

Chapter: 6

Civil Procedure code, 1908 ~

The CPC consolidates and amends the law relating to the procedure of courts of civil jurisdiction.

The code is a general law. So in case of conflict between the code and special law the latter will prevail over the former. (special prevail over the general.)

Cause of Action ~

Order 2, Rule 2 means a reason for action which the case has been filed.

Cause of Action means every fact that would be necessary for the plaintiff to prove in order to support his right to judgement of the court.

Cause of Action is based on two facts ~

A right and

An infringement for which a relief is claimed

Decree ~ Section - 2 (2)

- i Decree means a formal expression of an adjudication, which the court express
- ii conclusively

- iii determining the rights of the parties
- iv in regard to all the matters in controversy.
- v it may be either preliminary or a final decree.

Preliminary decree :- Decree when further proceedings have to be taken before the disposal of the suit.

This decree is independent and ascertain what is to be done.

Final decree :- Final decree states the result achieved by means of preliminary decree, it depends and subordinates to the preliminary decree.

Decree holder :- Any person in whose favour decree has been passed.

Judgement debtor :- Any person ~~in~~ whose against a decree has been passed.

Every decree is appealable except those which are specifically barred.

Decree doesn't include

- i Adjudication from which an appeal lie from order
- ii Order of dismissal or of default.

Order ~ Section 2(14)

Formal expression of any decision of civil court which is not a decree.

No appeal shall lie against any order other than what is expressly provided in the code.

Judgement ~ Section 2(9)

Statement given by judge on the ground of decree or order.

Summon ~

- > If no date is fixed for appearance of defendant, court has no power to dismiss the suit.
- > Summon must state the defendant is to produce all documents in possession.
- > Delivery of summon is made to person summoned either personally or ~~through~~ to his agent or to any adult male or female member of his family against the signature obtained in acknowledgement of the service.

Order 5 Rule 9 Substituted by code of Civil Procedure Amendment Act 2002.

- ① If defendant resides within the jurisdiction of court or has an agent empowered to accept service of summon, the summon can be delivered to proper officer or his subordinate or sent through approved courier.
- ② Summon may be delivered by registered post, speed post or other approved courier services.
- ③ Expenses for such service are usually born by plaintiff.
- ④ If acknowledgement or receipt signed by defendant or their agent is received by the court, court may declare that summon has been duly served.
- ⑤ If court is satisfied that person summoned is keeping out of the way of for the purpose of avoiding services or that for any other reason, summon cannot be served in the ordinary way, court shall order that summon is to be served by affixing a copy of it on some conspicuous place in court's house in which such person resides.

- (6) In case of public officer or servant of railway or any local authority court may send summon to the head office where he was employed.
- (7) If suit is instituted against a corporation then summon may be served
- i On the secretary or any other director or other principle officers of the corporation
 - ii By leaving it or by sending it to the corporation and its registered office and if there is no registered office than at a place where corporation carries on business.
- (8) In case of partners summon shall be served upon one or more partners at the principal place where partnership business is carried on within India or upon any person having control of management of partnership business.

Stay of Suit (Doctrine of Res Sub Judice)

Section 10 provides no court shall proceed with the trial of any suit which is previously instituted between the same parties litigation under the same title and the suit is pending in the court having competent jurisdiction:

The pendency of a suit in foreign court does not preclude the court in India from trying a suit filed for same cause of action (This doctrine is not applicable when one court is in foreign jurisdiction)

Object -

To prevent the court of concurrent jurisdiction from trying two similar suits.
To avoid conflicts of decisions.

Essential conditions for stay of suit -

- There must be two suits instituted at a same time.
- suit should be between the same parties
- The matter in issue in the latter suit should be directly and substantially in issue in the earlier suit.
- Such earlier suit is still pending in the court of competent jurisdiction.

Case Law :- Wings Pharmaceuticals v/s Swan Pharmaceuticals

If the matters of the suits are different then this doctrine will not apply.

Doctrine of Res Judicata / Bar on Suit

Section: 11 deals with the doctrines of Res Judicata. According to this no court shall try any suit in which the matter has been directly or substantially in issue in former suit (i.e. suit previously decided.) between the same parties and the issue has been finally decided by the court.

