justice under inherent powers though not covered by Order 39 Rules 1 and 2 C.P.C. An order of temporary injunction can be implemented by seeking police aid under the inherent powers. Temporary injunction cannot be granted even under inherent powers by a small cause Court. Courts power to grant injunctions is not confined to Order 39, Rules 1 and 2 of C.P.C and in appropriate cases injunctions can be granted exercising inherent powers. In exceptional circumstances Court can grant injunction in exercise of inherent powers though not covered by situations envisaged by Order 39, Rules 1 and 2 C.P.C. **(Pati Indravati Devi vs. Bulugosh, AIR 1990)**
- Restoration of possession at the interlocutory stage can be granted in rare cases. **(Jivan Bhai vs. Bhavanje, AIR 1995 Guj. 92)**

**Appointment of receiver in an application for temporary injunction:-** In **Ravi Laxmaiah vs. Nagamothu Laxmi and another (AIR 1971 A.P. 380 at 381)**, the Division Bench of Andhra Pradesh High Court held on this aspect:

*“Under Order 39 Rule 1 C.P.C the Court may by order grant a temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders, thus the Court*

*has wide powers not only to grant a temporary injunction but to make such other order for any of the purpose referred to above. This would certainly include an order for the appointment of a receiver .... Further under Order 40 Rule 1 C.P.C the Court has the power to appoint a receiver where it appears to the Court to be just and convenient. The said order does not require that there should be an application for the appointment of a receiver. Even without such an application if the facts and circumstances are brought to the notice of the Court justifying the appointment of a receiver, it may do so suo motu even without an application by way of the parties for that purpose. In this case the Court, while hearing the application for an injunction came to the conclusion that it was just and convenient to appoint a receiver. We do not find anything either in Order 39 or Order 40 C.P.C which would preclude the Court from passing such an order. On the other hand, on a reading together of Order 39 and Order 40 C.P.C we are of the view that the Court is entitled to pass an order appointing a receiver even in an application for an injunction under Order 39 C.P.C."*

If the plaintiff does not ask for a receiver and there is no application to that effect, it is not open to the Court purporting to act under Order 39 Rule 1 C.P.C to appoint a receiver without any request from the parties. In view of the terms of Order 39 Rule 1 C.P.C allowing the Court to make such other order there can be no objection to the appointment of a receiver in an application for an injunction if the plaintiff wants it in the alternative. The Court can appoint a receiver even suo motu if the Court finds that step to be just and convenient in the circumstances of the case. **(Chummar vs. Kuniamathu, AIR 1952 Tra Co. 331; Dar Prasad vs. Gopikrishen, AIR 1914 All 4)**

- A temporary injunction cannot be granted except against a named person. Equity acts in personam and an injunction must be addressed to the defendant personally. **(N.W. Rly. Administration vs. N.W. Rly. Union, Lahore, AIR 1933 Lah 203)**
- **Court can summon the deponent of an affidavit for cross-examination while deciding temporary injunction application:-** Upon any application evidence may be given by affidavit but the Court may at the instance of either party order the attendance for cross-examination of the deponent. Such attendance shall be in Court unless the deponent is exempted from personal appearance in Court or the Court otherwise directs. Though some contrary opinion was expressed in general the Courts are of the opinion that they have power to summon the deponents for the purpose of cross-examination in a proceeding for the granting of temporary injunction. Directing attendance of deponents of affidavit for cross-examination is within the discretion of Court. **(Chotu Khan vs. Abdul Karim, AIR 1991 Raj. 119)**
- A letter of credit is no doubt independent of the primary contract of sale between the buyer and the seller and it must be allowed to be honoured free from

interference by the Courts but this principle cannot be extended to protect an unscrupulous seller when there is a fraudulent transaction and if fraud is pleaded and proved prima facie, temporary injunction can be granted in such a case. **(National Oils and Chemicals Industries, Delhi vs. Punjab & Sind Bank Ltd., Delhi, AIR 1979 Delhi 9)**

- **Temporary Injunctions between Co-sharers:** Where one of the coparceners attempts to waste the property by committing a wrongful act or makes use of the property in such a way which may amount to ouster, in such a case temporary injunction can be granted. **(Anant vs. Balvant, (1985) ILR 19 Bom. 269)**
- **Can the defendant pray for temporary Injunction:** The defendant can pray for a temporary injunction against the plaintiff without filing a counter claim only when and where the relief claimed arises out of plaintiff's cause of action or is incidental to it. **(Suganda bai vs Sulu bai. AIR 1975 Kar.137).**
- A positive relief contemplated by Order 39 Rule 1 (b) and (c) in favour of the defendant can be granted only if a relief of a similar nature can be granted in favour of the defendant in the main suit or original petition. There is nothing wrong in assuming that Order 39 Rule 1 affords scope for passing order of injunction prohibitory or mandatory on applications filed by defendants also. **(Vincent vs. Aisumma, AIR 1989 Ker. 81)**
- When a suit which was dismissed for default is restored to file after setting aside the order of dismissal for default all the interlocutory orders made before dismissal of the suit are automatically restored. **(Mutyalu vs. Rajyalaxmamma, AIR 1978 AP 316)**
- **Injunction against auction-purchaser:** The action of auction-purchaser taking possession of property purchased in Court sale is not a wrongful act and hence he need not be restrained from taking possession of property. **(Managamma vs. Venkateswarlu, 1990 (1) An. WR 404)**
- **Second application for temporary injunction:** Where the plaintiff files an application for the grant of a temporary injunction and after notice to the opposite party who has filed a reply and during the course of arguments, the plaintiff withdraws such application, the plaintiff is debarred from instituting a fresh application unless there had been change of circumstances since the date of dismissal of the previous injunction application. **(Narain Singh vs. M/s. Ramgopal Madan Lal, AIR 1981 Delhi 88)**
- **Compensatory Costs:** It is not appropriate to make an order for compensatory costs on the dismissal of an application for temporary injunction when the Court is concerned only with the question whether the plaintiff has made out a prima facie case since it is premature for the Court to find out at that stage that the claim of the plaintiff is frivolous or vexatious. Even before the suit has come up for trial and before any evidence is adduced, it is not proper for the Court to come to a conclusion that the claim of the plaintiff is frivolous and vexatious rendering the

plaintiff also liable for payment of compensatory costs to the defendant. **(Aleyamma vs. Idicula, AIR 1982 Ker. 44 at 47)**

- **Injunction by a probate Court:-** Though a probate proceeding is not a suit in which there is a property in dispute as contemplated by Order 39 Rule 1 C.P.C a probate Court also can grant a temporary injunction but such order can be granted in aid of and in furtherance of the purpose for which a grant is made by a probate Court. **(Nirod Barini Debi vs. Chamatkarini Debi, 9 CWN 205; Atula Bala Dasi vs. Nirupama Devi, AIR 1951 Cal. 561)**
- **Temporary injunction by an Appellate Court:-** In an appeal against interim injunction powers of appellate Court are as wide as that of the trial Court. **(Shri Ram Singh vs. Special Judge, AIR 1993 All 236)**
- **Temporary injunction in revision:-** Temporary injunction can be granted in Civil Revision Petition too since revisional jurisdiction is only a form of appellate jurisdiction. **(T.T. Devasthanams Committee vs. Chengama Naidu, 1947 (1) MLJ 411; State Transport Authority, Bhopal vs. S.A.J. Motor Service, AIR 1956 Bhopal 49)**
- **Elections:-** It is now a well settled principle of law that when defeated candidates in an election come to the Court and seek to restrain the successful candidates from functioning as such and taking part in the proceedings of an authority to which they were elected, injunction should not be granted. **(The Andhra University vs. P.V.N. Raju, 1974 (2) An. WR 17)**
- **Arbitration proceedings:-** A temporary injunction can be granted restraining arbitration proceedings where the agreement of reference is attacked on the ground of fraud, mistake etc., **(Sardar Mall vs. Agarchand Mehata & co. AIR 1999 Cal. 89)** or suppression or misconduct of arbitrator. **(Kurerji Devchand vs. David Sassoon & co. AIR 1929 Sind. 182)**
- **An order of injunction becomes effective from the date of its communication:-** An order of injunction will become effective from the date it is communicated to the concerned party. **(Mulkraj vs. Murti Raghunathji, AIR 1967 SC 1387)**
- **Execution of decree against a person who is not a party to the suit:-** Execution of decree arising out of a suit to which the plaintiff in the subsequent suit was not a party, amounts to an injury within the meaning of Order 39 Rule 2 (1) C.P.C. **(Kanti Kumar vs. State of Tripura, 1988 (2) CCC 11)**
- **Injunction against a lessor:-** The possession of a statutory tenant is protected by Courts of law. **(Badrilal vs. Municipal Corporation of Indore, AIR 1973 SC 508)**

Persons are not permitted to take forcible possession. They must obtain such possession as they are entitled to through a Court. **(Lallu Yeshwanth Singh vs. Rao Jagadish Singh, AIR 1968 SC 620)**

A tenant by sufferance also is entitled to an injunction. (**Sri Balaji Trading Company vs. Veeraswamy Sreenivasan, 1980 (1) An. WR 28; K.K. Verma vs. Union of India, AIR 1954 Bom. 358; M/s. Patil Exhibitors vs. The Corporation of City of Bangalore, AIR 1986 Kar. 194**)

- **Injunction and Section 53-A of the Transfer of Property Act, 1882:-** In a suit for specific performance of agreement of sale interim injunction can be granted against defendant basing on 53A of T.P. Act. (**Anjan Ali vs. Jaya Shankar, 1989 (2) ALT 199**)
- **Injunction against a trustee:-** A trustee making unauthorized changes in the case of a trust property affecting the very character of the institution will be restrained by means of an injunction. An injunction can always be granted in the case of breach of trust and to see that such acts which are detrimental to trust are prevented in the interests of the trust as such. (**Naina Pillai vs. Ramanathan, ILR 47 Mad. 337; Ranganathan vs. Peria Karuppan, AIR 1957 SC 815**)
- **Injunction against wrongful use of trade marks:-** Where the whole or any essential particular of the plaintiff's mark forms an element of combination with other matter in the defendants label, the Court will grant an injunction if it finds that the addition of the other matter in the label is in effect only a colourable introduction to disguise the real purpose of infringement. (**Northe Cheshir and Manchester Brewery Co., vs. Manchester Brewery Co., 1899 AC 83; In re Sphinx, (1902) 19 R.P.C. 377**)
- **Injunction in case of caste questions:-** The caste is a social combination, the members of which are enlisted by birth, not by enrolment. Its rules consist of partly resolutions passed from time to time but for the most part of usages handed down from generation to generation. (**Raghunath Damodar vs. Janardhan Gopal, (1891) 15 Bom. 599**)

Caste question is a question which relates to matters which affect the internal autonomy of the caste and its social relations. (**Nagindas vs. Somnadh, AIR 1932 Bom. 122**)

Normally the Courts may not be inclined to interfere in caste questions except where an action is in violation of a rule sanctioned by the caste itself or in violation of principles of natural justice. (**Appayya vs. Peddappa, ILR 23 Bom. 122; Krishnasami vs. Veerasami, ILR 10 Mad. 133; Fakir Mohammed vs. Agha Khan, AIR 1930 Sind. 204; Devchand vs. Ghansham, AIR 1935 Bom 361**)

- **Injunction by an Insolvency Court:-** An insolvency Court can grant injunction in an appropriate case. An insolvency Court has power to decide all questions arising in insolvency under Section 4 of the Provincial Insolvency Act, 1920. (**Ramnad District Central Co-operative Bank vs. Official Receiver, AIR 1954 Mad. 12**)

The powers of Insolvency Courts under Section 4 of the Provincial Insolvency

Act, 1920 and Section 7 of the Presidency Towns Insolvency Act, 1909 are very wide and hence suitable injunction can be granted by Insolvency Courts in the interests of justice in proper cases. **(Ramnad District Central Cooperative Bank vs. Official Receiver of Ramnad, AIR 1954 Mad. 12)**

**Under Section 5 of the Provincial Insolvency Act, 1920** the Insolvency Court has the same powers which an ordinary civil Court has under the Civil Procedure Code and it seems clear that those powers include the powers mentioned in Order XXXIX that is the power in suitable cases to issue a temporary injunction. **(Ally Mahomed vs. Bham, AIR 1928 Rang. 241)**

The Court can grant an injunction to prevent the creditor who claimed the lien from bringing the property to sale, pending the decision of the dispute between the two creditors. **(Ally Mahomed vs. Bham, AIR 1928 Rang. 241)**

- **Injunction in case of Companies:-** The Court is empowered to restrain the winding up proceedings of a company in an appropriate case but such injunction cannot be granted in a case where the winding up order had been made already. **(Governor General-in-Council vs. Shiromani Sugar Mills, AIR 1946 FC)**
- **Nuisance and injunctions:-** Where obstruction is caused to a public way, a suit for removal of obstruction and for an injunction is maintainable. **(Mst. Bhagwanti vs. Mst. Jiuti 7, AIR 1975 All. 341)**
- **Injunction restraining the water being polluted:-** Where the pollution of water by the flow of sewage into streams from towns or cities, is injurious and renders such water to be unfit for use, the Courts have power to grant injunctions in such cases. **(Goldsmid vs. Tunbridge, See High on Injunctions Sec. 810 Ch. 349)**
- **Fiduciary Relations and injunction:-** A party who had engaged an advocate or vakil first may restrain him by an injunction from disclosing the communication made to him. **(Ramlal vs. Moonia, I.L.R. 6 Cal. 97)**
- **Matrimonial affairs and injunctions:-** Where an ex parte decree was made against wife and an application for setting aside ex parte decree was filed by the wife, she can also move an application for temporary injunction restraining husband from remarrying pending application and Court can issue temporary injunction in favour of wife. **(1992 (2) DMC)**
- **Injunction in case of disciplinary action:-** Civil Court cannot grant an injunction in a suit filed by workmen restraining management from taking disciplinary action against them. **(The Palakol Co-operative Sugars Ltd., vs. Narasimha Raju & Another, 1988 (2) ALT 160)**
- **Agreement to sell does not confer right on plaintiff:-** In **Smt. Laxmi Dei vs. Shyam Sundar Hans (AIR 2005 Ori. 78)**, it was held that in a suit for specific performance of agreement to sell, plea is that property was sold to third person and they are to be restrained by making constructions, agreement to sell does not confer right on the plaintiff in relation to disputed property and hence

temporary injunction cannot be granted.

