



Subject :
**Civil Procedure
Code-II & Limitation**

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CODE OF CIVIL PROCEDURE - II

CHAPTER - 1

EXECUTION

1.1 Execution is the process of giving effect to any judicial order and to satisfy a court's judgment. With regard to property, executions are authorized in any action or proceeding in which a monetary judgment is recoverable and in any other action or proceeding when authorized by the statute.

In *Periyammal (Dead) Through LRs & Ors. v. V. Rajamani & Anr.* CIVIL APPEAL NOS. 3640-3642 OF 2025 Etc. it is observed by the Supreme Court that an executing court is competent to decide all questions relating to execution, discharge, or satisfaction of the decree, including those concerning possession, without requiring the decree-holder to initiate fresh litigation.

1.2 PROCEDURE FOR EXECUTION: Section 37 defines the court which passed the decree and section 39 to 45 deals with the transfer for the execution of the decree by the court which passed the Decree to the another court. Section 38. Court by which decree may be executed. A decree may be executed either by the court which passed it, or by the Court to which it is sent for execution. Section 39 provides for the Transfer of decree. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction:

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Merla Rammana v. Nallaparaju AIR 1956, it is the settled principle that the court which actually passed the decree does not lose its jurisdiction to execute it by the reason of the subject matter being transferred subsequently to the jurisdiction of the another court.

Section 43-44A deals with the power of the Indian courts to execute a decree passed by the Indian courts, the courts situate outside India.

1.3 APPLICATION FOR EXECUTION:

Section 10. Provides for the application for execution: Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof

Section 11. Oral application: (1) Where a decree is for the payment of money the court may, on the oral application of the decree holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the court.

(2) Written application-Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely: —

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and the mode in which the assistance of the court is required, whether —
 - i) by the delivery of any property specifically decreed;
 - ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;
 - iii) by the arrest and detention in prison of any person;
 - iv) by the appointment of a receiver;
 - v) otherwise, as the nature of the relief granted may require.

(3) The court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

Section 105 provides for the Hearing of application. — (1) The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application ex parte and pass such Order as it thinks fit.

The code lays down the following modes of execution: Section 51 provides for the Powers of court to enforce execution. — The court may, on the application of the decree holder, order execution of the decree —

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;
- (d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require :

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons recorded in writing, is satisfied-

(a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree —

- i) is likely to abscond or leave the local limits of the jurisdiction of the Court. or
- ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

Explanation : In the calculation of the means of the judgment debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

18. Execution in case of cross decrees — (1) Where applications are made to a court for the execution of cross decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such court, then-

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment debts due by the original assignor as in respect of judgment debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless-

(a) the decree holder in one of the Suits in which the decrees have been made is the judgment debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite,

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one or more of such persons.

ILLUSTRATIONS

(a) A holds a decree against B for Rs. 1,000, B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule

19. Execution in case of cross-claims under same decree — Where application is made to a court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then, —

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

1.4 Attachment: Section 60-64 and order 21 rules 41-57 provides for the attachment of the property. Section 60 deals with the Property liable to attachment and sale in execution of decree.-

(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank notes cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

(a) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;

(b) tools of artisans, and, where the judgment debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may in the opinion of the court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist or a labourer or a domestic servant and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Government or of a local authority or of any other employer, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pension;

(h) the wages of labourers and domestic servants, whether payable in money or in kind;

(i) salary to the extent of the first one thousand rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance:

Provided that where any part of such portion of the salary as is liable to attachment has been under attachment, whether continuously or intermittently, for a total period of twenty four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and the same decree, shall, after the attachment has continued for a total period of twenty four months, be finally exempt from attachment in execution of that decree;

(ia) one-third of the salary in execution of any decree for maintenance;

(j) the pay and allowances of persons to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, applies;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925 (19 of 1925), for the time being applies, in so far as they are declared by the said Act not to be liable to attachment;

(ka) all deposits and other sums in or derived from any fund to which the Public Provident Fund Act, 1968 (23 of 1968), for the time being applies, in so far as they are declared by the said Act as not to be liable to attachment;

(kb) all moneys payable under a policy of insurance on the life of the judgment debtor;

(kc) the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and accommodation apply;

(l) any allowance forming part of the emoluments of any servant of the Government or of any servant of a railway company or local authority which the appropriate Government may, by notification in the Official Gazette, declare to be exempt from attachment, and any subsistence grant or allowance made to any such servant while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any Indian law to be exempt from liability to attachment or sale in execution of a decree; and

(p) where the judgment debtor is a person liable for the payment of land revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation I : The moneys payable in relation to the matters mentioned in clauses (g), (h), (I), (Ia), (j), (I) and (O) are exempt from attachment or sale, whether before or after they are actually payable, and, in the case of salary, the attachable portion thereof is liable to attachment, whether before or after it is actually payable.

Explanation II : In clauses (I) and (ia), “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (I), derived by a person from his employment whether on duty or on leave.

Explanation III : In clause (I) “appropriate Government” means —

(i) as respects any person in the service of the Central Government, or any servant of a Railway Administration or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) as respects any other servant of the Government or a servant of any other local authority, the State Government.

Explanation IV : For the purposes of this proviso, “wages” includes bonus, and “labourer” includes a skilled, unskilled or semi skilled labourer.

Explanation V : For the purposes of this proviso, the expression “agriculturist” means a person who cultivates land personally and who depends for his livelihood mainly on the income from agricultural land, whether as owner, tenant, partner or agricultural labourer.