No one ~~can~~ shall be twice vexed for the same cause.

It prevents two different decrees on the same subject.

Conditions -

- The matter in issue in former suit is directly and substantially the matter in issue in later suit.
- Prior suit should be between the same parties.
- Parties have litigated under same title.
- The court which determines the earlier suit must be competent.
- The same question shall be in issue in the later issue.

Doctrine of Res Judicata is based on the following public policy -

- There should be an end to litigation
- Parties should not be harassed for same matter
- Time of court should not be wasted.
- It's a rule of convenience and not a rule of absolute justice.

(Parties ki mutual consent se decision lena)

(sic) Consent or compromise decree is not a decision by court. It is an acceptance of something to which parties have agreed. The court does not decide anything. So principle of Res Judicata does not apply to consent or compromise decree. But when court on the facts proved comes to a conclusion that the parties entered that consent decree should have the effect of deciding



the question finally, the principle of Res Judicata may apply to it. (2nd case nhi hoga)

An application for amendment of decree is not a suit and may be entertained. But if such application is heard and finally decided then Res Judicata may apply.

Dismissal of suit for default where there has no adjudication will not operate as Res Judicata.

Constructive Res Judicata ~

Constructive Res Judicata is an essential constituent of Doctrine of Res Judicata. It is embodied in explanation 4 to Section 11. According to explanation 4 any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such former suit.

(To baatein aap pehle suit m bel skte the pr aap bhul geye to dubara us baat ke baare aap court m new suit file nhi kr skte.)

Appeals ~

A legal right, its not a natural or inferential right attached to litigation. Such right is

given by the statute (law) or by rules having the force of statute.

There are 4 kinds of appeal provided under CPC.

1) Appeal from original Decree ↘

- i Appeals from original decree may be preferred in the superior court to the court passing the decree.
- ii When decrees are passed by consent of parties then no appeal shall lie.
- iii Appeal may lie for an original ex-parte decree.
- iv Decree lies on a question of law.