- **Educational Institutions and injunctions:-** In a manner touching either the discipline or the administration of the internal affairs of a University Courts should be most reluctant to interfere. They should refuse to grant an injunction unless a fairly good prima facie case is made out for interference with the internal affairs of educational institutions. (**Varanasaya Sanskrit Vishwa Vidyalaya vs. Dr. Raj Kishore, Tripathi, AIR 1977 SC 615, at 619**)

### **ATTACHMENT BEFORE JUDGMENTS**

(Order 38 Rule 5 of Code Civil Procedure deals with attachment before judgments)

The general rule is that a plaintiff must first obtain a decree and then execute the same. The question of arrest of the debtor or attachment of the property would arise at the stage of execution of the decree. However, under special circumstances which are specified in Rules 1 and 5 of Order 38 Code of Civil Procedure the creditor can take out arrest or attachment against his debtor even before the judgment.

**Order 38 Rule 5: Where defendant may be called upon to furnish security for production of property** – (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, -

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

#### **Case Laws on Attachment before Judgments:**

(1) Court while exercising its jurisdiction under Order XXXVIII, Rule 5 of CPC is required to form a prima facie opinion at that stage. (**Rajendran vs. Shankar Sundaram, AIR 2008 SC 1170**)

(2) In a suit against a partnership firm and its partners, even the personal property of any of the partners can be attached before the judgment. (**D.V.Krishnamurthy vs. P.Viswanadh, AIR 1994 AP 43**)

(3) Attachment before judgment, to be ordered on reasonable grounds, and not on mere conjectures and imaginations. For passing of an order thereunder, requisite intention of the defendant has to be proved. **(Uco Bank, Madras vs. Sukra Shoe Fabric and others, AIR 192 Mad. 293)**

(4) Right, title and interest of a partner in the firm, being a saleable movable property was open to attachment before judgment. **(Raja Theatre, Coimbatore, M/s. vs. M/s. Selvam Financiers & others, AIR 1992 Mad. 227)**

(5) **Rule 5 of Order XXXVIII, CPC** is an extraordinary remedy and if the ingredients for invoking it are lacking in the application and the affidavit filed in support thereto, attachment before judgment order cannot be ordered, claim for attachment before judgment on the averment has been mainly set out in questions and a bare reading thereof reveals that it was not pleaded therein that appellants with intent to obstruct or delay the execution of decree that may be passed against them (a) are about to dispose of the whole or any part of property, or (b) are about to remove the whole or any part of the property from the local limits of jurisdiction of this Court. **(KCV Airways Ltd., and another vs. WG.Cor.R.K.Bhagana, AIR 1998 Delhi 70)**

(6) An order under Order XXXVIII, Rule 5 is not to be passed merely for asking for it and merely because of the fact that the garnishee has huge amount to pay in favour of the appellant. The law in this regard was discussed by this Court in **Sripathi Panditarajula Venkanna Babu vs. Varalakshmi Finance Corporation, Rajahmundry (1996 (4) ALLD 453 (DB))**, wherein the steps necessary to be taken before an order is passed, were clearly discussed. Such an order is not to be passed in a routine manner merely for the asking for it but that the Court has to be satisfied on tangible material placed before it that there are attempts at alienation and that steps are taken so as to delay or obstruct the judgment that may be ultimately passed against the defendant. Before passing an order, the defendant is first of all to be called upon to furnish security in shape of specific sum to produce and place it at the disposal of the Court when required the property specified by the plaintiff in his petition or such portion of it is as may be sufficient to satisfy the decree or call upon him to show cause as to why he shall not furnish security. **(Chairman & Managing Director Rashtriya Paryojana Nigam Ltd., New Delhi vs. Rambachan Singh, AIR 1998 AP 127)**

(7) The fundamental principle that an application under Order XXXVIII, Rule 5, CPC can be filed only against a defendant where it is apprehended that he is likely to remove his properties from jurisdiction of trial Court was badly ignored. **(LAO (SDC), Somasila Project Officer, Rajampet vs. Vijaykumar, AIR 2009 NOC 646 (AP))**

(8) Where plaintiff does not know as to relation to which property of defendant attachment was to be sought, it is Court that will direct the defendant to disclose his property so that the Court can order its attachment, accordingly, the Court has sufficient power to direct the defendants to disclose the assets. **(Merine Container Services (I) Pvt. Ltd. vs. Rajesh Dheerajlal Vora, 2002 (1) CIV LJ 427 (Bom.))**

(9) Satisfaction of Court necessary as to practical certainty of plaintiff's

success. Also existence of grave danger as well as fear of dishonest defendant who is making away with probable fruits of decision. Before exercising jurisdiction under Order XXXVIII, Rule 5, CPC for attachment of properties before judgment, the Court should satisfy itself of practical certainty of plaintiff's success and of existence of a grave danger and of a real fear that the defendant, undoubtedly, is liable in making away with probable fruits of judgment. **(Cosmopolitan Trading Corpn.M/s. vs. M/s. Engg. Sales Corporation, AIR 2001 Raj. 331)**

(10) An attachment before judgment cannot be ordered for mere asking. The Court should get satisfied about prima facie case first. **(Vantaru Chinasubbarayudu vs. Smt. Y.Lalitha Vani, AIR 2009 NOC 325 (AP))**

(11) In **Syndicate Bank vs. M/s. National Wire Products, (AIR 1994 Guj. 2)**, the Gujarat High Court has held that attachment before judgment under Order XXXVIII, Rule 5 shall not affect the rights existing prior to the date of attachment and the order passed under Order XXXVIII, Rule 5 for attachment of property before judgment does not confer any title, charge, lien or priority in favour of a person attaching it.

(12) Attachment before judgment not affect the right of one who is not party to suit. **(My Forex Services (P) Ltd. vs. Monfforex and Travels Ltd., AIR 2008 Mad 42)**

(13) The conditional attachment can't be declared as void on account of the court not following the procedure under O 38 R 5 (1) CPC as per the sub-rule 4 in view of O 38 R 5 (3). **(Y.Chandra Reddy Vs. N.Chandramouli Naidu (1991 (2) ALT 343)**

(14) Issue of notice to the defendant under O.38-R.5 (1) is absolutely necessary before any order under O.38-R.5 (3) is made. **(In Mahindra & Mahindra Financial Services Ltd., Vs. Thalamadla Durga Goud (2006 (5) ALT 645)**

(15) Dismissal of the execution Application does not extinguish the attachment made before the Judgment of the immovable property. Subsequent EP for the sale of said property is maintainable without further attachment. **(M/S Sri Varalakshmi Metal Stores Vs. Y. Bhaskhara Haranath (1976 (1) APLJ 76)**

- **Under O.21-R.57(1) CPC** the court has to pass separate order about the attachment and the period of attachment.
- **Under O.21-R.57(2) CPC** if the court omits to pass any such order the attachment shall be deemed to have ceased.
- **O.38-R.5(1) CPC** mandates a direction to the defendant to furnish the surety and only on failure of furnishing security the properties of the defendant will be attached. It may be at any stage of the suit.
- Whereas as per **O.38-R.1 CPC** no such notice is necessary before issue of a warrant but on production of defendant only the Court should issue show cause. If the defendant fails to give security for his appearance or to give security for the suit amount the court will commit the defendant to civil prison under O.38-R.4 CPC up to 6 months.

- An Order of attachment made by court ceases to operate in case if the suit is dismissed (**Bank of India, Visakhapatnam Vs. Avtar Singh Oberai (1986 (1) ALT 109)**)
- Attachment effected before the Judgment and the suit was dismissed by the trial Court but Decreed in an Appeal. The attachment will not revive automatically after Appellate Court's Decree. (**K. Devadatham Vs. Union of India (AIR 1958 AP 216)**)
- An Appeal against the Decree of dismissal or an Order of the remand does not revive the order of the attachment made before the Judgment. (**Punjab National Bank, New Delhi Vs. V. G. Maheshwarappa and company (2012 (1) CLT (75)**)
- **Right of person not party to suit – Attachment before judgment:-** Attachment before judgment not effect the right of one who is not party to suit. (**My. Forex Services (P) Ltd., vs. M/s. City Men Forex and Travels Ltd., AIR 2008 Mad 42)**)

## **APPOINTMENT OF COMMISSIONERS**

### **Order 26 of Civil Procedure Code deals with:-**

- (1) Commissions to Examine Witnesses (O.26-R.1 to R.8 CPC)
- (2) Commissions for local investigations (O.26-R.9 and R.10 CPC)
- (3) Commissions for scientific investigation, performance of ministerial act and sale of moveable property (O. 26-R.10A, R.10B, R.10C CPC)
- (4) Commissions to examine accounts (O.26-R.11 and R.12 CPC)
- (5) Commissions to make partitions (O.26-R.13 CPC)
- (6) Commissions issued at the instance of foreign Tribunals (O.26-R.19 to R.22 CPC)

### **Case laws on appointment of Commissioners:-**

In **Sarala Jain and others vs. Sangu Gangadhar and others (2016 (3) ALT 132)**, it was held that to appoint an advocate commissioner, Court has to keep in mind the following:

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

- It cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an Advocate Commissioner can be appointed – However, a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the

property as it is a judicial function. **(Mohammed Jaffer Abdul Qadeer Qureshi vs. Aziz-ur-Rehman Qureshi and others, 2016 (3) ALT 477)**

Order 26 Rule 10-A is one of the important aspect and Commissioner can be Appointed for scientific investigation. Principles under R.10-A as laid down by their lordship's in **S.Chinnathai vs. K.C. Chinnadurai** 2010(1) LW 646 : 2010 (1) MWN (Civil) 413 : 2010(3) MLJ 65: 2009 Indlaw Mad.2070

**The following principles emerge for consideration:**

(1) The Civil Court is having jurisdiction to send the document to the Forensic Expert for comparing the signatures between the disputed documents with the admitted documents by appointing a Commissioner and get a report.

(2) When the Civil Court is exercising its power under Section 73 of the Indian Evidence Act, 1872, the civil court will have to exercise its power under Order 26, Rule 10A of the code of Civil Procedure , 1908 instead of invoking section 73 of the Indian Evidence Act, 1872.

(3) The Commissioner, being an officer of the Court can be asked to take the original document.

(4) When the Advocate Commissioner takes the original document, and then a certified copy of the same will have to be kept under the custody of the Court.

(5) The Civil Court cannot direct the disputed document to be compared with the vakalat or written statement of a party.

(6) When the Civil Court comes to the conclusion that the power under Order 26, Rule 10A of the Code of Civil Procedure , 1908 should be invoked, then the Civil Court shall invoke the same even without an application from the parties concerned in the interest of justice and in order to solve the dispute between the parties.

(7) When a document is sent to an Expert it should be sent only to the Government Department Expert and not to a Private Expert. While sending a document to an Expert, the original of the same has to be sent since it is not possible to compare the Xerox copies with the other admitted documents.

(8) The Civil Court shall not dismiss an application seeking for the examination of the document by an expert on the ground of quoting of wrong provision of law and in such a case, the Court shall exercise under Order 26, Rule 10A of the Code of Civil Procedure, 1908.

(9) The Civil Court shall exercise under Order 26, Rule 10 A of the code of Civil Procedure . 1908 even when a prayer is sought for a direction to summon the Expert to the Court for the purpose of examining the document.

(10) An application filed under Order 26, Rule 10 A of the Code of Civil Procedure, 1908 will have to be filed at the earliest opportunity in the normal circumstances.