Explanation VI : For the purposes of Explanation V, an agriculturist shall be deemed to cultivate land personally, if he cultivates land —

- (a) by his own labour, or
- (b) by the labour of any member of his family, or
- (c) by servants or labourers on wages payable in cash or in kind (not being as a share of the produce), or both.

(1A) Notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under this section shall be void.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

Section 61 - Partial exemption of agricultural produce:

The State Government may, by general or special order published in the Official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the State Government to be necessary for the purpose of providing until the next harvest the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

Section 62 - Seizure of property in dwelling-house:

No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling-house after sunset and before sunrise.

No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Section 63 - Property attached in execution of decrees of several Courts :

Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Explanation: For the purposes of sub-section (2), “proceeding taken by a Court” does not include an order allowing, to a decree-holder who has purchased property at a sale held in execution of a decree, set off to the extent of the purchase price payable by him.

Section 64 - Private alienation of property after attachment to be void :

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest there in and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment

Rule 41 provides for the Examination of judgment debtor as to his property : Where a decree is for the payment of money the decree holder may apply to the court for an Order that —

- (a) the judgment debtor, or
- (b) where the judgment debtor is a corporation, any officer thereof, or
- (c) any other person, be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree; and the court may make an order for the attendance and examination of such judgment debtor, or officer or other person, and for the production of any books or documents.

Sub rule 2 states that : Where a decree for the payment of money has remained unsatisfied for a period of, thirty years, the court may, on the application of the decree holder and without prejudice to its power under sub-rule (1), by order require the judgment debtor or where the judgment debtor is a corporation, any officer thereof, to make an affidavit stating the particulars of the assets of the judgment debtor.

In case of disobedience of any order made under sub-rule (2), the court making the order, or any court to which the proceeding is transferred, may direct that the person disobeying the order be detained in the civil prison for a term not exceeding three months unless before the expiry of such terms the court directs his release.)

Rule 44. Attachment of agricultural produce : Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment, —

- (a) where such produce is a growing crop, on the land on which such crop has grown, or
- (b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited, and another copy on the outer door or on some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the court.

Rule 45. Provisions as to agricultural produce under attachment : (1) Where agricultural produce is attached, the court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the court in this behalf either in the Order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment debtor fails to do all or any of such acts, the decree holder may, with the permission of the court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been served from the Soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time

before the crop is likely to be fit to be cut or gathered, the court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Rule 46. Attachment of debt, share and other property not in possession of judgment debtor.—

(1) In the case of —

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other movable property not in the possession of the judgment debtor, except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting, —

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor.

(2) A copy of such Order shall be affixed on some conspicuous part of the court house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Rule 47. Attachment of share in movables.- Where the property to be attached consists of the share or interest of the judgment debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment debtor prohibiting him from transferring the share or interest or charging it in any way.

Rule 49. Attachment of partnership property :

● Property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

● The court may, on the application of the holder of a decree against a partner, make an Order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an Order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require.

● The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

- Every application for an Order under sub-rule (2) shall be served on the judgment debtor and on his partners or such of them as are within India.

- Every application made by any partner of the judgment debtor under sub-rule (3) shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within India.

- Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Rule 50 provides for the execution of decree against firm — (1) Where a decree has been passed against a firm, execution may be granted-

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with summons and has failed to appear.

(2) Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the Order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

51. Attachment of negotiable instruments — Where the property is a negotiable instrument not deposited in a court, nor in the custody of a public officer, the attachment shall be made by the actual seizure, and the instrument shall be brought into court and held subject to further orders of the court.

52. Attachment of property in custody of court or public officer — Where the property to be attached is in the custody of any court or public officer, the attachment shall be made by a notice to such court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the court from which the notice is issued.

3. Attachment of decrees — (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made, —

(a) if the decrees were passed by the same Court, then by Order of such court, and

(b) if the decree sought to be attached was passed by another court then by the issue to such other court of a notice by the court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until —

(i) the court which passed the decree sought to be executed cancels the notice, or (ii) (a) the holder of the decree sought to be executed, or

b) his judgment debtor with the previous consent in writing of such decree holder, or with the permission of the attaching court, applies to the court receiving such notice to execute the attached decree.

(2) Where a court makes an Order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other court, also by sending to such other court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the court from which it was sent.

(5) The holder of a decree attached under this rule shall give the court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the court making an Order of attachment under this rule shall give notice of such Order to the judgment debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment debtor in contravention of such Order with knowledge thereof or after receipt of notice thereof, either through the court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

54. Attachment of immovable property — (1) Where the property is immovable, the attachment shall be made by an Order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1) The Order shall also require the judgment debtor to attend court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The Order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the Order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court house, and also, where the property is land paying revenue to the government, in the office of the Collector of the District in which the land is situate and, where the property is land situate in village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.)

Sale of property: order 21 Rules 65-74 and sections 65-74 deals with the sale as a mode of execution. Rule 64 deals with the Power of the Court to Order property attached to be sold and proceeds to be paid to person entitled. Any court executing a decree may Order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Rule 66 provides for the Proclamation of sales by public auction. Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause a proclamation of the intended sale to be made in the language of such court.

Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold, or, where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property.

Subrule provides that Every application for an Order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation. For the purpose of ascertaining the matters to be specified in the proclamation, the court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto

Rule 68. Time of sale — Save in the case of property of kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least fifteen days in the case of immovable property, and of at least seven days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the judge ordering the sale.

Rule 69. Adjournment or stoppage of sale — (1) The court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court house, no such adjournment shall be made without the leave of the court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days, a fresh proclamation under rule 67 shall be made, unless the judgment debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the court which ordered the sale.