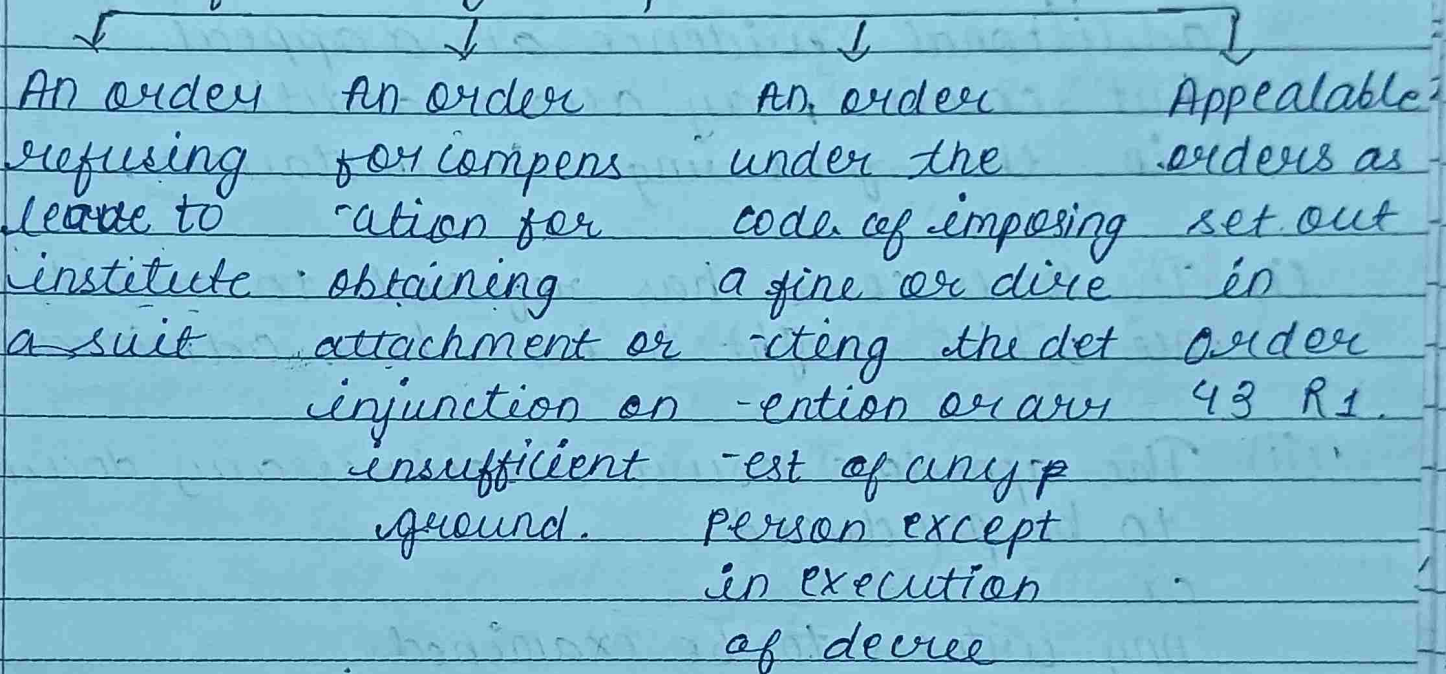
2) Second Appeals ↘

- i As per Section - 100 of CPC, an appeal lies to the High court from a decree passed by subordinate court is a second appeal.
- ii The case involves a substantial question of law.
- iii Appeal may lie under this section from an Apparent decree passed ex-parte.
- iv In appeal under this section, memorandum of appeal shall precisely state the substantial que. of law involved in the appeal.

Appeal against the orders ↵

Appeal against the order are not allowed. However if it is specifically permitted under the provision of law then a appeal can be filed.

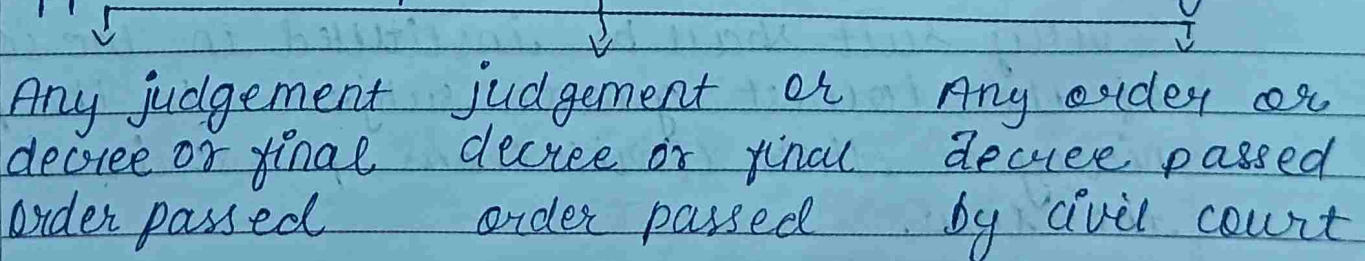
Appeal from order would lie only from the following orders -



Appeal to Supreme Court ↵

Appeal can be filed to the Supreme court in respect of those decrees which have been passed by High court.

Appeal to Supreme court shall lie against -



an appeal
by H.C
or other
of final
appellate
jurisdiction

by a H.C in
a original
civil juris-
-diction.

and such suit is
fit for appeal to
the SC or when
special leave is
granted by the
SG.

→ The general rule is that the parties to an appeal shall not be entitled to produce additional evidence at a appeal. But court may allow additional evidence in the following circumstances.

(i) The lower court has refused to admit evidence which ought to have been admitted.

(ii) The appellate court requires any document to be produced.

or

Any witness to be examined.

(iii) For any other substantial cause, and court shall record ~~in~~ the reasons for additional evidence.

Place of suing (Territorial)

Every suit shall be instituted in the court of the lowest grade subject to the pecuniary or other limitations prescribed by the law.

According to Section-16 the following suits shall be instituted in the court within the local limits of whose jurisdiction the property is situated -

- 1 for recovery of immovable property
- 2 for partition of immovable property
- 3 for foreclosure or redemption in case of mortgage or charge on immovable property.
- 4 for determination of any right or interest
- 5 for compensation for wrong to immovable property.
- 6 for recovery of movable property.