The following are to be considered for accepting or rejecting a report of the Commissioner as laid down by their lordships in **Gnanaraj vs. Bakyalakshmi** [2006 (4) CTC 258]

- (i) Under Order 26, Rule 10(2), Code of Civil Procedure, the report of the Commissioner and the Evidence taken by him shall be Evidence in the suit and shall form part of the record;
- (ii) The Court itself could examine the Commissioner and in such cases, the Commissioner is to be invariably examined as a Court Witness;
- (iii) When application is filed by any of the parties to the Suit to examine the Commissioner, it is the discretion of the Court to allow the Application. But permission should not be withheld arbitrarily. If permission is declined it must be by a reasoned order. When the Court grants permission to the party to examine the Commissioner, it is the discretion of the Court either to examine the Commissioner as a Court Witness or as that of the Party's witness;
- (iv) In the facts and circumstances of the case, the Court has to judicially determine whether the Commissioner is to be examined as a Court witness or the Party's Witness?
- (v) The contention that in all the instances the Commissioner is to be examined only as a Court Witness, is unacceptable. Protection is afforded to the Commissioner from any vexatious examination by either of the party.

The party in an appeal has filed petition for Appointment of a Commissioner to note down the physical features. A Commissioner can be Appointed by the Appellate Court to note down the physical features. (**T.Ravindra Kumar Vs. P. Chenga Reddy** (1991 (3) ALT (129) (**T. S. Ramesh Vs. Neelakandan** (2004 (2) CTC (674)

**In Sridhar Shetty Vs. Narayana Naick [2005 (5) KR LJ 458]:-**

Order 41, Rule 27 of Code of Civil Procedure would come into play when the evidence is sought to be produced during the course of the proceedings at appellate stage. It is only after the report is placed before the Court, it would partake the character of additional evidence which, will have to be considered along with the main appeal.

**In Pr. Chockalingam Vs. M. Pichai And V. Lakshmanan (2003 (2) MLJ 399)**

"An analysis of the above judgments would lead to an irresistible conclusion that the appellate Court, while considering the application for appointment of commissioner, should not order the application for the sake of asking. Since the power could be exercised judicially, the proper application of mind to the facts of

the case is essential before either ordering or rejecting such application. No hard and fast rule can be laid down that in all cases of application filed for appointment of commissioner, that it should be only heard along with the appeal and the Court should order the appointment of commissioner only in the event it satisfies for such commission during the hearing of the appeal."

**In C.R.P.No.997 of 2013, Hon'ble High Court of AP held that:**

An appeal filed against a decree in a suit has to be decided on the basis of the evidence, which was made part of record by the trial Court.

In case, the appellant feels that additional evidence needs to be taken on record, an application under Rule 27 Order 41 CPC needs to be filed. It is only when the circumstances, that are mentioned in the provision, are established, that an appellate Court can consider the feasibility of granting permission.

Appointment of advocate commissioner at the stage of appeal is a rare phenomenon and the scrutiny into it would be more stringent, compared to the one filed under Rule 27 of Order 41 CPC.

The difference between the Appointment of Commissioner under Or.26 R.9 and Or.39 R.7 CPC discussed in **Jayalakshmi constructions vs. Nawab Behboob Alikhan (2006 (2) ALT (132)**

- The word local "investigation" in Order 26, Rule 9, whereas the word inspection was used in Rule 7 of Order 39. The word "investigation" mean an inquiry to find out certain facts, whereas inspection merely was observation as to the state of things. Moreover, Order 39 appears in the Chapter on "temporary injunctions and interlocutory orders." Whereas, Order 26 deals with Commissions. Quite obviously the two provisions of the Code have different meanings and purposes. **(Hashmukhlal Harjivandas Sanghvi Vs. Ishwarlal Jethalal Prakesh (1986 (1) GLR 257)**

In **Bandaru Mutyalu and another vs. Palli Appalaraju (4) 2013 (6) ALT 26** and it had held that in circumstances where there is controversy as to identification, location or measurement of the land, local investigation should be done.

The object of the local investigation under Order XXVI Rule 9 CPC is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but can be taken only from the peculiar nature, on the spot. The Commissioner in effect is a projection of the Court appointed for a particular purpose. The law of evidence enjoins upon a party to prove the fact which he relies on and in that sense, an obligation is cast upon the party; and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in

the interlocutory proceedings under Order XXVI Rule 9 CPC. (**Jajula Koteswar Rao vs. Ravulapalli Masthan Rao, 2016 (1) ALT 134**)

In **C.Veeranna vs. C.Venkatachalam (2) 1958 (5) ALT 792**, had held that even ex-parte and without issuing notice to the other side, an Advocate Commissioner can be appointed.

In **Savitramma and another vs. B.Changa Reddy (3) 1988 (6) ALT 353**, a learned Single Judge of this Court had held that it cannot be said that no Commissioner could be appointed before the issues are framed or evidence is led.

The three suits are respectively filed for specific performance of respective agreements of sale in respect of the respective suit schedule properties. According to the plaint averments, the suit schedule properties in the respective suits are hayrick yards. According to the defence, they are agricultural lands being parts and parcels of a huge extent of agricultural land in different survey numbers. Since the defendant disputed the nature of the said schedule land in each of the suits, the appointment of an Advocate Commissioner was sought by the plaintiff/s to ascertain whether the suit schedule land in each suit is a hayrick yard or an agricultural land. The trial Court appointed the Advocate Commissioner for the said purpose. The law is lucid that in any suit in which the Court deems that a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a Commission to any person as it thinks fit directing him to make an investigation and report to the Court. When there is a dispute about the nature of the land in each of the three suits and also about the use to which the respective lands in the three suits are being put to, the appointment of an Advocate Commissioner to inspect the schedule lands in the suits and note down the nature of the said lands and the uses to which the lands are being put to, cannot be faulted and the appointment of Commissioner for the said purpose by no stretch of imagination can be called as an attempt to gather evidence. (**Mundladinne Gopal Reddy vs. P.Ramachandra Reddy, 2016 (5) ALT 728**)

## **APPOINTMENT OF RECEIVERS**

### **Order XL of the C.P.C deals with Appointment of Receivers**

Appointment of receivers:- (1) Where it appears to the Court to be just and convenient, the Court may by order,

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for

the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

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

**RELEVANT CIVIL RULES OF PRACTICE:-** Rules 286 to 293 deal with the procedure relating to appointment of receivers, their duties etc.,

A receiver is an officer or representative of the Court and he functions under its directions. He is not an agent of the party for and on whose behalf he is appointed. He acts on behalf of the Court and is expected to protect the property. Appointment of receiver is considered as one of the harshest remedies and it allowed only in extreme cases and in circumstances where the interest of person seeking the appointment of receiver is exposed to manifest peril. Protection of properties and safeguarding the rights of the parties are the twin objectives impelling the appointment of receiver. If there is a waste and mismanagement of property Court would certainly intervene and appoint receiver. The mere circumstance that the appointment of receiver will do no harm to anyone is no ground for appointing receiver. Receiver can be appointed at any time not only on the application of a party to the suit but also of one who is not a party to the suit but interested in the preservation of the property.

**Guiding principles for appointment – AIR 1955 Mad 430 (Five principles), AIR 1987 Karnataka 204.**

Order XL Rule 1 – Appointment of Receiver – Application was filed by plaintiff, the Trust Association of the Convention of the Baptist Churches of the Northern Circars (CBCNC), for appointment of Receiver on ground that in spite of granting injunction on earlier occasion, plaintiff unable to protect its possession – Therefore, appointment of Receiver imperative so as to safeguard suit schedule property till disposal of suit – Receiver can be appointed even in a suit for injunction provided a good title to the property is shown to Court, a special equity in his favour and the property in the hands of defendant is in danger of being wasted i.e., to preserve status quo ante during litigation – The words 'just and convenient' in Rule 1 of Order XL CPC, construed to mean that it is practicable and the interest of justice requires it – The word 'just' can be said to be right in accordance with law and justice – Five requirements to be followed in a case where a receiver can be appointed to manage the property pending disposal of suit – (Requirements set out) – while exercising judicial discretion, whole of circumstances to be taken into consideration – Unless a receiver is appointed the property is in dissipating or

an irreparable mischief would be caused – with regard to prima facie title, appointment of Receiver is discretion of Court, to be exercised judiciously on settled legal principles.

**Held:** Therefore, appointment of Receiver is imperative so as to safe-guard the suit schedule property till the disposal of the suit.

There cannot be any dispute that a Receiver can be appointed even in a suit for injunction provided the Court comes to the opinion that it is just and convenient to appoint a receiver by showing a good title to the property, a special equity in his favour and the property in the hands to the defendant is in danger of being wasted i.e., to preserve the status quo ante during litigation. The words 'just and convenient' has been construed, as meaning that it is practicable and the interest of justice requires it. In ascertaining what is a just or convenient, regard should be had to what is just according to settled legal principles as well as to what is convenient. The word 'just' can be said to be right in accordance with law and justice.

Five requirements ordinarily have to be followed in a case where a receiver can be appointed to manage the property pending disposal of the suit. Those requirements are set out in the decision reported in **K.Mangamma vs. K.Brahma Reddy (1989 (1) Law Summary 30)**, which are thus:

*“(1) The appointment of Receiver pending a suit is a matter resting in the discretion of the Court; (2) The Court should not appoint a Receiver except upon proof of the plaintiff that prima facie he has a very excellent chance of succeeding in the suit; (3) Not only the plaintiff show a cause of adverse and conflicting claims to property, but he must show some emergency of danger or loss demanding immediate action and of his own right he must be reasonable clear and free from doubt. The element of danger is an important consideration, (4) An order appointing a Receiver will not be made where it has the effect of depriving a defendant of a 'defacto' possession since that might cause irreparable wrong. It would be different where the property is shown to be 'in modio' that is to say in the enjoyment of no one; and (5) The Court on the application made for the appointment 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. These well recognized principles are generally be considered and applied to the fact of a particular case”.*

Similarly those five requirements have also been highlighted in a decision reported in **State Bank of India vs. Jayshree Ceramics Pvt. Ltd. (AIR 1987 Calcutta 194)**.

While exercising the judicial discretion in appointing the receiver, the whole of the circumstances of the case has to be taken into consideration. Unless a receiver is

appointed the property is in dissipating or an irreparable mischief would be caused. With regards to prima facie title, the appointment of Receiver is discretion of the Court, which has to be exercised judiciously and on settled legal principles.

**AIR 1971 A.P. 380; 1989 (1) Law Summary 30; AIR 1987 Calcutta 194; AIR 1955 Madras 571 – Relied on.**

**Trust Association of the Convention of the Baptist Churches of the Northern Circars (CBCNC), represented by its Chairman TDS Kumar vs. Smt. J.Malini Tyagaraj and others; 2010 (4) ALT 331 = 2010 (4) ALD 57 = 2010 (2) L.S. 73.**

In the absence of any application, the Court may appoint the Receiver while rejecting the application for temporary injunction to prevent larger mischief – **AIR 1998 Bom 87-98, 99.**

Court can appoint a receiver when relief of injunction may not serve the desired end in full.

Issuance of a temporary injunction does not affect the right as to appointment of a Receiver and even after the issuance of temporary injunction can be appointed – **AIR 1978 Allahabad – 189.**

This is my humble submission of the topics designated to me.

I thank one and all.

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SMT. K.SUDHAMANI  
JUDGE, FAMILY COURT,  
SRIKAKULAM.

# INTERLOCUTORY APPLICATIONS

## Sub-Topics:-

1. Checking and Registration of Interlocutory Applications
2. Enquireis and Orders In Interlocutory Applications: Temporary injunctions, Attachment before Judgments, Appointment of Commissioners and Receivers
3. Examination of Witnesses and Recording of evidence in Interlocutory Applications
4. Impleadment of third parties vis-à-vis Doctrine of Dominus Litus

## INTRODUCTION:

The meaning of 'Interlocutory application' is given in the Rule 2 (j) of A.P. Civil Rules of Practice and Circular Orders, 1980. It reads: 'Interlocutory application' means an application to the court in any suit, appeal or proceeding already instituted in such court, other than a proceeding for execution of a decree or order. There is no specific definition in Civil Procedure Code, 1908 to this phrase 'Interlocutory application'. Rules 53 to 60 deal with Interlocutory Proceedings. Further, the word "application" is defined in Rule 2 (c) that includes execution application, execution petition and interlocutory application, both written and oral. A comprehensive reading of the definition as above would unveil that interlocutory application is one species of a broader term of 'application', but the execution application is not an interlocutory application. For the purpose of applications in the execution, the definitions are given in the Civil Rules of Practice.