72. Decree holder not to bid for or buy property without permission, no holder of a decree in execution of which property is sold shall, without the express permission of the court, bid for or purchase the property. Where decree holder purchases, amount of decree may be taken as payment. Where a decree holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set-off against one another, and the court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly. Where a decree holder purchases, by himself or through another person, without such permission, the court may, if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by Order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree holder.

Precept: 46. Attachment of debt, share and other property not in possession of judgment debtor—

(1) In the case of —

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other movable property not in the possession of the judgment debtor, except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting, —

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor.

32. Decree for specific performance for restitution of conjugal rights, or for an injunction —

(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed in a corporation the decree may be enforced by the attachment of the property of the corporation or with the leave of the court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for a month, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application.

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

CHAPTER – 2: Appeals

2.1 APPEAL: ORDER XLI : APPEALS FROM ORIGINAL DECREES

The word appeal has not been defined in the Code. A right of appeal is not a natural or inherent right it is a creature of statute and there is no right of appeal unless it is given clearly in the statute. The form of appeal is provided in sections 96-99A and in order 41.

Form of appeal — (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. the memorandum shall be accompanied. by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgement on which it is founded

(2) Contents of memorandum- The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit

2. Grounds which may be taken in appeal :

The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection set forth in the memorandum of appeal, but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

3. Rejection or amendment of memorandums :

(1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

3A. Application for condonation of delay :

(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice hereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1) the Court shall not make in order fact the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.

4. One of several plaintiffs or defendants may obtain reversal of whole decree where it pro-

ceeds on ground common to all.

Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiff or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiff or defendants, as the case maybe. Stay of proceedings and of execution.

5. Stay by Appellate Court :

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Stay by Court which passed the decree- Where an application is made for stay of execution of an appeal able decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied —

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.

6. Security in case of order for execution of decree appealed from :

(1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

7. Exercise of powers in appeal from order made in execution of decree :

The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Procedure on admission of appeal.

8. Registry of memorandum of appears :

(1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

(2) Register of Appeals- Such book shall be called the Register of Appeals.

9. Appellate Court may require appellant to furnish security for costs :

(1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Where appellant resides out of India —

Provided that the Court shall demand such security in all casts in which the appellant is residing out of India, and is not possessed of any sufficient immovable property within India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

11. Power to dismiss appeal without sending notice to Lower Courts :

(1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub - rule (1), it shall deliver a judgement, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgement.]

11A. Time within which under rule 11 should be concluded:

Every appeal shall be heard under rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed.]

12. Day for hearing appeal :

(1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

13. Appellate Court to give notice to Court whose decree applied from :

(1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Transmission of Papers to Appellate Court — Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

(3) Copies of exhibits in Court whose decree appealed from — Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

14. Publication and service of notice of day for hearing appeal : Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the

respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice. Appellate Court may itself cause notice to be served — Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to. The notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal. Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal. Nothing in sub-rule (4) shall bar the respondent referred to in the appeal from defending it.

15. Contents of notice :

The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard ex parte.

Procedure on hearing.

16. Right to begin :

(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal and in such case the appellant shall be entitled to reply.

17. Dismissal of appeal for appellants' default :

(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Hearing appeal ex parte- Where the appellant appears and the respondent does not appear the appeal shall be heard ex parte.

18. Dismissal of and where notice not served in consequence of appellant's failure to deposit costs :

On the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the Period fixed, the sum required to defray the cost of serving the notice 23 [or, if the notice is returned and it is found that the notice to the respondent has not been issued in consequence of the failure of the appellant to deposit, within any subsequent period fixed, the sum required to defray of the cost of any further attempt to serve the notice,] the Court may make an order that the appeal be dismissed :

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

19. Re-admission of appeal dismissed for default :

Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

20. Power to adjourn hearing and direct persons appearing interested to be made respondents :

(1) Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

(2) No respondent shall be added under this rule, after the expiry of the period of limitation for appeal, unless the Court, for reasons to be recorded, allows that to be done, on such terms as to costs as it thinks fit.

21. Re-hearing on application of respondent against whom ex parte decree made :

Where an appeal is heard ex parte and judgement is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

22. Upon hearing respondent may object to decree as if he had preferred a separate appeal :

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

25 [Explanation: A respondent aggrieved by a finding of the Court in the judgement on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto — Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

23. Remand of case by Appellate Court :

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate court may, if it fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgement and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register

of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

23A. Remand in other Cases: Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

24. Where evidence on record sufficient Appellate Court may determine case finally: Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgement, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgement of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from : Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor 26 [within such time as may be fixed by the Appellate Court or extended by it from time to time].

26. Findings and evidence to be put on record. Objections to finding :

(1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) Determination of appeal- After the expiration of the period so, fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

27. Production of additional in Appellate Court :

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

28. Mode of taking additional evidence :

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

29. Points to be defined and recorded: Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined and record on its proceedings the points so specified.

JUDGEMENT IN APPEAL

30. Judgement when and where pronounced : The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgement in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders. Where a written judgement is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the Court to read out the whole judgement, but a copy of the whole judgement shall be made available for the perusal of the parties or their pleaders immediately after the judgement is pronounced.]

33. Power of Court of Appeal : The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection 25 [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]:

28 [Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

ILLUSTRATION

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X. appeals and A and Y are respondents. The Appellate Court decides in favour of X. it has power to pass a decree against Y.