→ Proviso: where suit for relief pretains to compensation or involves immovable property it can be instituted in either of following courts -

- (1) Local court in whose jurisdiction the immovable property is located.
- (2) court in whose jurisdiction defendant voluntarily resides or carries on business or personally works for gain.

→ This relief rule is applicable only if relief can be achieved through defendant's personal obedience.

Section: 17 where the jurisdiction for suit is to obtain compensation for wrong to immovable property situated at two the & the property is

limits of two different courts, then the suit may be instituted in any court within the limits of jurisdiction and value of entire claim is cognizable by such court.

Section: 18 where the jurisdiction is to be uncertain and within the local limit of jurisdiction there are two or more courts, then any of the court can proceed to entertain the suit after recording a statement by the court.

Section: 19 where a suit is instituted for compensation of wrong done, then if the wrong was done in the local limits of the jurisdiction of one court, and the defendant resides, or carries a business or work for personal gain, in the local limits of another jurisdiction of court, then suit can be instituted on the opinion of the plaintiff.

If the defendants to suit resides at different places in jurisdiction of different courts, then suit can be instituted at the place of cause of action or at the jurisdiction of any one of the defendant by taking the permission of other defendants and of the court.
(Section - 20)

In case of body corporate or company suit can be instituted at the jurisdiction of court where the principal office is situated or at any branch office provided that there must be a cause of action at that jurisdiction.

If the parties to the contract agreed to vest jurisdiction in one such court to try disputes, then such agreement shall be valid.

Set off - Order 8 Rule 6

It allows a defendant to set off a certain sum of money legally recoverable from the plaintiff not exceeding the pecuniary jurisdiction of a court.

Defendant may present a written statement containing the particulars of a debt sought to be set off at first hearing of the suit and not afterwards unless permitted by the court.

It's a reciprocal acquittal of debts between the plaintiff and defendant. It has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a claim.

Effect of set off ↵

written statement is said to have the same effect as plaint in a cross suit, so as to enable the court to pronounce a final judgement.

Equitable set off ↵

In case of "Titendra. Ku. Khan & Ors V/s Fearless General Finance and Insurance Finance and Company Ltd." it was held that equitable set off is different from legal setoff. Equitable setoff is based on the principle of justice equity and good conscience. Court's discretion play a role in entertaining and allowing an equitable setoff plea (request). It is not claimed as a matter of right and court has authority to decide whether to permit it.

The defendant is permitted to claim set-off in respect of an unascertained sum of money, where the claim arises out of the same transaction or transaction considered as one.

This doctrine is intended to save the defendant from having recourse to a separate cross-suit.

Counter claim ↘

Counter claim is a legal action initiated by defendant in response to the plaintiff's claim in a law suit.

Defendant has right to plead a counter claim in addition to the right of pleading a set off.

Cause of action must have accrued before the defendant have delivered their defence or before the ^{time} limit for delivering the defence is expired.

Counter claim must be within the pecuniary jurisdiction of a court.

Temporary Injunction ↘

In Dalpat Kumar & ors v. Prahlad Singh court held that 3 main requirements are to be satisfied while granting temporary injunction -

(at a first sight)

- 1) There should be a prima facie case.
- 2) If injunction not granted it would lead to irreparable loss.
- 3) Balance of convenience.

The court may grant temporary injunction to restrain any act or to make order for the purpose of staying and preventing the wasting, damaging, alienation or sale or

remove or disposition of the property or dispossession of the plaintiff or causing injury to the plaintiff.

- (a) where it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree.
- (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.

It would be necessary for plaintiff to satisfy the court that substantial or irreparable harm or injury would be suffered by him if such temporary injunction is not granted and such loss or damage or harm cannot be compensated by damages money.

Detention, Preservation, Inspection etc of Subject matter of suit.

The court may, on application of any party to a suit and on such terms as it thinks fit -

a) make an order for the detention, preservation or inspection of any property which is the subject matter of suit or as to which any question may arise therein.

b) for all or any of the purposes above, authorise any person to enter upon or into any land or building in the possession of any other party to such suit.

may authorise any samples to be taken, or any observations to be made or experiments to be tried, which are necessary for obtaining information or evidence.