They read:  
Rule 2(e) "Execution Petition" means a petition to the court for the execution of any decree or order;

Rule 2(f) "Execution Application" means an application to the court made in a pending execution petition, and includes an application of transfer, of a decree. These definitions would denote that the term "interlocutory application" will be generally used in Suits and proceedings similar to suits. The other relevant provision in the Civil Procedure Code relating to the interlocutory applications is Section 141 CPC. Further,

Sec. 141 is also relevant in this context. – It says abouts 'Miscellaneous proceedings' : The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. Explanation: In this section, the expression "proceedings" includes proceedings under Or IX, but does not include any proceeding under Art. 226 of the Constitution

*In this context, some key points that are to be kept in mind are succinctly explained with fulcrum of some important rulings in this paper for better interaction on this topic.*

**Key underlying factors:**

1. The Hon'ble Supreme Court, in Ramachandra Agarwal vs. State of U. P and another AIR 1966 SC 1888, held "though there is no discussion, this Court has acted upon the view that the expression `Civil Proceedings` used in Sec.141 CPC is not necessarily confined to an original proceeding like a suit or an application for appointment of guardian etc., but it applies also to a proceedings which is not an original proceeding." From this view it would follow that the procedure contemplated in the Code with regard to suits shall be followed in all proceedings in any court of civil jurisdiction, not only in original proceedings but also in other proceedings.
2. As seen from ratio laid down in Manthrala Chandrakala vs. Mandan Janakiram Singh (2004) 5 ALD 156 (Gunnam Venkateswara Rao vs. Vanaja Kumari (2004) 4 ALD 786, it is held that the principles underlying Or 22 Rule 4 CPC cannot be limited to the judgments in suits only. They apply to the disposal of applications with equal force, as is evident from section 141 CPC.
3. As was held in Gunnam Venkateswara Rao vs. Vanaja Kumari (2004) 4 ALD 786, when an application to bring on record the Legal Representatives of a deceased party is pending, an application under Or 1 Rule 10 CPC to add party to the miscellaneous petition is maintainable in the light of section 141 CPC.

**1. CHECKING AND REGISTRATION OF INTERLOCUTORY APPLICATIONS:**

As to checking and registration of interlocutory applications, the following provisions are most relevant.

a) Form of Interlocutory Application as in Form No.13:- If we go through Rule 53 of the Civil Rules of Practice, it is known that interlocutory applications shall be made as in Form No.13. This rule reads as infra:  
53. (29) Form of Interlocutory Application:- Interlocutory applications shall be headed with the cause title of the plaint, original petition, or appeal, as in Form No. 13.

b) What An Interlocutory Application shall state:- If we go through Rule 54 of the Civil Rules of Practice, what an Interlocutory application shall state is known to us. This rule reads as infra:  
54. (30) Contents of :- Except where otherwise provided by these rules or by any law for the time being in force, an Interlocutory Application shall state the provision of law under which it is made and the order prayed for or relief sought in clear and precise terms. The application shall be signed by the applicant or his Advocate, who shall enter the date on which such signature is made every application in contravention of this rule, shall be returned for amendment or rejected.

c) There shall be separate application in respect of each distinct relief:- As seen from Rule 55, there shall be separate application in respect of each distinct relief prayed for. Further, when one interlocutory application is filed combining several reliefs, the court may direct the applicant to confine the application only to one of such relief's unless the relief's are consequential and to file a separate application in respect of each of the others. This rule reads as follows:-

55. (30) Contents of :- There shall be separate application in respect of each distinct relief prayed for. When several relief's are combined in one application, the court may direct the applicant to confine the application only to one of such relief's unless the relief's are consequential and to file a separate application in respect of each of the others.

It is held *Supriya Cold Storage, Warangal vs. K. Sambasiva Rao and others* (2006) 3 ALD 659 a single petition with multiple prayers is not maintainable and there should be separate application in respect of each distinct relief prayed for. A petition to condone the delay in setting aside the *ex parte* decree being interconnected with main relief, namely, setting aside *ex parte* decree, squarely falls under category of consequential reliefs, which are exempt from requirement of Rule 55 of CRP, See: *Kavali Narayana and others vs. Kavali Chennamma* (2005) 1 ALD 672 . and so, it was held that a single petition can be maintained. These two judgments were found not inconsistent to each other as seen from another ruling. See. *Massarath Yasmeen vs. Mohammed Azeemuddin* (2011) 6 ALT 202. As per this ruling, if the relief is separate and distinct as per Rule 55 of CRP, two separate applications have to be filed. When one relief is ancillary to the main relief or inter-connected to the main relief two prayers can be asked for in one petition and those prayers can be granted. Even otherwise, as per Rule 55, if two separate applications are necessary, the court may direct the party making the application to file two separate applications. However, when once the party is entitled to the relief, the Court is not supposed to dismiss the petition on the technical ground, as observed in this ruling.

d) Court has power to reject or dismiss an application under rule 56:-

Court may reject interlocutory application if substantive order is not asked for. Rule 56 reads as follows:-  
56. (31) May rejected if substantive order is not asked for:- Every application which does not pray for a substantive order but prays merely, that any other application may be dismissed, and every application which prays for an order which ought to be applied for on the day fixed for the hearing of any suit, appeal or matter, may be rejected with costs

e) Out of order petition:- If the applicant intends to move an urgent (out) of order application, copy of such application shall be served to the advocate or the party and it shall contain an urgent application on the day specified in the endorsement. See Rule 57 which reads as follows:-

57. (New) Out of order petition:- Whenever it is intended to move the application as an urgent (out) of order) application, the copy of the application served on the Advocate or the party appearing ion person shall contain an urgent application on the day specified in the endorsement.

f) Service of Notice shall be given not less than three days:  
As seen from Rule 58, unless the court otherwise orders, notice of an interlocutory application shall be given to the other parties to the suit or matter or their Advocate not

less than three days before the day appointed for the hearing of the application. 58. (32) Service of Notice:- 1. Unless the court otherwise orders, notice of an interlocutory application shall be given to the other parties to the suit or matter or their Advocate not less than three days before the day appointed for the hearing of the application. 2. Such notice shall be served on the Advocate whenever the party appears by such Advocate. 3. Notice of the application may be served on a party not appearing by Advocate by registered post "ACKNOWLEDGEMENT DUE, OR BY SPEED POST OR BY AN APPROVED COURIER SERVICE OR BY FAX MESSAGE OR BY ELECTRONIC MAIL SERVICE OR BY SUCH MEANS" to the address given in the pleading acknowledgement per-paid and in the event of its non- service on the party by means of summons to be delivered to the party or in the event of the party being absent or refusing to receive the same, affixature at his address. 4. Unless the court, otherwise orders, notice of Interlocutory application need not be given to a party, who having been served with the notice in the main suit, appeal or other proceedings, has not entered appearance or to a party to whom notice in the appeal has been dispensed with under the provisions of Rule 14 of Order XLI of the Code.

g) Supply of Copies to opposite party:-

Rule 59 tells us to supply every interlocutory application shall be supported by an affidavit and true copies of the application. Those copies shall be supplied to the opposite party or his advocate. This rule reads as follows: 59. (New) Copies to opposite party:- Every interlocutory application shall be supported by an affidavit and true copies of the application, affidavit and the documents, if any which the applicant intends to use or on which he intends to rely, shall be furnished to the opposite party or his advocate, unless otherwise ordered, not less than three clear days before the hearing date.

## **2. ENQUIREIS AND ORDERS IN INTERLOCUTORY APPLICATIONS: TEMPORARY INJUNCTIONS, ATTACHMENT BEFORE JUDGMENTS, APPOINTMENT OF COMMISSIONERS AND RECEIVERS**

An interlocutory order is an order that does not finally determine the rights, duties and obligations of the parties to a proceeding. Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit. Applications for appointment of Commissioner, Temporary Injunctions, Receivers, payment into court, security for cause, and etc. According to Stroud, interlocutory order means an order other than a final judgment Section 94 summarises general powers of a civil court in regard to different types of Interlocutory orders. The detailed procedure has been set out in the I Schedule of the C.P.C which deals with Orders and Rules.

a) Sec.94 CPC – Supplementary Proceedings: In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any

order for security commit him to the civil prison;  
(b) Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;  
(c) Grant a temporary injunction and in case of disobedience, commit the person guilty thereof to the civil prison and order that his property be attached and sold;  
(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;  
(e) Make such other interlocutory order as may appear to the court to be just and convenient.

b). Is there any difference between supplementary proceedings and incidental proceedings?

A supplementary proceeding is initiated with a view to prevent the ends of justice from being defeated. The supplemental proceedings may not be taken recourse to as a routine matter but only when an exigency arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardship to the other side and, thus, are required to be taken recourse to, when a situation arises therefor and not otherwise. There are well-defined parameters laid down by the Courts from time to time as regards the applicability of the supplemental proceedings. Incidental proceedings are, however, taken recourse to in aid of the ultimate decision of the suit which would mean that any order passed in terms thereof, subject to the rules prescribed therefor, would have a bearing on the merit of the matter. Any order passed in aid of the suit is in exercise of ancillary powers. Whenever an order is passed by the Court in exercise of its ancillary power or in the incidental proceedings, the same may revive on revival of the suit. But so far as supplemental proceedings are concerned, the Court may have to pass a fresh order for their revival.

### c). **Temporary Injunctions:**

1. The grant of injunction is in the nature of equitable relief and the court has undoubtedly power to impose such terms and conditions as it thinks fit. ("DALPATKUMAR AND OTHERS VS. PRAHALAD SINGH AND OTHERS" reported in 1992 (1) SCC 719").

2. The circumstances under which Interlocutory mandatory injunction could be granted has been dealt with in "Dorab Cawasji Warden VS. Coomi Sorab Warden and Ors, 1990 (2) SCC 117. Also see: "Glaxo Smithkline Consumer Healthcare Limited, Registered Office, Gurgaon through its Managing Director and Others vs. All Stores through its Proprietor S.M.Abdul Gani, 2009 (8) MLJ 845.

3. "Martin Burn Ltd. vs. R.N.Banerjee, AIR 1958 SC 79". Once the existence of prima facie case is made out the court should analyze the 2nd condition viz., the irreparable injury. Only if the applicant would suffer irreparable injury if interim injunction is not granted then the injunction can be granted. The court must be satisfied that the refusal of injunction would result in irreparable injury to the party seeking injunction. See:-

"Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Others, AIR 1985 SC 330".

4. The third condition for granting Interim Injunction is the balance of convenience must be in favour of the applicant. The balance of convenience test must be clearly in favour of the applicant for granting an Interim Injunction order. See:- "Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and Others, AIR 1985 SC 330".

5. The principles while dealing with temporary injunctions are enunciated in "Shiv Kumar Chadha vs. Municipal Corporation of Delhi, 1993 (3) SCC 161". Grant of injunction is "ex debito Justitiae", i.e. to meet the ends of justice.

6. If injunction is granted on insufficient ground then ultimately if suit fails, the plaintiff can be directed to pay such amount not exceeding Rs.50,000/- as damages to the defendant. This is made clear in Section 95 of C.P.C. Recently the Apex Court had an occasion to deal with imposition of costs in vexatious, frivolous, malicious or speculative litigation. This decision is reported in "Vinod Seth vs. Devinder Bajaj & Another , 2010 (8) SCC Page 1". This ruling deals with the nature of order that can be passed at the Interlocutory stage and what sort of conditions can be imposed.

**d). Appointment of advocate commissioners:-**

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 . (To know more, see To know more visit: <https://articlesonlaw.wordpress.com/2016/07/12/the-law-on-appointment-of-advocate-commissioner-in-suits/>.)

Appointment of Commissioner in terms of part III i.e. matter "Incidental proceedings" of CPC is provided by section 75 of the Code. Inasmuch as this article is concerned with the appointment of Commissioner section 75 of CPC being the provision relevant, empowering the court, it would be apposite to refer the provisions.

" 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."

When an application for appointment of advocate commissioner is filed, such application must be decided without any delay. As was held in *P. Pedda Saidaiah And Ors. vs T. Padmavathi*, 1997 (5) ALT 818, it is the duty of the Court to dispose of the interlocutory applications filed by the parties during the pendency of the suit within a reasonable time. Where in a suit for possession, the purpose of appointment of a Commissioner was to collect evidence the rejection for appointment of Commissioner is a proper one, as opined by the Hon'ble Madras High Court in *Raja vs Narashimamurthy* (2011), C.R.P.PD.No.3163 of 2009, dt.01.08.2011. It is well-settled that if the oral and documentary evidence are found enough to resolve the controversies in the suit, the rejection of application for appointment of a Commissioner is a valid one. It is provided under Order XXVI Rule 9 of CPC that 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 or damages or annual 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.