34. Dissent to be recorded: Where the appeal is heard by more judges than one, any judge dissenting from the judgement of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

DECREE IN APPEAL

35. Date and contents of decree: (1) The decree of the Appellate Court shall bear date the day on which the judgement was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Judge dissenting from judgement need not sign decree —

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgement of the Court to sign the decree.

36. Copies of Judgement and decree to be furnished to parties : Certified copies of the judge-

ment and decree in appeal shall be furnished to the parties on application to the Appellate their expense.

37. Certified copy of decree to be sent to Court whose decree appealed from : A copy of the judgement and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgement of the Appellate Court shall be made in the register of civil suits.

Order 33 of the Code of Civil Procedure deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons.

10. Order 33 Rule 1 of the Code of Civil Procedure provides for instituting of suits by indigent person, stating:

“1. Suits may be instituted by indigent person— Subject to the following provisions, any suit may be instituted by an indigent person.

Explanation I — A person is an indigent person, —

(a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed bylaw for the plaint in such suit, or

(b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matterof the suit.

Explanation II — Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the applica- tion, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III — Where the plaintiff sues in a representative capacity, the question whether heis an indigent person shall be determined with reference to the means possessed by him in such capacity.”

SECOND APPEAL: Sections 100-103, 107-108 and order 42 deal with second appel. The provides for the second appeal in the High Court whre the High court is satisfied that the case involves asubstantial question of law. The following are the essentials of second appeal :

- A second appeal lies in the High Court
- Only on the based on the substantial question of law
- The High Court should formulate the substantial question
- No appeal lies in money decree where the amount does not exceed twenty five thousand rupees
- Appeal may be filed against an exparte decree

Sections 100 & 103 C.P.C.:

8. These provisions provide for the conditions precedent for entertaining a Second Appeal and the specific manner of its disposal. Section 100 CIVIL PROCEDURE CODE,1908 reads as follows:

According to section 100. Second Appeal: An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. In an appeal under this section, the memoran-dum of appeal shall precisely state the substantial question of law involved in the appeal.Where

the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

“103. Power of High Court to determine issue of fact — In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, —

(a) which has not been determined by the lower appellate court or both by the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100.”

In *Chunilal Mehta v. Century Spg & Mfg. Co. Ltd AIR 1962* the supreme court observed that the proper test for determining whether a question of law raised in the case is substantial question would be whether it is of general public importance or affects the rights of the parties.

Appeal from order: Appeal from orders under order 43 : Section 104-108 and order 43 deal with appeals from orders. Order has been defined as the formal expression of an adjudication which is not an decree. The code has made certain orders to be appealable.

Appeal from orders under order 43:

An appeal shall be from the following orders under the provisions of section 104, namely: —

- * an order awarding compensatory costs in respect of false and vexatious claims or defense.
- * an order refusing leave to institute suit against public nuisance.
- * an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte.
- * an order awarding compensation for obtaining arrest and detention, attachment or injunction
- * an order imposing fine
- * order dismissing suit out defence for non-compliance with an order for discovery.
- * an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- * an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;
- * an order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that Order is appealable.
- * an order refusing to set aside the abatement or dismissal of a suit;
- * an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- * an order rejecting an application for permission to sue as an indigent person;
- * orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;
- * an order to deposit money for attachment of property;
- * an order under rule 1, rule [rule 2A], rule 4 or rule 10 of Order XXXIX;
- * an order to appoint receiver;

- * an order to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;
- * an order of remanding a case, where an appeal would lie from the decree of the Appellate court;
- * an order under rule 4 of Order XLVII granting an application for review.

Appeal to the Supreme Court: The Supreme Court stands out to be at the apex of the pyramid of the Courts in India. It is the Highest Court of Appeal in India. Apart from having the appellate jurisdiction of the Honorable Court, it also acts as a guardian of the Constitution of India. Sections 109 and 112 read with order 45 deal with appeals to the Supreme court.

The following are the Jurisdictions of the Supreme Court:

- * Original Jurisdiction — Acts as a Guardian of the Constitution
- * Appellate Jurisdiction — Has the power to hear the appeals in all the cases lie with the High Court :
- * Writ Jurisdiction — For enforcing the Fundamental Rights
- * Advisory Jurisdiction — The Supreme Court has the authority to advise the President for the Question of law or fact.

109. When appeals lie to the Supreme Court — Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies —

- (i) that the case involves a substantial question of law of general importance and
- (ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

112. Saving — (1) Nothing contained in this Code shall be deemed —

- (a) to affect the powers of the Supreme Court under article 136 or any other provision of the Constitution, or
- (b) to interfere with any rules made by the Supreme Court, and for the time being force, for the presentation of appeals to that Court, or their conduct before that court.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction, or to appeals from orders and decrees of Prize courts.

15. Procedure to enforce orders of the Supreme Court — (1) Whoever desires to obtain execution of any decree or order] of the Supreme Court shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the court from which the appeal to the Supreme Court was preferred.

(2) Such court shall transmit the decree or order of the Supreme Court to the Court which passed the first decree appealed from, or to such other court as the Supreme Court by such decree or order may direct and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said decree or order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) Unless the Supreme Court otherwise directs, no decree or order of that court shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party of deceased respondent in a case, where such opposite party or

respondent did not appear either at the hearing in the court whose decree was complained of or at any proceedings subsequent to the decree of that court, but such order shall have the same force and effect as if it had been made before the death took place.

2.2 Appeal from Appellate Decree: -

Appeals from Appellate Decrees (Section 100 – 103)

Section 100: Second appeal. —

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Section 100-A: No further appeal in certain cases.—

Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge.

Section 101: Second appeal on no other grounds.—

No second appeal shall lie except on the grounds mentioned in Section 100.