Application for such order to be after notice-

- 1) Application by the plaintiff any time after institution of the suit.
- 2) Application by defendant for order made at any time after appearance.
- 3) Application made for the purpose, the court shall except where it appears that the object of making such order would be defeated by the delay, direct notice to the opposite party.

Deposit of money ~

The court may order the party to deposit in court the money held by such party or any thing belong to suit.

Suit by or against the person of unsound mind -

All rules that are applicable to minors that is "Rule 1 to Rule 14" excluding Rule - 2A are generally applicable to suit involving minor person of unsound mind.

These rules are also applicable to persons who even if not formally adjudged as of unsound mind, but found by court through an inquiry to be incapable due to any mental infirmity of protecting their interests when suing or being sued.

In Ramchandra Ayya v. Mansingh court held that decree passed against a minor or lunatic without appointed legal guardian is void and not voidable.

Reference (Section: 113)

Any time before ^{the} judgement a court in which a suit has been instituted may refer the case to the High Court for the opinion of High Court and High Court may make such order as it thinks fits.

(H.C decision is final unless order is appealable.)

Review (Section: 114) Any person aggrieved by a decree or order may apply for a

review of judgement.

Review can be granted on following grounds -

- (i) discovery of new and important matter or evidence by the applicant which was not in his knowledge at the time when the decree was passed.
- (ii) on account of mistake or error apparent.
- (iii) for any sufficient cause/reason.

Revision (Section 115)

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

(H.C may call it by itself or by any party against whom decision was received and appeal cannot be done.)

and such subordinate court appears to-

- (i) have exercised a jurisdiction not vested in it by law.
- (ii) have failed to exercise the jurisdiction vested
- (iii) have acted of its jurisdiction illegally or with material irregularity.

Suits by or Against A Corporation

In suits by or against a corporation, any pleading may be signed and verified by the secretary or by director or other principal

officer of corporation, who is able to dispose the facts of the case.

service of summons -

where suit is against a corporation the summon may be served -

↓
on secretary, director or any principal officer of the corporation.

↓
by leaving or sending it to the registered office or where the corporation carries on business.

The court may at any stage of suit require the personal appearance of the secretary, or director or principal officer of corporation who may be able to ans. the ques. related to suit.

Suits by or against minor ↘

A minor is a person -

- (i) who has not completed the age of 18 years
- (ii) and for those person or property a guardian has been appointed by court under court of wards, the age of minority will complete at age of 21 years.

Every suit by the minor shall be instituted by a person called as next friend.

of minor. Next friend should be major & of sound mind.

where suit is instituted without a next friend, the defendant may apply for dismissal of suit.

where the defendant is minor, the court shall appoint a proper person to be his guardian for suit.

when minor attains majority, he shall apply for an order discharging the next friend and for leave to proceed in his own name & title of suit shall be corrected. He may apply for an order to dismiss the suit on repayment of cost incurred by opposite party.

Summary Procedure ~ / suit

Order- 37 (XXXVII)

If defendant has not applied for leave to defend or if rejected, plaintiff may be granted judgement.

After decree issued court has authority under special circumstances to set aside the decree and may grant leave to defendant to appear and defend the suit.

In case of Uma Sankar Kamal Narayan & others and v. M.O Overseas Limited.

Supreme court highlighted certain principle relating to summary suit

Good defence → Un conditional leave to defend will be given if defendant proves a good defence.

Triable issue → If defendant raises triable issue indicating fair, bonafied defence, they are entitled to unconditional leave to defend.

Disclosure of facts → If defendant discloses fact that may be deemed sufficient to entitle them to defend, court may impose conditions at time of granting leave to defend.

(False)

No defence or sham defence → If defendant has no defence or defences sham or moonshine (weak argument) they may not be entitled to defend.

Court's discretion → Court may show mercy to defendant by allowing them to leave to defend. (दया) (permission to do a case)

Summary procedure of suit applies to suits upon bills of exchange, hundis or promissory notes or suits in which the plaintiff seeks to recover debt or liquidated demand in money payable by defendant with or without interest arising -

on a written contract

on an enactment, where sum is to be recovered in nature of a debt.

on a guarantee of a debt or liquidated demand only.