#### e). **Appointment of Receivers:-**

Chapter XVII, Rules 286 to 293 of A.P.Civil Rules of Practice and Circular Orders, 1980 deal with 'Receivers'. "Panch sadachar" for appointment of receivers:- In *Krishnaswamy Chetty v. C. Thangavelu Chetty*, AIR 1955 MAD 430, it was held that "The five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows (see: <https://articlesonlaw.wordpress.com/2010/12/10/guiding-principles-for-appointment-of-a-receiver/>) :

(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. (See: '*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 Madhab 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. (See: '*Dhumi v. Nawab Sajjad Ali Khan*', AIR 192.3 Uh 623 (Z16); -- '*Firm of Raghubir Singh' Jaswant v.*

Narinjan Singh', AIR 1923 Lah 48 (217); -- 'Siam Das v. Mohabir Das', 27 Cal 279 (Z18); -- 'Mahammad Kasim v. Nagaraja Moopnar', 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. (See: "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. (See: '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) The 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 disintitiled himself to the equitable relief by laches, delay, acquiescence etc."

**f). Attachment before Judgment:-**

'An attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree eventually made, from the defendant property'. This is the object of the Order 38 rule 5 of The Civil Procedure Code,1908 (herein after referred as CPC). See. Ganu Singh Vs Jangi Lal, 26 C 531. The scope and object of Order 38 rule 5 of CPC and the rules followed thereon merely to protect a plaintiff against loss arising from

the defendant making away with his property pending suit. An attachment before judgment is in the nature of an interlocutory order. (See: Some important judgments of the Hon'ble High Court of Andhra Pradesh as to the subject matter of 'Attachment before Judgment':-

- 1) Katari Ratna Rani vs Velagapudi Rama Rao And Ors, 2003 (6) ALT 79.
- 2) Mamidala Suresh Babu And Ors. vs Tirumalasetti Krishnamurthy, 2006 (3) ALT 250
- 3) State Of A.P. vs Prakash, 2007 (1) ALD 133, 2007 (1) ALT 383
- 4) Sri Laxmi Cloth Stores, ... vs Ratna And Co., Machilipatnam, 1999 (6) ALT 681
- 5) Rama Murthy And Ors. vs Srinivas Corporation General , AIR 1989 AP 58
- 6) S.P. V. Babu v. Varalakshmi Finance Corporation, 1996 (4) ALD 453,
- 7) Union Bank Of India, Visakapatnam's case, AIR 1982 AP 408
- 8) Duvvuru Siva Kumar Reddy vs Malli Srinivasulu, 2006 (1) ALT 570
- 9) Allu Appa Rao vs Siriki Bapu Naidu And Ors, 2006 (5) ALD 240
- 10) Gosu Venkata Sesha Reddy And Anr. vs Valluru Krishnaiah, 2005 (4) ALT 238
- 11) Ananthula Buchiramulu vs Sakinala Janaki Ramaiah, 2004 (2) ALD 730
- 12) Pasupulati Seshanna vs Epparala Balaiah (Died) Per Lrs, 2006 (3) ALD 511).

**Settled principles for granting attachment before judgment:-**

In the case of Premraj Mundra vs Md. Maneck Gazi And Ors.: AIR 1951 Cal 156, the following principles are given in para 10 as to attachment before judgment . (Visit : <https://articlesonlaw.wordpress.com/2015/10/18/attachment-before-judgment/>) :

- (1) That an order under Order 38, Rules 5 & 6, can only be issued, if circumstances exist as are stated therein.
- (2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.
- (3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defts. would not be prejudiced.
- (4) That the affidavits in support of the contentions of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated. (5) That a mere allegation that the deft. was selling off & his properties is not sufficient. Particulars must be stated.
- (6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.

- (7) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf's claim.

- (8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit has been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, & to draw an inference as to whether the deft. is about to dispose of the property, & if so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.

- (9) The fact that the deft. is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

- (10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

- (11) Where however the deft. starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'s claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the pltf's'. claim.

- (12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the pltf's'. claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the deft. Where the removal is to a foreign country, the inference is greatly strengthened.

- (13) The deft. in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere neglect, or suffering execution by other creditors, is not a sufficient reason for an order under Order 38 of the Code.

- (14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the pltf's. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations.

### **3. EXAMINATION OF WITNESSES AND RECORDING OF EVIDENCE IN INTERLOCUTORY APPLICATIONS.**

a). Sec. 141 CPC: In fact, confining the evidence to the form of affidavits at the interlocutory stages is adopted mostly as a measure of convenience. With the recent amendments to the Code, the evidence through affidavits also stands equated to that of oral evidence. The broad principles such as reference to pleadings, evidence,

appreciation of the contentions, application of the provision of law, need to be followed even while disposing of interlocutory applications. It is pertinent to note that the Code does not prescribe any special procedure to be observed in regard to interlocutory or miscellaneous proceedings. Sec. 141 mandates that the procedure provided for in the Code in regard to suit, shall be followed in all the proceedings in any Civil Court as far as possible. See: *Asia Vision Entertainment limited vs. Suresh Productions* (2004) 3 ALD 874.

b). Proof of facts by affidavit: Chapter-V, Rule 60 of the Civil Rules of Practice makes it clear that the facts that are necessary for adjudication of the interlocutory applications are to be proved by affidavits. This rule reads as follows:-

60. (33) Proof of facts by affidavit:- Any fact required to be proved upon an interlocutory proceeding shall unless otherwise provided by these, rules, or ordered by the court, be provided by affidavit but the Judge may, in any case, direct evidence to be given orally, and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibits shall be prepared and annexed to the judgment.

As was observed in *S. Ravinder vs G. Dasarath*, 2004 (4) ALD 851, 2004 (5) ALT 217, , the facts that are necessary for adjudication of the applications are to be proved by affidavits, as provided for under Rule 60 of the Civil Rules of Practice. It is true that depending on the circumstances of the case, the Court may record oral and documentary evidence at that stage also.

c). Recording of evidence and examination of witnesses in interlocutory stage – Some relevant provisions and case-law :-

1. In *Kanbi Mavji Khimji And Anr. vs Kanbi Manjibhai Abjibhai And Ors.* AIR 1968 Guj 198, (1968) 0 GLR 907, See Para 5, wherein it was observed that when the Court has been given special power to decide certain interlocutory matters by affidavit, that power is unfettered. It is not subject limitations and conditions prescribed.

2. As is discussed above, under Rule 60 of the Civil Rules of Practice makes it clear that the facts that are necessary for adjudication of the interlocutory applications are to be proved by affidavits.

3. The language mentioned in Order 39 rule 1 'Where in any Suit it is proved by affidavit or otherwise—' has some meaning. From this, it can be understood that a fact as to interlocutory application filed under Order 39 Rule 1 CPC can be proved by an affidavit.

4. Here, it is most relevant to consider Order 19, Rule 1 of CPC. It says as follows:-  
ORDER XIX- AFFIDAVITS 1 . Power to order any point to be proved by affidavit— Any Court may at any time for sufficient reason order that any particular fact or facts may be

proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable : Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

5. Order 18 rule 4 of CPC says that witnesses to be examined in open Court— The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the judge. As seen from this provision, it is applicable to hearing suits. Of course, even in suits, party is permitted to submit Examination-In-Chief affidavits.

6. Section 30 (c) of CPC says that order any fact to be proved by affidavit. According to Indian Evidence Act, 1873, " Evidence" means and includes- , (1) . all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence: (2) all documents produced for the inspection of the Court; . such documents are called documentary evidence.

7. In *Shamsunder Rajkumar, a firm v. Bharat Oil Mills, Nagpur*, AIR 1964 Bom 38, it was held as follows: 11. What evidence means and includes, is described in section 3 of the Indian Evidence Act, but affidavits are not included within that description. On the contrary, affidavits have been expressly excluded by section 1 of the Indian Evidence Act from the applicability of that Act, That means that affidavits cannot be used as evidence under any of the provisions of the Indian Evidence Act. Affidavits can however, be used as evidence, only under Order 19, of the Civil Procedure Code. In accordance with Order 19, Rule 1, of the Civil Procedure Code, the Court has, for sufficient reasons, to pass an order that any particular fact or facts may be proved by affidavit. That would mean that affidavit evidence: cannot be entertained unless the Court passes an order, for sufficient reasons, that any particular fact or facts may be proved by affidavits. While passing an order under Order 19, Rule 1, to call for evidence on affidavits, it is necessary to consider compliance with the proviso to Rule 1 and with the requirements of Rule 2, under Order 19, as the circumstances of each case may require.

8. *B. N. Munibasappa v. G. D. Swamigal*, AIR 1959 Mys 139. In Para 17 of the judgment, it was held as follows: 17. In my opinion, while it would not be correct to say that an affidavit cannot be regarded as evidence even though it is properly produced under Rule 1 or 2 of Order 19 of the C. P. C., it is clear that an affidavit can never take the place of evidence recorded in the ordinary way unless the case is one to which the provisions of those rules apply or the affidavit relates to a matter like an application for an attachment or an injunction in regard to which the Code itself has made express provision.

9. Also see, AIR 1954 AG 260, *Kanhaiyalal S. Dadlani v. Meghraj Ramkaranji* and in AIR 1942 Oudh 350, *Shib Sahai v. Tika*; *S. Ravinder vs G. Dasarath*, 2004 (4) ALD 851, 2004 (5) ALT 217, *MOHANLAL JUGARAJ KHABIYA VERSUS KAMLABAI W/O MADHAVRAO*, LAWS(BOM)-1981-2-37 and *GURSHARAN KAUR VS H.B.Singh*, LAWS(DLH)-1999-2-67

10. In interlocutory stage, when the Courts are concerned about prima facie case, the Court tries interlocutory applications on affidavits. Similarly, in a winding up petition, claims are adjudicated on the basis of the affidavits by the Company Court. But when Court feels the claims should be adjudicated upon in trial in those cases, Court directs and relegates the claims to a suit. See: *The Howrah Motor Company Limited vs Exide*

Industries Limited, (2005) 3 CALLT 573 HC

11. Sakalabhaktula Vykunta Rao v. Made Appalaswamy), A.I.R. 1978 Andhra Pradesh 103, in respect of disposal of the application under Order 39, Rule I on the ground that the scope of inquiries is quite limited and the rights of the parties was not being decided Finally.

#### **4. IMPLEADMENT OF THIRD PARTIES VIS-À-VIS DOCTRINE OF DOMINUS LITUS**

The term '**Dominus Litus**' is Latin phrase which means 'the master of the suit'. To say aptly, the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. (See: (<http://thelawdictionary.org/dominus-litis/>)). As was held in Mohannakumaran Nair vs Vijayakumaran Nair (CASE NO.: Appeal (civil) 4811 of 2007, DATE OF JUDGMENT: 11/10/2007), application of doctrine of dominus litus is confined only to the cause of action which would fall within Sections 15 to 18 of the Code of Civil Procedure. It will have no application in a case where the provision of Section 20 thereof is sought to be invoked.

#### **Impleadment of third parties:-**

Basically, it is for the plaintiff in a suit, to identify the parties against whom he has any grievance and to implead them as defendants in the suit filed for necessary relief. He cannot be compelled to face litigation with the persons against whom he has no grievance. Where, however, any third party is likely to suffer any grievance, on account of the outcome of the suit, he shall be entitled to get himself impleaded. The question as to whether an individual is a proper or necessary party to a suit, would depend upon the nature of relief claimed in the suit and the right or interest projected by the persons, who propose to get themselves impleaded. No hard and fast rule can be weighed, that would cover a possible situation in this regard. (See: Pallapu Mohanarao (died) by LRs. v. Thammisetty Subba Rao and Others, 2011 (6) ALD 324, and Mitta Sanjeeva reddy and another v. Shaik fakruddin and another, 2011 (6) ALT 176, and Darji Krishna Murthy and 2 others vs. M.Shankar Reddy and 3 others, CRP No.3046/2012,date of judgment: 01-10-2013). Also see:- SURAJ LAMP AND INDUSTRIES PRIVATE LIMITED (THROUGH DIRECTOR) v. STATE OF HARYANA AND ANOTHER, (2012) 1 SCC 656; and RAMESH CHANDRA PATNAIK v. PUSHPENDRA KUMARI AND OTHERS, (2008) 10 SCC 708.

#### **CONCLUSION:-**

The meaning of the word 'Interlocutory application' can be understood that an application to the court in any suit, appeal or proceeding already instituted in such court, other than a proceeding for execution of a decree or order. Section 141 of CPC deals with miscellaneous proceedings. Every Interlocutory Application need not be tried as a suit under the guise of Sec. 141 CPC. Sec.94 CPC deals with Supplementary Proceedings. As has been discussed above, Chapter-V, Rule 60 of the Civil Rules of Practice makes it clear that the facts that are necessary for adjudication of the

interlocutory applications are to be proved by affidavits. As can be seen from dicta observed in S. Ravinder's case, depending on the circumstances of the case, the Court may record oral and documentary evidence at that stage also. It is only when the Court decides to record oral evidence instead of deciding the matter on affidavits, that the procedure for marking documents, as in the case of recording of the evidence in the suit, needs to be followed. Whenever an order is passed by the Court in exercise of its ancillary power or in the incidental proceedings, the same may revive on revival of the suit. But so far as supplemental proceedings are concerned, the Court may have to pass a fresh order for their revival. application of doctrine of dominus litis is confined only to the cause of action which would fall within Sections 15 to 18 of the Code of Civil Procedure. The question as to whether an individual is a proper or necessary party to a suit, would depend upon the nature of relief claimed in the suit and the right or interest projected by the persons, who propose to get themselves impleaded. No hard and fast rule can be weighed. An interlocutory order is an order that does not finally determine the rights, duties and obligations of the parties to a proceeding. Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit.