Section 102: No second appeal in certain cases.—

No second appeal shall lie from any decree, when the subject-matter of the original suit is for recovery of money not exceeding twenty-five thousand rupees.

Section 103: Power of High Court to determine issues of fact.—

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in Section 100.

IMPORTANT CASE LAWS: -

1. Scope of Second Appeal

Ramathal v. Maruthathal, (2018) 18 SCC 303 : “A clear reading of Sections 100 and 103 CODE OF CIVIL PROCEDURE, 1908 envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the High Court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a second appeal is a substantial question of law involved in the case which has to be adjudicated by the High Court. It is the intention of the legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to Section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact-finding court. However, it is not an absolute rule that the High Court cannot interfere in a second appeal on a question of fact. Section 103 CODE OF CIVIL PROCEDURE, 1908 enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, the court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible; in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.”

2. Importance of Substantial Question of Law

Kshitish Chandra Purkait v. Santosh Kumar Purkait, (1997) 5 SCC 438: “.....when the Court exercises its jurisdiction under the proviso to sub-section (5) of Section 100 CODE OF CIVIL PROCEDURE, 1908 in formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 CODE OF CIVIL PROCEDURE, 1908 should always be borne in mind.....”

2.3 Appeals from Orders (Section 104 – 106): -

Section 104: Orders from which appeal lies: —

(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders: —

(ff) an order under Section 35-A;

(ffa) an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

~~Provided that no appeal shall lie against any order specified in clause (ff) save on the ground~~

that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

Section 105: Other orders: —

(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Section 106: What Courts to hear appeals.—

Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

IMPORTANT CASE LAWS: -

1. Scope of Section 104:

Subal Paul v. Malina Paul, (2003) 10 SCC 361: “By reason of Section 104 of the Code of Civil Procedure the bar of appeal under a special statute is saved. A plain reading of Section 104 of the Code of Civil Procedure would show that an appeal shall lie from an appealable order and no other order save as otherwise expressly provided in the body of this Code or by any law for the time being in force. Section 104 of the Code merely recognises appeals provided under special statute. It does not create a right of appeal as such. It does not, therefore, bar any further appeal also, if the same is provided for under any other Act, for the time being in force. Whenever the statute provides such a bar, it is so expressly stated, as would appear from Section 100-A of the Code of Civil Procedure.”

2. Appeals allowed under Section 104:

P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672:

At this stage it would be appropriate to analyse Section 104 CODE OF CIVIL PROCEDURE, 1908. Sub-section (1) of Section 104 CODE OF CIVIL PROCEDURE, 1908 provides for an appeal from the orders enumerated under sub-section (1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law for the time being in force. Sub-section (1) therefore contemplates three types of orders from which appeals are provided, namely,

- (1) orders enumerated in sub-section (1),
- (2) appeals otherwise expressly provided in the body of the Code, and
- (3) appeals provided by any law for the time being in force.

2.4 APPEAL TO SUPREME COURT: -

INTRODUCTION: -

The term 'appeal' has not been defined in the Code of Civil Procedure, 1908. It generally refers to the removal of a cause from an inferior to a superior Court to test the soundness of the decision of the inferior Court. In simple words, it is a remedy provided by law to nullify the decree of the lower Court. The provisions relating to the appeal to Supreme Court (hereinafter referred as SC) has been provided in the Constitution of India from Article 132 to Article 134A and in Section 109 and Order XLV of the Code of Civil Procedure, 1908.

Right to Appeal is substantive as well as a statutory right: -

It has been conferred by the appeal statute. This right arises as soon as the Court pronounces judgement against the party. This Right can be waived by the party if the concerned party has accepted the benefits under the decree. Thus it was stated in the case of Veeraya vs. Subbia Chaudhury. that the Right to Appeal cannot be taken away if available on the date of institution of the suit and subsequent law passed taking away Right of appeal. Although the fact that it may be exercised when the unfavourable judgement is given and such right are to be ruled by the law prevailing at the time of institution of the suit and not by the law that induces at the time of giving decision.

It was stated in the case of Amarjeet Kaur vs. Pritam Singh that when the appeal against a decree was pending, the SC has gone through the matter and became a sub-judice again. The trial court decree gets merged with the Appellate court decree and hence the court of appeals shall perform the same duties as imposed on the court of original jurisdiction.

PROVISIONS RELATING TO APPEAL TO SUPREME COURT UNDER CODE OF CIVIL PROCEDURE,1908: -

Article 132 of the Constitution accommodates the Appellate Jurisdiction of SC in appeals from High Court (hereinafter referred as HC) in situations where the appeals shall lie to the SC from judgement, decree or final order whether in Civil or Criminal or any other proceedings. Article 133 also prescribes if the High Court specifies or certifies that the particular case needs to be decided by the SC.

Article 133 was based on the provisions of Section 109 and Section 110. If we compare the Article with the Section, few differences that can be made out are previously, the right to appeal was confined to decrees and final order by the HC but now it is available against the judgement, decree and final order and even the certificate of fitness which was available for any order of HC has now been restricted to the final order.

Article 136 allows the Court to grant leave to a case decided by any Court in India to become an appeal and under this, the term "Court" does not include which is constituted under the law relating to armed force.