The object is to prevent unreasonable obstruction by defendant.

Summary procedure applicable to -

- 1) High courts, City civil courts and Small courts
- 2) Other courts - H.C may restrict them by notification in Official Gazette.

Defendant is not entitled to defend the suit unless he enters in appearance within 10 days from service of summons.

Leave shall not be granted where -

Court satisfies that the facts disclosed by the defendant do not indicate that he has substantial defence

Defendant has not deposited the amount in court, admitted by him.

Summary must be brought within 1 year from date of the debt becomes due or payable within 3 year in case of negotiable instrument.

Hearing of the suit ~

- i The plaintiff has the right to begin - unless the defendant admits the fact alleged by the plaintiff
- ii Either in point of law or some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought by him

In such case the defendant has the right to begin.

Affidavit ~

Affidavit is a written statement of the deponent on oath duly affirmed before any court or Magistrate or any oath commissioner appointed by court or before the Notary Public.

Affidavit can be used in following cases -

(i) Court may at any time on its own or on application of any party order that any fact may be proved by affidavits.

(ii) Court may make the order that the affidavit

of any witness may be read at the hearing.

(iii) Evidence of a witness may be given on affidavit. Court may order the deponent to attend the court for cross examination unless he is exempted from personal appearance.

(iv) Affidavits are confined to such facts as the deponent is able of his own knowledge to prove except on interlocutory applications.

Saving of inherent powers of courts

In Case of *K.K. Velusamy V. N. Palanisamy*

Section 151 is not a substantive provision. It merely recognizes discretionary power inherent in any court to do what is right and to undo what is wrong.

Court is free to exercise inherent power when matter is not covered by any specific provision in the code.

Court cannot use inherent power to do something prohibited by the law.

Court while exercising inherent power must be cautious.

F

Inherent power should be used only when absolutely necessary.

It is applicable when there is no provision in the code governing the matter.

This power should not be treated as *carte blanche* (unrestricted authority)

It is one of the most used section of the code in litigation.

JMP

Commercial Courts (23rd October, 2015)

Commercial Courts Act, 2015

The Government of India introduced the 'Commercial Courts, Commercial Division and Commercial Appellate Division of H.C.' to reduce the burden on judiciary with respect to commercial disputes.

State Gov., after consultation with HC may-

Specify the pecuniary value, not less than ₹. extend, alter and reduce the jurisdiction of court.

Appoint one or more persons dealing in commerce.

to be the judge of such courts.

Determination of specified value -

Recovery of money :- Value should include interest accrued, upto the date of filing of application.

Movable / Immovable property / Intangible right -
 Estimated market value of such right by plaintiff.

IMP Pre-Institution Mediation and settlement -

Prior to approaching a commercial court for dispute, the Act requires that parties attempt to settle their issue through mediation.

Time period -

Pre-litigation mediation shall complete within 3 months from date of application.

Can be extended for further two months with the consent of parties.

Award / Settlement -

shall be in writing and signed by the parties to the dispute.

Any person aggrieved by judgment of commercial court within 60 days may file appeal to-

Commercial Appellate
Court



If judgement is of
Commercial court below
district judge.

Commercial Appellate
Division of H.C



Judgement of C.C
at District Judge or
H.C.

Summary Judgement ~

Order - 13A

Disputes which are recognized as commercial disputes can be disposed off by commercial court without a full-fledged trial.

Application for summary judgement can be made either by party, after service of summons and before framing of issues

Summary judgement may be given that-



the plaintiff/defendant
has no real prospect
of succeeding on claim

There is no other
compelling reason as
not to dispose before
recording of oral
evidence.

Daimler Financial Services India Pvt Ltd v.
Vikash Kumar ~

Commercial court dismiss the petition on

ground of having no pecuniary limit

In *Telangana state tourism development corporation Ltd v. A.A. Avocation Pvt Ltd*:

Court held that - If specified value of commercial suit is ₹ 104 or above, it shall be referred to commercial court Act. U/s 9 of Arbitration & Conciliation.