-X-

**PAPER PRESENTATION FOR THE WORKSHIOP ON THE SUBJECT:**

**INTERLOCUTORY APPLICATIONS**

Presented by: - **Smt.K.Nagamani**,  
1st Addl. Junior Civil Judge, Srikakulam.

The procedure required for proper and effective checking of interlocutory applications (IAs) is the following: -

- 1) First pick up the connected bundle.
- 2) Then verify case number and the names of parties with the connected original records and decrees of a suit (OS or SC),Appeal Suit (AS), Civil Miscellaneous Appeal (CMA),Execution petition(EP) etc.,
- 3) Cause title should be in the following manner: -
  - a) In the affidavit or verified petition the names of original parties should be as mentioned in the connected matter.
  - b) In case of Final Decree petitions and other verified petitions, like in plaint, there must be short and long cause titles of parties.
  - c) In the petition enclosed to affidavit the cause title should be in full descriptive manner.
    - i) The petition should contain the name of petitioner who filed the petition and category of him in the suit etc., like petitioner/plaintiff, Petitioner/defendant, Petitioner/respondent etc.,
    - ii) Then the names of respondents and their array in the connected suit etc., as plaintiff or defendant etc., like respondent/plaintiff, respondent/defendant, respondent/petitioner etc.,

d) If the petition is by third parties for impleading themselves as parties to the suit, the cause title should be (since all the parties to the proceedings must be shown)

i) Petitioners would be the proposed parties.

ii) Respondents would be

1) Respondent,

2) Respondents/plaintiffs

3) Respondents/defendants as the case may be

e) If the petition is for impleading of third parties by the parties to the suit, etc., the person who sought impleadment of the 3<sup>rd</sup> party, be shown as petitioner whether he is plaintiff or defendant or some of plaintiffs or defendants and then the correct procedure is that the proposed party be shown as respondent and if more than one, as respondents and the other parties on record whether some of plaintiffs or defendants (who are not covered as petitioners) must also be shown as respondents otherwise the names of proposed parties should not be shown in the cause title but their names and full description should be shown underneath the prayer portion of petition as proposed parties.

4) Verification of Affidavit: -

i) Whether the contents of affidavit are connected with the matter in which the petition is filed.

ii) If several petitioners are there and one party is swearing the affidavit, whether it is for himself or on behalf of others also.

iii) Whether there is signature of deponent with date, and

- iv) Whether verification of contents of affidavit is there with signature of attesting authority(Generally an Advocate) with full name or code number if allotted (see Sec.139 CPC)
- v) Petitioner the affidavit contents are from the deponent's personal knowledge or belief (with grounds of belief) or information(with source of information)to be stated clearly) (as per Rule 48 of CRP).

5) **Verification of petition:-**

- A) If it is a verified petition whether the same contained short and long cause titles correctly, name of the court whether correctly mentioned or not, the case number mentioned correctly or not, provision of law and whether the petition is in time are mentioned correctly or not, whether there is a specific prayer or prayers or not, whether there is any court fees payable or not, if so, whether correctly mentioned the provision of law and paid the court fees or not and whether jurisdiction of the court properly mentioned or not.
- B) If it is an affidavit petition to verify:
  - 1) Correct provision of law
  - 2) Prayer of the petition should be in consonance with the affidavit.
  - 3) Signature of petitioner or advocate on record for petitioner.
  - 4) There should be docket to the petition.
  - 5) In all IAs for each prayer there must be a separate petition supported by Affidavit (Rules 55 CRP).

**1st Addl. Junior Civil Judge,  
Srikakulam.**



## **Paper Presentation on the Doctrine of Dominus Litus**

**vis-à-vis**

**Impleadment of 3rd parties.**

*Submitted by*  
**Smt N.Saraswathi,**  
Junior Civil Judge, Narasannapeta

**Dominus litus** denotes that the person to whom a suit belongs. Thus plaintiff in a suit is dominus litus. He is a master of a suit or having dominion over the case. The general rule is that the plaintiff being author and master of suit, has prerogative to implead any one as the defendant in the suit instituted by him and cannot be compelled to sue a person relief and consequently a person against whom he does not seek any who is not a party has no right to be impleaded against the wishes of plaintiff. But this general rule is subject to provisions of Order 1 Rule 10(2) CPC which provides for impleadment of proper or necessary parties. Order 1 Rule 10 (2) says that the court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a

person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff.

In *Dr.T.Vijayendradas V. M.Subramanian (2006(3) CTC 702*, it had been held that a necessary party is one without whom no order can be made effectively and a proper party is one whose presence is necessary for the complete and final decision on the issues involved in the proceedings. The expression 'settle all the questions involved in the suit' used in Order 1 Rule 10, sub-rule (2) CPC is susceptible of a liberal and wide interpretation so as to take in the final adjudication of all the questions pertaining to subject matter thereof. Order 1 Rule 10(2) CPC empowers the court to bring before the court all the persons who are parties to disputes relating to one subject matter, so that all the disputes may be determined at the same time without the delay, inconvenience and expenses of separate actions and trials and it gives wide discretion to meet every case of defect of parties.

In the judgment of *Mazhar Hussain Vs. Shafi Mohd. & Ors reported in 1969 WLN 316*, it was held that plaintiff is **dominus litus** and cannot be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law because Order 1 Rule 10(2) CPC is applicable to two classes of cases only. In this case, this Court very carefully observed that the plaintiff being generally **dominus litus**, he can't be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law. The Order 1 Rule 10

CPC is wide enough empowers the court to implead the necessary party and thus Order 1 Rule 10 CPC itself suggests that there may be cases where even when the plaintiff is **dominus litus**, the court can implead the party in a suit, therefore, it cannot be said that impleading the party in a suit is beyond the jurisdiction of the court. It depends upon the facts of each case whether one be impleaded as party or not.

In the judgment delivered in ***Sumant Kumar Jain & Ors Vs. Pramod Kumar Agarwal & Anr reported in RLW 1998(3)***, again the plaintiff being **dominus litus** has been recognized and it has been held that plaintiff being **dominus litus** cannot be compelled to fight against some other litigants not of his own choice. This very judgment recognizes exception to this general rule and clearly observed that the rule empowers the court to permit a person or body of persons interested in any question of law in issue in any suit to present his or its opinion before the Court and to take part in the proceedings in the suit.

The Hon'ble Supreme Court in the case of ***Kasturi Vs. Iyyamperumal & Ors. [(2005) 6 SCC 733]***, has held that while addressing an application for impleadment, it cannot be forgotten that the plaintiff is **dominus litus** and cannot be forced to litigate against whom he does not want to fight unless it is a compulsion by the rule of law and that if the plaintiff did not want to join a person as a defendant in his suit, it was at the risk of the plaintiff himself. Similarly in the case of ***Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay & Ors. [(1992) 2 SCC 524]***, the Hon'ble Apex Court referring to the case of ***Razia Begum Vs. Anwar Begum [AIR 1985 SC 886]*** noted that it is a firmly established principle of law consequent to judicial decisions that in order that the person be added as a party to a suit he should

have a direct interest in the subject matter of litigation whether relating to moveable or immovable property. In the case of ***Mumbai International Airport Private Limited Vs. Regency Convention Centre & Hotels Private Limited & Ors. [(2010) 7 SCC 417]***, the Hon'ble Supreme Court had held that the general rule in regard to impleadment of parties is that the plaintiff in a suit, being **dominus litus**, may choose the person against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, the Hon'ble Supreme Court had held that a person who is not a party has no right to be impleaded against the wishes of the plaintiff. The Hon'ble Supreme Court in the aforesaid case was however pleased to consider the impact of order 1 Rule 10(2) CPC which is an exception to the principle of **dominus litus** and empowers the court to implead a person where it may be necessary to enable the court to effectually and completely adjudicate upon and settle all the questions involved in the suit. It was held that the order 1 Rule 10 (2) CPC did not confer any right on a non party to be impleaded as a party but conferred judicial discretion in the Court to direct the addition of a party in suit with the object of effectively and completely adjudicating upon and settling of all questions involved in the suit. The power of the Court under Order 1 Rule 10 (2) CPC is however subject to judicial discretion being exercised according to reason and fair-play and not according to whims and caprice.

Referring to suits for specific performance, the Hon'ble Supreme Court in ***Kasturi Vs. Iyyamperumal & Others. [(2005) 6 SCC 733]***, held that the following persons are to be considered as necessary parties: (i) the parties to the contract which is sought to be enforced or their legal representatives; (ii) a transferee of the property which is the subject-matter of the contract.

The Hon'ble Supreme Court also explained that a person who has a direct interest in the subject-matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party on his application under Order 1 Rule 10 CPC and concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant vendor will not be a necessary party.

While considering the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties, the Hon'ble Supreme Court observed that the said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice."

The provisions of Order 1, Rule 10(2) C.P.C. are very wide and the powers of the court are equally extensive. In ***Mohannakumaran Nair V. Vijayakumaran Nair (2007)*** the Supreme Court held that the court has discretion in exercise of that power, but such discretion cannot be exercised

arbitrarily or capriciously. It must be exercised according to the principle of law. The Allahabad High Court observed that in Committee of Management, *Ratan V. Iii Additional Civil Judge, Agra (AIR 1995 All 7)* the doctrine of **dominus litus** should not be over- stretched because it is the duty of the court to ensure that if for deciding the real matter in dispute, a person is necessary party, the court can order such person to be impleaded. Merely because the plaintiff does not choose to implead a person, is not sufficient for rejection of an application for being impleaded.

While dealing with the point of **dominus litus** that the court may consider whether the joining of a person is essential or not otherwise it amounts to play Hamlet without the prince of Denmark. With the brief discussion we understand the importance of **dominus litus** theory and also importance of Order 1 Rule 10(2) CPC which empowers the court to implead necessary and proper parties for effective and complete adjudication of matter, at the same time without the delay, inconvenience and expenses of separate actions and trials. Order 1 Rule 10(2) CPC in a way curbs collusive suits and multiple proceedings. If Order 1 Rule 10(2) CPC provision is not there, the person who has **direct** interest in the litigation and who ought to be added, is not added in the suit, will file separate suit against the plaintiff to safeguard his interest and in such case it arises multiple proceedings in respect of same subject matter and it may sometimes lead to contradictory judgments.

## NOTES ON INTERLOCUTORY APPLICATIONS

**Ch.Vivek Anand Srinivas,  
Junior Civil Judge,  
Palakonda,  
Srikakulam District.**

### **INTRODUCTION:-**

The term Interlocutory Application or Interlocutory Petition has not been defined anywhere in Code of Civil Procedure. But, the Civil Rules of Practice defines the word Interlocutory Application in Rule 2(j) as “ an application to the court in any suit, appeal or proceeding already instituted in the such court, other than a proceeding for execution of a decree or order. The words interlocutory application and interlocutory petition are synonymous. The orders that come to be passed in these applications are called Interlocutory Orders.

Interlocutory Orders are of various kinds. Some like orders of attachment, Injunction or appointment of Receivers, Commissioners are designed to preserve the Status Quo pending litigation and some are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. These applications are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor do they put an end to the litigation.(Vide Arjun Singh Vs Mohindra Kumar reported in AIR 1964 SC 993.) The Interlocutory applications are purely temporary in nature and are coterminous with the main proceedings and are capable of being altered or varied by subsequent applications for the same relief, normally on proof of new facts or new situations which might subsequently arise. So, those applications which are designed to preserve the status quo, which do arise more often than not and are important among all other interlocutory petitions, which are envisaged under Sections 75 and 95 of the Civil Procedure Code, are expedient to be considered here. Section 75 of the Code envisages incidental proceedings while section 94 contemplates supplemental proceedings.

Incidental proceedings or orders are those which follow as a matter of course being necessary complements to the main order without which the matter would be incomplete or ineffective. According to section 75 of the Code, the court may issue a commission subject to such conditions and limitations as may be prescribed to examine a witness, to make a local investigation, to examine or adjust accounts, to make partition, to hold a scientific, technical or expert investigation, to conduct sale of property which is subject to speedy and natural decay and to perform any ministerial acts. The procedure for the appointment of commissioner for any of the purposes mentioned supra and the conditions and limitations prescribed therefore are dealt under the provisions of Order 26 of the Code of Civil Procedure.

Supplemental proceedings are separate proceedings in an original action in which the court, where the action is pending, is called upon to exercise its jurisdiction in aid of the judgment in action.