Under CODE OF CIVIL PROCEDURE,1908, appeal to the Supreme Court have been specified from Section 109 to Section 112 and in Order XLV. Section 109 prescribes certain conditions for the appeal from the judgement, decree or final order in a civil matter from High Court and it is subjected to the provisions of the Constitution of India. Notwithstanding that no allure can be recorded from the judgement, decree or final order of single a judge bench of the High Court. The conditions are if the High Court certifies that there is a substantive question of law involved in the case and this certificate is issued under Article 134A of the Constitution and that the said question is to be decided by the Supreme Court. There is even a limitation period of 60 days from the date of grant of the certificate by HC.

The said Article 134A was inserted in the 44th Amendment of the Constitution of India. Before this, no provision dealt with the time and way of applying to the issue of the certificate.

The object of this article is that the HC can allow the grant of a certificate under Article 132 either on its motion or on the oral application of the aggrieved party immediately after passing the judgement, decree or the final order.

It has been decided in the case of Union of India vs. Gopal Singh that the test to find out whether the order is final or not shall rely on whether the disagreement is finally over but the disagreement raised before the High Court is eventually over or not.

Apart from this the “substantive question of law”, as stated in the first condition of Section 109, has not been defined in the CODE OF CIVIL PROCEDURE, 1908 and it has to be constructed from the facts. One of the prime aspects is to test whether the question of law will benefit the general public or not. Moreover, the High Court ought to think that the specific question of law is of grave importance and therefore need to be decided by the Supreme Court. Another reason may be the lack of competency of the High Court in considering the issue related to that particular case. These two conditions must be fulfilled for SC to allow the appeals from the lower courts.

The second necessity is that the case should involve a reasonable or considerable question of law of general importance. Since this term is of great significance has not been outlined under the Code and in Mahindra and Mahindra Limited vs. Union of India, it was stated that the substantial question must be of such nature that apart from the party to the litigation, the public ought to have an interest in the determination of such question in SC because it will affect a huge number of people or several cases having the same question of law.

Even according to the 44th Law Commission of India report, the granting of certificate should not be taken lightly. It should be conceded only when the HC discovers it extremely difficult to decide the matter or in any exceptional circumstances.

PROCEDURE OF HEARING OF THE APPEAL IN THE SC: -

The procedure or methodology for Appeal to SC under Order XLV prescribes that a request for or petition for leave be made by the Appellant from the Court of law, the decision of which is claimed against. The period prescribed by law is sixty days from the order or the decision given by the Court. The said petition should state the specific grounds and it is solely after that the Court against whose decision an appeal is favored pulls out to the opposite side that is Judgment Debtor, in whose favor the case is chosen and really at that time an authentication or a Certificate is given to the judgment debtor to Appeal before the Supreme Court.

Application of leave or certificate of fitness: –

The party desirous of filing an appeal on the certificate by the HC need to file a petition of appeal in SC.

Security and Deposits: -

Order XLV Rule 7 prescribes the provision of security, where it says the applicant need to within 90 days or in reasonable cause given, within further 90 days from the date of decree or within 6 weeks from the date certificate was granted, whichever is later. The SC at any point can revoke this security and under Order XLV Rule 10, after the admission of appeal but before the transmission of a copy of a record, the SC can ask for further security if it finds it to be inadequate. Other procedural aspects involving the furnishing of security and costs and so on which are alongside the procedure of admission by the Court to examine the declaration of assets by the subordinate court alongside checking if the amount is paid in a specified time so that such appeal may enter in records of the Supreme Court. From this time forward the arrangement, everyday summarizes the arrangements and methodology concerning the Appeal to the Supreme Court.

Admission of Appeal: -

Under Order XLV Rule 8, the procedure of admission is given. After furnishing of security, the Court shall declare the appeal has been admitted, give notice of such admission to the respondent, transmit a correct copy of the said record under the seal of the court and provide one or more authenticated copies of any paper in a suit to either party.

Pending appeal: –

Under Order XLV Rule 13 of the Code prescribes the power of the Court pending Appeal. It is an order given by Court which suspends the Court proceeding but it does not prevent the other party from imposing the order of a lower Court. In the case of Videocon vs. SEBI, the Court held that if the right to Appeal is restricted, it does not affect the right to Appeal in pending proceedings, unless expressly so expressed.

Execution of Orders: –

Order XLV Rule 16 of the Code states that the order made by the Courts or Supreme Court, will be appealable in a similar manner as the rules as the orders of that Court relating to the execution of the decree.

Chapter 3: Reference, Review and Revision: -

3.1 Reference

Section 113 - Reference to High Court: -

Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit;

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court.

Explanation — In this section "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897, (10 of 1897) or in the General Clauses Act of a State.

3.2 Review: -

Review: Section 114, Order 41 Rule 1 of CIVIL PROCEDURE CODE, 1908: The review proceedings will be initiated, on the application of an aggrieved party or person, i.e. party or person who has legal grievance. An application for review shall lie to the following authorities.

(i) Review application against decree or order of High Court :

When decree or order, against which reviewed is prayed, is that of High Court, review application should be filed before any judge of High Court.

(ii) Some judge or his successor :

When the decree or order is that of court, other than High Court, it shall be reviewed by same judge or his successor, if the review application is filed by aggrieved person on the following grounds

- Discovery of new and important matter or evidence, or

- A clerical or arithmetical mistake, apparent on the face of the decree

Review application can be filed on basis of either of following grounds: (i) Appealable Decree or Order When any person is aggrieved by a decree or order and appeal is allowed against such decree or order, but appeal is not filed, review application can be filed against such decree or order.

(ii) No Right of Appeal allowed: Where no right of appeal is allowed to an aggrieved party, he can file a review application.

(iii) Discovery of new and important matter or evidence: When new and important matter or evidence is discovered, but such matter or evidence was not within knowledge of aggrieved person or such matter or evidence could not be produced by aggrieved person at that time when decree or order was passed, review application can be filed.