### **PROCEDURE FOR DEALING WITH INTERLOCUTORY APPLICATIONS:-**

**Checking and Registration of Interlocutory Applications:-  
Enquires and Orders in Interlocutory Applications:-**

When an Interlocutory application is filed in the court, the application is to be checked whether it is filed with proper provision and the relief claimed is in accordance with the provision of law. Whether proper court fee is paid. If it is filed in the pending suit whether notice is given to other side. If any amendments are to be made in the plaint or written statement, whether consequential amendmet prayer was made as per rule 28 of Civil Rules of practice and the cause titles are properly mentioned and the petition is properly verified and if all the requirements are satisfied, the petion is to be registered and numbered and entered in the Interlocutory application register and suit register and after due enquiry by taking into consideration the oral evidence and documentary evidence if any placed by both the parties, the orders will be pronounced and the result is to be noted in the Interlocutory Applications disposal register and also the suit register.

### **Examination of Witnesses and Recording of Evidence in Interlocutory Applications:-**

The procedure for enquiry and passing of orders in an Interlocutory Application: Rule 60 of Civil Rules of Practice says that the enquiry in an interlocutory application shall be conducted by receiving affidavits, but if the judge directs that the evidence be given orally it shall be recorded, exhibits marked in the same manner as in the case of suits. The Honourable High Court in S.V.Rao Vs M.Appala Swamy reported in AIR 1970 A.P 103, held that that Order 39 Rule 1 CPC provides expressly that the court is permitted to dispose of the Interlocutory Application by affidavit and in view of the urgency involved in the matter the regular procedure of examining the witnesses is dispensed with and the court is given special powers to decide the matter by affidavits. However on point of summoning the deponent for cross examination the Honouable High Court of A.P in C.Srinivasa Rao Vs K.Mohana Rao reported in AIR 1981 AP 406 and in Ali Bin Aifan case reported in AIR 1983 AP 114, differed with its earlier view in S.V.Rao's case and held that deponent can be summoned for cross examination. Moreover, in view of the legal position laid down in Bhopal Reddy Vs KR Lakshmi Bai and another reported in 1998(1) ALD 770, it was held that the practice of marking documents at Interlocutory stage shall be continued despite the fact that there is no rule to that effect either in the code or in the rules of practice. So, in view of the above legal position evidence can be recorded in Interlocutory Applications if the court desires or the enquiry can be conducted on affidavits after marking the documents and orders are to be passed by the court on merits considering the material and documents available on record.

### **Temporary Injunctions:-**

Injunctions are of two types. Perpetual and Temporary. As per **section 37 of Specific Relief Act**, the Temporary Injunction is to continue until a specified time or until further of the court and Perpetual Injunction can be granted by means of a decree in a suit. Because of the interim nature Temporary Injections are also known as Interim Injunctions.

**Under Order 39 Rule 1 of CPC** the court may order to grant a Temporary Injunction to restrain such act or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or diposition of the property, or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute pending disosal of the suit or until further orders. Under Rule 3A the court shall make all endeavour to dispose of the petition within 30 days and in case the court is not able to do so it shall record its reasons for its inability, which is mandatory. Under Rule 4 the court may vary or set aside even the order passed on merits in view of the changed circumstances. The provisions under Order 39 Rule 3 are mandatory and non-compliance of mandatory provisions entails vacation of the order. Vide Shiva Kumar Chadda Vs Municipal Corporation, Delhi reported in 1993 (3) SCC 161 AND Nikesh Vs Smt. Malathi Bai, reported in 1996(4) ALT 483. Even Exparte order passed in ignorance of the Caveat that has been lodged earlier becomes illegal and is liable to be vacated vide Seethaiah Vs Govt. Of AP, reported in 1983 (2) APLJ 196.

The cardinal principles for granting an interim injunction are:-

- 1) Prima Facie Case. It means a bonafide contention between the parties or a serious question to be tried. Vide United Commercial Bank Vs Bank of India reported in AIR 1981 sc 1426.
  - 2) Balance of Convenience. It means weighing competing possibilities or probabilities of likelihood of injury i.e amount od substantial mischief injury which is likely to be caused if injunction is issued while comparing it with which is likely to be caused to the other side if the injunction is granted. Vide Dalpat Kumar Vs Prahalad Singh reported in 1992 (1) SCC 719.
  - 3) Irreparable Injury. It means a material injury that cannot be adequately compensated by way of damages but does not mean that there must be no physical possibility of reaping the injury.
- All the three ingredients are to be satisfied for granting injunction. Vide Dalapt Kumar Vs Prahalad Singh reported in 1992 (1) SCC 33.

Injunction against the Plaintiff:-

Under clause (a) of rule 1 of Order 39 CPC, injunction can be granted a t the instance of either of the parties to the suit. But, under clauses (b) and (c) no injunction can be granted against the plaintiff at the instance of the defendant unless he seeks a set off or counter claim after apying the requisite court fee. The main object behind such order against the plaintiff or the defendant is to preserve the subject matter of the suit pending disposal of the suit. Vide 1971 (2) APLJ (SN) 37 and J.Samba Murthy Vs CH. Srinivasa Rao reported in 1987 (2) ALT 630.

**status Quo orders not to be passed without specifying what the status quo at the time of giving orders.**

1994(2) SCC 266, Satyabrata Biswas Vs Kalyan Kumar Kishku. It was held that Status Quo shall be specified by the court before ordering the same. Passing order of status quo without specifying what the status quo was at the time of passing orders leads to complications. So, it is expedient not to pass such ambiguous orders. Vide Ch.Veeranna Vs Mahaboob Subhani reported in 1991(1) ALT 366.

### **Attachment before Judgement:-**

**Order 38 Rule 5 CPC** is an important provision which deals with Attachment before Judgement. If the court is satisfied that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property or is about to remove the whole or any of his property from the local limits of the court direct the defendant either to furnish security or to appear and show cause why he should not furnish security. Under Rule 3 the court may also order conditional attachment of property. But rule 4 mandates that the an order of attachment without complying with the provisions of sub rule 1 shall be void. It has been held that sub rule 1 and 4 do not come into play at the stage of ordering conditional attachment but they do come into play in respect of order passed under rule 6 after hearing both the parties. Any order of attachment, either conditional or regular, can be ordered only after the court reaching necessary satisfaction in regard to the twin requirements enjoined in sub rule 1, i.e satisfaction by cogent evidence that the defendant is about to alienate the properties so as to delay and defeat the decree and that the defendant first be asked to furnish security for the suit amount and then only the attachment can be effected. Vide S.P.V.Babu Vs Varalaxmi Finance Corporation, reported in 1996 (4) ALD 453.

### **Appointment of Commissioners and Receivers:-**

The elaborate procedure for appointment of a Commissioner for any purposes and the conditions and limitations therefor are dealt with under the provisions of **Order 26 of CPC**.

Order 26 Rule 1 envisages the appointment of a commissioner to examine a person who is residing within the local limits of the jurisdiction of the court and who is exempt from attending the court and who is from sickness or infirmity unable to attend the court. Sections 132 and 133 of CPC exempts certain women who cannot be compelled to appear in public as per custom and the President, Vice President, Speaker, Union Minister, Judges of the Supreme Court, Governors of the State, Judges of the High Court and rulers of the former Indian States,

The court may issue a commission under Order 26 rule 4 CPC for the examination of a person who is resident beyond the limits of its jurisdiction or a person about to leave such limits or a person in the service of the Government. No one shall be ordered to attend the court to give evidence under Order 16 rule 19 CPC, unless he resides within the local limits of the court or at a place less than 100 kilometres from the court house or at a place less than 500 kilometers distance provided they are connected by railway or public conveyance. In such cases commission shall be issued under Order 26 rule 4 CPC. Under Order 26 Rule 9 a commission may be issued for local investigation for the purpose of elucidating any matter in dispute or ascertaining market value or mesne profits or damages or annual net profits. Under Rule 10-A, 10-B AND 10-C, a commissioner may be appointed for scientific investigation or performance of a ministerial acts or sale of immovable property. Under Rule 11 a commissioner may be appointed for examination or adjustment of accounts. Under Rule 13 a commissioner may be appointed for partition of properties

**Appointment of Receiver.** **Order 40 of the Civil Procedure Code** contemplates the appointment and discharge of Receivers. Whenever it appears for the court to be just and convenient the court may appoint a receiver of any property whether before or after the decree. The court shall appoint a receiver for the protection of rights or for the prevention of injury. The order is discretionary but the discretion must be exercised in accordance with the principles on which judicial discretion is exercised. The Madras High Court, in Krishna Swamy Vs Thangavelu reported in AIR 1955 Madras

430, laid down five principles which are described a Panch sadachar for exercising equity jurisdiction. They are:-

1) The appointment of a receiver in a pending suit is a matter resting in the discretion of the court.

- 2) The court should not appoint a receiver except upon proof that prima facie the plaintiff has a very excellent chance of succeeding in the suit.
- 3) Apart from the conflicting claims to the property the plaintiff must show some emergency or danger or loss demanding immediate action and therefore the element of danger is an important consideration.
- 4) Where the property is shown to be in medio, that is to say in the enjoyment of none and
- 5) The conduct of the party who made the application shall be free from blame.

The said principles were reiterated by the A.P.High Court in K.Mangamma Vs K.Brahma Reddy reported in 1989 (1) ALT 331.

### **Impleadment of 3<sup>rd</sup> parties vis Doctrine Dominus Litus:-**

**Dominus Litus is the person to whom a suit belongs. This also means master of a suit. The person who has real interest in the decision of the case.**

#### **(6) Addition of parties:**

The plaintiff might have impleaded wrong persons as defendants or he might have permitted to implead proper persons as defendants to the suit due to a variety of causes. It also happens that the defendants who have actually been impleaded are not really interested in the subject matter of the suit, that some other person who has not been impleaded is in fact interested in the subject matter. Since a decree passed against a wrong person is of no avail as against the person who is not a party, petition are filed by the plaintiff under order 1 rule 10 for impleading certain other persons as supplemental defendants or as defendants in the place of those who have wrongly been impleaded in the first instance. Sometimes third parties themselves file applications for bringing themselves on record as parties to the suit. Even such petitions are governed by Order 1 rule 10 CPC. The only consideration which weigh with the court when petitions of this type are filled is whether the person who are sought to be added are necessary or proper parties to the suit and whether there can be no effective adjudication of all the matters in controversy, unless these persons have been impleaded. In such cases parties are added to avoid needless multiplicity of proceedings. Whenever supplemental parties are added in this manner, consequential amendments to the plaint should be made by means of a separate applications filed under Order 6 rule 17 C.P.C. Thereupon suit summons will have to be issued to the newly added parties if they are supplemental defendants

and the usual procedure in that regard should be adopted as if the suit has been newly instituted against the parties. If during the pendency of a suit one of the parties thereto dies, then also an application is made under Order 22 Rule 3 (If the party who died is the plaintiff) and under Order 22 rule 4 (if the party who died is a defendant) for bringing the legal representatives of the deceased party on record. The period of limitation for bringing the legal representatives of a deceased party on record is 90 days. So, no final disposal of the suit can be given until after the expiry of the said period of 90 days and the Court has to wait till the period of 90 days is over before passing any final orders in the suit. If no application is made within the time allowed, by law for bringing the legal representatives on record, the suit automatically abates. If the party who died is the plaintiff and his legal representatives do not come on record within the time allowed by law, after the expiry of the period the court should make an order to the docket to the effect that the suit stands dismissed as having abated since the plaintiff's legal representatives have not been added. If the legal representatives of a deceased sold defendant are not brought on record within the period of 90 days then also an order should be passed by the Court after the expiry of the period of 90 days on the lines indicated above. If there are more than one defendant on record and if only one of them dies and his legal representatives are not brought on

record within the time allowed by law, after the expiry of the said period the court should make an order on the docket in the main suit that the suit in so far as it relates to the deceased defendant has abated. The court may proceed to dispose of the suit in the usual manner as regard the other defendants who are alive.

If in money suits the legal representatives of a deceased plaintiff are brought on record the question arises whether the legal representatives should be directed to produce a succession certificate or not. If the widow and the undivided sons of a deceased Hindu plaintiff are brought on record as legal representatives it is not necessary to produce a succession certificate. In all other cases where the legal representatives of a deceased plaintiff are brought on record in a money suit succession certificate ought to be produced, and no decree can be passed till the production of a succession certificate. This principle also applies when the heirs of a deceased creditor (who died prior to the institution of the suit) file the suit for recovery of the money due from the defendant. At the time of the registration of the plaint the Chief Ministerial Officer should in such cases check and see whether production of Succession Certificate is mandatory. A plaint may be registered subject to production of a succession certificate, but a suit cannot be decreed unless the succession is produced.

When legal representatives either of the plaintiff or of the defendant are brought on record consequential amendments to the plaint should be made in the manner mentioned above.

**CONCLUSION:**

20. In view of the discussion made supra, it shows that filing of interlocutory applications in the proceedings before a Court as common and important procedure and it is the duty of the courts to dispose the said applications expeditiously to proceed with the main case. The orders passed in interlocutory applications though may not be elaborate but they shall not cryptic and they should be passed with sound reasoning basing on established legal principles.