(iv) When any mistake or error is apparent on face of record, and not require any extra evidence to establish it, than a review application can be filed.

(v) Party may apply for review, an order or decree when there is any other sufficient ground or reason, review application can be filed.

Application for review may be rejected: (i) Where it appears to the court, that there is no sufficient reason for review.

(iii) Where an application for review is heard by more than one judges, and the court is equally divided.

3.3 Revision: -

115. Revision — (1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears —

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit :—

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation: In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding.

The code of civil procedure is branch of procedural law. For the purpose of providing justice the Court possess statutory powers as well as such other powers which are complementary to those powers which are generally called the inherent powers of the court and which are required for providing the end of justice.

The general meaning of the term inherent is natural. Sections 148 - 153- B deal with the inherent powers of the court. Section 148 provides that the court has power to enlarge any period fixed or granted upto 30 days. For application of this section the period must have been fixed or granted by the court and such period must be for doing an act prescribed or allowed by the code.

Sec 149 empowers the court to allow a party to make up the deficiency of court fees payable on plaint, memorandum of appeal etc. Sec 150 provides for where the business of any court is transferred to any other court the transferee court will exercise same powers and discharge same duties conferred or imposed by the code. Under section 151 the court can recall its own orders and correct mistakes and can set aside an ex parte order passed against the party and can issue temporary injunctions. This section is based on the doctrine of actus curiae neminem gravabit (an act of the court shall prejudice no one). Section 152 enacts that the clerical, arithmetical, mistakes in judgements, decree or orders may at any time be corrected by the court.

Sec 153-A provides where the appellate court dismisses an appeal power of amendment under section 152 can be exercised by the court of first instance.

Differences between Appeal and revision:

- Appeal lies in the superior court not necessarily to the high court whereas revision is only done by the High court
- A right to appeal is the substantive right while revisional power is discretionary

- A revisional application is filed on the ground of jurisdictional error an appeal lies on a question of fact and law

Difference between Appeal and reference:

- A right to appeal is vested in the parties the power of reference is vested in the court
- Reference is always made in the High Court whereas appeal can be filed in the superior court
- The grounds of appeal is wider than the grounds of reference.

Chapter 4: Miscellaneous

4.1 Transfer of Cases:

The importance of ensuring that cases are heard in the right court cannot be overstated. This is particularly true when it comes to the transfer of cases under the Code of Civil Procedure, 1908 (CODE OF CIVIL PROCEDURE,1908). The provisions related to the transfer of cases aim to ensure fairness in the judicial process, remove any reasonable apprehension of bias, and ensure that the case is heard in the most appropriate forum.

Transfer of Cases under Code of Civil Procedure,1908:

The transfer of cases under the CODE OF CIVIL PROCEDURE,1908 refers to the process of moving a case or proceeding from one court to another court that has the jurisdiction to hear and decide the matter. The transfer can be requested by a party to the case, or it can be done by the court on its own initiative (suo motu). This mechanism ensures that the case is heard at a court that is more competent, fair, and convenient for all parties involved.

The power to transfer cases is vital to ensuring justice is delivered fairly and without bias. By facilitating the transfer of a case to a court that can better serve the interests of justice, the CODE OF CIVIL PROCEDURE,1908 ensures that litigants are not subjected to undue hardship or prejudice due to the location, bias, or lack of competence of the court initially chosen.

The Legal Provision of Transfer of Cases: Sections 22 to 25 of the CODE OF CIVIL PROCEDURE,1908

The transfer of cases under the CODE OF CIVIL PROCEDURE,1908 is governed by Sections 22 to 25. These sections lay down the rules and procedures for when and how a case can be transferred. The key sections involved in the transfer of cases include:

Section 22: Deals with the power to transfer cases between two or more courts that have jurisdiction over the matter. This section empowers the defendant to apply for the transfer of the case to another court.

Section 23: Specifies which higher court (Appellate Court or High Court) should hear the application for the transfer of a case when there are multiple courts with jurisdiction.

Section 24: Provides the power for the High Court and District Courts to transfer or withdraw cases on their own motion (suo motu) or based on an application from any party.

Section 25: Empowers the Supreme Court to transfer cases between High Courts or Civil Courts in different states, ensuring that cases can be moved when required for justice.

Section 22 – Transfer by Defendant

Under Section 22, the defendant in a case has the right to apply for the transfer of the case to another court if the suit could have been filed in more than one court. This application for transfer must be made at the earliest possible opportunity, specifically before the issues in the case are settled or during the issue settlement stage.

Key Aspects of Section 22:

The defendant must file the application for transfer to another court.

The application must be made before the settlement of issues between the parties.

Notice of the application must be given to the other parties involved in the suit.

The court where the application is made will consider the objections of other parties and decide which court will handle the case.

Section 23 – Which Court to Approach

Once an application for the transfer of a case is filed under Section 22, Section 23 outlines the court that should hear the application based on the jurisdictional hierarchy. The section is divided into three parts:

If multiple courts have jurisdiction under the same Appellate Court: The application should be made to that Appellate Court.

If the courts are subordinate to different Appellate Courts but to the same High Court: The application should be made to the High Court.

If the courts are under different High Courts: The application should be made to the High Court within the local jurisdiction of the court where the case was originally filed.

This section ensures that the transfer application is heard by the appropriate authority, depending on the jurisdiction of the courts involved.

4.2 CAVEAT: -

The word Caveat has not been defined in the code. It came from the Latin term beware. Sec 148-A of the code provides for the lodging of Caveat.