**(CH.VIVEK ANAND SRINIVAS)**  
**Junior Civil Judge**  
**Palakonda**

PAPER PRESENTATION BY THE JUDICIAL OFFICERS OF  
SRIKAKULAM DISTRICT FOR THE WORK SHOP AT  
SRIKAKULAM, DATED 19.11.2016

TOPIC :

IMPLEADMENT OF THIRD PARTIES

VIS-À-VIS

DOCTRINE OF DOMINUS LITUS

Submitted by :

SHAIK MEERA KHASIM SAHEB, B.A., LL.M.

JUNIOR CIVIL JUDGE,

KOTABOMMALI, SRIKAKULAM DISTRICT.

*Paper Presentation on Topic:*

**IMPLEADMENT OF THIRD PARTIES  
vis-a'-vis**

**DOCTRINE OF DOMINUS LITUS**

By

*S.Meera Khasim Sahbe,  
Junior Civil Judge,  
Kotabommali,  
Srikakulam District.*

**Introduction:-**

**Doctrine of Dominus Litus :**

The Latin word "dominus litus" means "the master associated with the suit". It means a person who is really and directly interested in the suit as a party and who will be affected by the decision in a case. This person derives benefits of the judgment is in favour or suffers the consequences of an adverse decision. A person can be dominus litus even if his name does not appear in a case proceedings as a plaintiff or defendant.

Doctrine of dominus litus is applied to one who though not originally a party has made himself such, by intervention or otherwise, and has assumed the entire control and responsibility for one side, and it is treated by the Court as liable for costs and a person who is really and directly interested in the suit as a party. It is settled principle of law that the plaintiff is the master of litigation initiated by him. He is dominus litus and cannot be compelled to wage war against somebody with whom he does not want to fight. The plaintiff is dominus litus having dominion over his suit. He has a right and prerogative to choose and implead in his suit as defendant the person against whom he seeks relief. He is not obliged to implead a person as defendant in the suit, against whom no relief is sought. It cannot be gainsaid that no decree in a suit can bind a person if he is not a party thereto or duly represented therein. It is also well settled law that the plaintiff being the master of the suit cannot be compelled to fight against the person whom he does not wish to claim any relief.

## **IMPLEADMENT OF THIRD PARTIES :**

The theory of dominus litus should not be over stretched in the matter of impleading of parties because it is the duty of the Court to ensure that if for deciding the real matter in dispute a person is necessary party, the Court can order such person to be impleaded. Merely because the plaintiff does not choose to implead a person is not sufficient, for rejection of an application for being impleaded. The approach of the Court is not to invite fresh proceeding on same issue but to keep same litigation pending for decision, bring all persons who are equally affected and interested to bring about settlement of issues once for all.

The concept of impleadment of third parties vis-a-vis Dominus Litus though not parallel to each other, both the concepts are very vital in the disposal of the suit on merits for final adjudication of the controversy before the court of law. Though it is said that plaintiff is the dominus litus who can chose the defendants against whom he can agitate

the litigation., but the Civil Procedure Code provides that third parties to the suit can also be impleaded during the course of trial against whom initially not filed suit.

**The relevant provisions under Civil Procedure Code for impleadment of third parties.**

(a) Order 1 Rule 10 (2) CPC

(b) Order XXII Rule 1 to 4 and Rule 10 CPC.

**Order 1 Rule 10(2) CPC explains that the “court may strike out or add parties”:**

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

completely to adjudicate upon and settle all the questions involved in the suit, be added.

The provisions of Order 1 Rule 10(2) of CPC are very wide and the powers of the Court are equally extensive. At the same time the principle governing the powers of Court U/O.1 Rule 10 CPC are that as a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition, the reason is that the plaintiff is **“dominus litus”**.

The above provision clearly goes to show that in a suit or proceedings before the court either upon the application by the plaintiff or defendant or the Court, as appear to be just add the name of any person who ought to have joined as a plaintiff or defendant or whose presence is necessary in order to decide the controversy effectually and completely by settling all the questions involved in the matter.

The plain reading of U/O.1 Rule 10(2) CPC appears contrary to the principle of dominus litus since though the plaintiff has not bring a party on record and no relief is claimed in the suit filed by him under the doctrine dominus litus, but U/O.1 Rule 10(2) CPC enables the Court to implead third parties to the proceedings if the situation warrants in the suit. The general rule that plaintiff in a suit being dominus litus may chose the persons against whom he wishes to litigate and cannot compel to sue a person against whom he does not seek any relief. But this general rule is subject to the provisions of Order 1 Rule 10(2) CPC and Order 22 Rule 10 CPC which provides for impleadment of third parties in a suit or proceedings.

**Before impleading third parties to the suit or proceeding the court must satisfy the following conditions :**

Any person who ought to have joined as a plaintiff or defendant who not added or by any person whose presence before the court may be necessary in order to enable the

Court to effectually and completely settle the questions involved in the suit. In short it clearly goes to show that the Court is having ample power and discretion to add any person as a party who is found to be necessary or property party.

**At this juncture it is apt to explain who is necessary party and proper party.**

(a) A **necessary party** is a person who ought to have been joined as a party and in whose absence no effective decree can be passed at all by the Court, if a necessary party is not impleaded to suit it is liable to be dismissed.

(b) A **proper party** is a person who though not a necessary party whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. It is also pertinent to note that if a person is not found to be a proper or necessary party, the Court has no jurisdiction to

implead him against the wishes of the plaintiff. The fact that a person is likely to secure interest or right in the suit property after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit.

The scope of ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties can be said that the sub-rule is not about the right of a non party to be impleaded as a party, but about judicial discretion of the Court to strike out or add parties at any stage of a proceeding. The discretion can be exercised either suo motto or on the application of the plaintiff or the defendant or the application of a person who is not party to the suit. In exercising its jurisdiction, the Court will of course act according to reason and fair play and not according to whims and fancies.

## **Order XXII of CPC explains death, marriage and insolvency of parties :**

Order XXII provides the procedure for bringing the legal representatives of parties on record in case of death marriage or insolvency of parties. It also provides in which cases the proceedings would abate where legal representatives are not brought on record

### ***Basic Principles for Impleadment of third parties under the provisions of Order 1 Rule 10 C.P.C., in the light of various Judicial pronouncements:-***

In **Razia Begum Vs. Anwar Begum** reported in AIR 1958 SC 886, the **Hon'ble Apex court** laid down the following broad principles:-

***“(1) That the question of addition of parties under R.10 of O.1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in S. 115 of the Code;***

***(2) That in a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation;***

***(3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of presentor direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy;***

***(4) The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of Ss.42 and 43 of the Specific Relief Act;***

***(5) In cases covered by those statutory provisions, the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission;***

***(6) The result of a declaratory decree on the question of status, such as in controversy in the instant case, affects not only the parties actually before the Court, but generations to come, and in view of that consideration, the rule of 'present interest', as evolved by case law relating to disputes about property does not apply with full force; and***

***(7) The rule laid down in S. 43 of the Specific Relief Act, is not exactly a rule of res judicata."***

In **Mumbai International Airport vs., Regency convention Centre** reported in 2010 (5) ALD (SC) = AIR 2010 SC 3109 the **Hon'ble Apex** court gave some illustrations regarding exercise of discretion for adding of parties as follows:-

*“ 1) If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order I.*

*If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for nonjoinder of a necessary party.*

*2) If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party. But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant in possession, then the tenant will be a necessary party in so far as the prayer for actual possession.*

*3) If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.*

*4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonfides etc., the court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms."*

**Amit Kumar Shaw and another Vs Farida Khatoon**

**2005 AIR (SC) 2209, 2005 AIR SCW 2078 and  
2005 (4) ALD (SC) 98**

Wherein the Hon'ble Supreme Court of India categorically dealt Order 1 Rule 10, Order 22 Rule 10 and Sec.52 of Transfer of Property Act :

The power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be effected if he is not added as a

party. Such right however will include necessarily the enforceable legal right. The Hon'ble Supreme Court further held that an application U/O.22 Rule 10 CPC can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial Court. No detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit for or against the person to whom the interest is devolved by assignment or devolution. The question about existence of validity of the assignment or devolution can be considered at final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit. The aliene pendente lite is bound by the final decree that may be passed in the suit. Such alienee can be brought on record both under this rule as also U/O.1 Rule 10 CPC. Since under the doctrine of lis pendence a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought

on record should ordinarily be allowed. The Court has held that the transferee pendente lite of an interest in immovable property is a representative in interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation. He is entitled to be heard in the matter on merits of the case

**Katta Venkateswara Rao Vs. Ch. Leelavathi (died)**  
**2008(5) ALD 320 and 2008 (6) ALT 323**

The Hon'ble High Court of A.P held that in a suit for perpetual injunction though the limited question to be decided is the factum of possession on the date of institution of the suit, however in the facts and circumstances of the case, when the suit for perpetual injunction was dismissed and the same was carried by way of appeal, the revision petitioner/purchaser would be definitely interested in further prosecuting the appeal since the other appellants

who are on the record, the legal representatives of the 1st appellant may not be much interested in further prosecuting the appeal having parted with the property. Though the suit for perpetual injunction is a transfer action, since incidentally the question of title may also have to be gone into whenever the suit for perpetual injunction is filed in relation to immovable property, the person having direct interest in such immovable property, cannot be said to be unnecessary party to the litigation. The Hon'ble Supreme Court expressed the opinion that the alien pendente lite also may be brought on record in the light of Order 22 Rule 10, Order 1 Rule 10 and Sec.146 of CPC.

**Applicability of Order 1 Rule 10 C.P.C., in different cases:-**

**(i) Sec.92 C.P.C., proceedings:-**

It is open to a court to add a party as defendant in a suit under Sec.92 C.P.C., just as in any other suit. Its right to sue is regulated by Order 1, Rule 10 C.P.C.,

### **(ii) Partition Suit:-**

In a suit for partition the principle of dominus litus is not strictly applicable since the plaintiff and also the defendants will be sharers.

### **(iii) Specific performance suit:-**

The plaintiff who has filed the suit for specific performance of the contract for sale is dominus litus and cannot be forced to add parties against whom he does not want to fight **unless it is a compulsion of the rule of law.**

### **(iv) Execution petition:-**

In Changanti Lakhmi Rajyam and others Vs., Kolla Rama Rao reported in 1998(1) ALD 497 the Division Bench of Hon'ble A.P., High Court held that Order 1 Rule 10 C.P.C., is applicable to suits and appeals and not applicable to the

execution proceedings. The heirs of J.Dr., if any will have to agitate Under Order 21 Rule 58 or Rule 101 C.P.C.,

**(v) Cause of action: -**

In Mohannakumaran Nair Vs. Vijayakumaran Nair reported in AIR 2008 SC 213 the Hon'ble Apex court observed that Application of doctrine of dominus litus is confined only to the cause of action which would fall within Sections 15 to 18 of the Code of Civil Procedure. It will have no application in a case where the provision of Section 20 thereof is sought to be invoked.

**Difference between Order 1 Rule 10(2) and Order 6 Rule 17 C.P.C.,:-**

Order 1 Rule 10(2) C.P.C., covers two types of cases (a) of a party who ought to have been joined but not joined and is a necessary party, and (b) of a party without whose presence the question involved in the case cannot be completely decided. On the other hand Order 6 Rule 17 of

the Code deals with amendment with the leave of the court by a party of his own pleadings if such amendment is necessary for determination of the real question in controversy. Order 6 Rule 17 is therefore wider in its scope and ambit than Order 1 Rule 10, though the later also confers power on even the court to add or strike off a party to the action. The object of Order 1 Rule 10(2) C.P.C., is to bring before the court all persons at the same time who are involved in the dispute relating to the subject-matter so that the disputes may all be determined at the same time without delay, inconvenience and expenses on a separate actions and trials. Order 6 Rule 17 of the Code deals with amendment with the leave of the court by a party of his own pleadings, if such amendment is necessary for determination of the real question in controversy. Order 1 Rule 10(2) C.P.C., confers powers also on the court without a motion from any of the parties to exercise the power, whereas Order 6 Rule 17 enables a party to seek amendment.

### **Computation of Limitation when a party is added:-**

Section 21 of Limitation Act provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regard him, be deemed to have been instituted when he is so made a party. However, if court is satisfied that omission to include a new plaintiff or defendant was due to mistake made in good faith, it may direct that the suit as regards to such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

### **Conclusion:-**

From the above discussion it can be concluded that the general rule is that the plaintiff is master of his suit. He is dominus litus. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. It is discretionary to grant a relief under Order 1 Rule 10(2) C.P.C., In exercising

the direction the court will invariably take into account the wishes of the plaintiff before adding a third person as a defendant to his suit. Keeping in view of the above discussed basic principles, where the court finds that addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant even without the consent of the plaintiff.