Right to lodge a caveat — (1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a court, any person claiming a right to appear before the court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveat or) shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been, or is expected to be, made under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveat or.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveat or, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period

4.3 RESTITUTION: -

Section 144 of the Code deals with the doctrine of restitution. The doctrine of restitution is based upon the well-known maxim "actus curiae neminem gravabit", the act of the court shall harm no one. Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified, and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute, it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

Transfer of Cases: sections 22- 25 enact the law as regards transfer and withdrawal of the suits, appeals, and other proceedings from one court to another court.

22. Power to transfer Suits which may be Instituted in more than one court.- Where a suit may be instituted in any one of two or more courts and is instituted in one of such courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have suit transferred to another court, and the court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several courts having jurisdiction the suit shall proceed.

23. To what Court application lies —

(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

24. General power of transfer and withdrawal —

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

25. Power of State Government to transfer suits —

(1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the State Government, by notification in the Official Gazette transfer such suit, appeal or proceeding to any other High Court:

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case

4.4 Inherent Powers of Courts: -

Introduction:

The inherent powers are considered necessary to do the right and undo the wrong in the course of the administration of justice and to be regarded as supplementary to specially conferred powers. Inherent powers have roots in necessity, and they are coextensive with necessity in order to do complete justice.

The law relating to inherent powers is contained in Section 148 to Section 153A of the Code of Civil Procedure, 1908 (CIVIL PROCEDURE CODE,1908) which visualizes the exercise of powers in different circumstances.

Section 148 of Civil Procedure Code,1908

This section deals with the enlargement of time.

It states that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, not exceeding thirty days in total, even though the period originally fixed or granted may have expired.

This power of the court is of discretionary nature and cannot be claimed as a right.

Section 149 of Civil Procedure Code,1908

This section deals with the power to make up deficiency of court-fees.

It states that where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court fee; and upon such payment, the document, in respect of which fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Section 150 of Civil Procedure Code,1908

This section deals with the transfer of business.

It states that save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Section 151 of Civil Procedure Code,1908

This section deals with the saving of inherent powers of Court.

It states that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

This section does not confer any substantive rights on parties but is meant to get over the difficulties arising from rules of procedure.

Section 152 of Civil Procedure Code,1908

This section deals with the amendment of judgments, decrees or orders.

It states that clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

This section is based on two important principles:

An act of court should not prejudice any party.

It is the duty of the courts to see that their records are true, and they represent the correct

state of affairs.

Section 153 of Civil Procedure Code,1908

This section deals with the general power to amend.

It states that the Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Section 153A of Civil Procedure Code,1908

This section deals with the power to amend a decree or order where appeal is summarily dismissed.

It states that where an Appellate Court dismisses an appeal under rule 11 of Order XLI, the power of the Court to amend, under section 152, the decree or order appealed against may be exercised by the Court which had passed the decree or order in the first instance, notwithstanding that the dismissal of the appeal has the effect of confirming the decree or order, as the case may be, passed by the Court of first instance.

Limitations of the Inherent Powers

The exercise of inherent powers carries with it certain limitations such as -

They can be exercised only in the absence of express provisions in the code.

They cannot be exercised in conflict with what has been expressly provided in the code.

They can be exercised in exceptional cases.

While exercising the powers, the court has to follow the procedure prescribed by the legislature.

The Courts cannot exercise jurisdiction not vested in them by law.

Case Laws: -

In *Ram Chand v. Kanhayalal* (1966), the Supreme Court held that the inherent powers under Section 151 of CIVIL PROCEDURE CODE,1908 can also be exercised to prevent the abuse of the process of court.

In case of *Mahendra Manilal Nanavati v. Sushila* (1965), the Supreme Court while expressing its view on the nature of inherent powers of the court, observed that the Code of Civil Procedure is a special piece of legislation to deal with procedural situations of proceeding of trials of civil nature. Under the Code itself, some hidden powers are conformed on the courts according to the emerging situations during the proceedings and courts can exercise them in absence of expressed provisions. But where there are express provisions in the Code, the Courts are barred from invoking such powers.

Chapter 5: LAW OF LIMITATION

Till 1859 there was no definite law of limitation from the year 1793 various regulations were passed prescribing the limitation for the institution of the suits. The question of limitation finally solved by the Limitation Act of 1908 and again modified by the law commission and a new Act came into force called The Limitation Act of 1963.

Section 3 provides for the bar of limitation and also provides that every suit instituted preferred and application made after the prescribe the period shall be dismissed , although the limitation period has not been set up as a defence.

Extension of prescribed period in certain cases. -Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Explanation.- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

6. Legal disability —

- Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

- Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

- Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

- Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

- Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died. Explanation.-For the purposes of this section, 'minor' includes a child in the womb.

Sec 7. Disability of one of several persons. — Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

11. Suits on contracts entered into outside the territories to which the Act extends —

(1) Suits instituted in the territories to which this Act extends on contracts entered into in the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.

(2) No rule of limitation in force in the State of Jammu and Kashmir or in a foreign country shall be a defence to a suit instituted in the said territories on a contract entered into in that State or in a foreign country unless —

(a) the rule has extinguished the contract; and

(b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.

12. Exclusion of time in legal proceedings —

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

13. Exclusion of time in cases where leave to sue or appeal as a pauper is applied for.-In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.

18. Effect of acknowledgment in writing —

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received. Explanation. For the purposes of this section—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word "signed" means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.

22. Continuing breaches and torts.-In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. 22. Continuing breaches and torts.-In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."
