



# LAW COMMISSION OF INDIA

TWENTY-SEVENTH REPORT

(THE CODE OF CIVIL PROCEDURE, 1908)

December, 1964

GOVERNMENT OF INDIA ● MINISTRY OF LAW

CHAIRMAN,  
LAW COMMISSION,  
5, Jorbagh, New Delhi,

December 13, 1964.

Shri Asoke Kumar Sen,  
Minister of Law,  
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Twenty-seventh Report of the Law Commission which relates to the Code of Civil Procedure, 1908.

2. The question of taking up revision of this Code was considered at the meeting of the Law Commission held on the 9th March, 1959. As the Fourteenth Report of the Law Commission (Reform of Judicial Administration) had suggested amendments in the Code on certain matters, it was decided at that meeting that clarification be sought from the Ministry of Law as to whether revision of the Code should comprise all questions, including matters covered by and suggested in the Fourteenth Report, or it should be confined to matters not covered by it. The Government decided that the revision should include those matters also. In accordance with that direction a draft Report was prepared which after discussion and reconsideration by the Commission at its 25th and 29th meetings held on December 2, 1959 and August 29, 1960, respectively, was circulated to the State Governments, High Courts, Bar Associations and other interested persons and bodies.

3. After the constitution of this Commission, the subject was studied in detail taking into consideration, as set out in the Report, the amendments in the R.S.C. after the Evershed Report, several amendments made by the various High Courts in India, the decisions of the Supreme Court and the conflict of judicial opinion in the High Courts and the criticisms of and suggestions on the previously circulated draft Report received by the Commission. The Commission consi-

dered all these matters at meetings held on the following dates:—

51st meeting—4th, 5th and 6th November, 1963.

52nd meeting—2nd to 7th December, 1963.

55th meeting—17th to 21st February, 1964.

56th meeting—30th and 31st March and 1st to 4th April, 1964.

57th meeting—4th to 8th May, 1964.

58th meeting—7th to 12th September, 1964.

59th meeting—21st to 26th September, 1964.

60th meeting—3rd, 5th and 6th October, 1964.

61st meeting—23rd, 24th, 26th, 27th, 28th, 30th and 31st October, 1964.

62nd meeting—5th to 7th November, 1964.

63rd meeting—16th to 18th November, 1964.

4. A revised draft Report, draft of the Bill and notes on clauses were prepared after the discussions at the meetings above mentioned and all these were again considered and finalised at the 64th meeting of the Commission held from December 7 to December 12, 1964.

5. I wish to acknowledge the assistance rendered to us by Mr. P. M. Bakshi, our Joint Secretary and Draftsman, in the preparation of the Report and the draft Bill and notes. His industry and research have been prodigious. He placed before us very valuable material for our consideration. He analysed the mass of case law on the subject, and drew our attention to the conflict of judicial opinion on the interpretation of various provisions of the Code. He also brought to our notice many knotty and intriguing points, which have arisen in Courts during more than half a century that the Code has been in force.

Yours sincerely,

J. L. KAPUR.

REPORT ON THE CODE OF CIVIL PROCEDURE, 1908

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## REPORT ON CIVIL PROCEDURE CODE

1. In every civilized society there are two sets of laws (i) substantive laws and (ii) procedural laws. Substantive laws determine the rights and obligations of citizens. Procedural laws prescribe the procedure for the enforcement of such rights and obligations. Of the two, substantive laws are no doubt the more important. But the efficacy of substantive laws, to a large extent, depends upon the quality of the procedural laws. Unless the procedure is simple, expeditious and inexpensive, the substantive laws, however good, are bound to fail in their purpose and object. Substantive law, according to Sir Henry Maine<sup>1</sup>, has at first the look of being gradually secreted in the interstices of procedure. In this view, the revision of the Code of Civil Procedure assumes considerable importance.

Importance of the subject.

2. The history of civil procedure in this country really begins with the year 1859, when the first uniform Code of Civil Procedure was enacted. Before 1859, the law of Civil Procedure was in a chaotic condition. Not only was there no uniform law of Civil Procedure applicable to the whole of the country, but in the same area different systems of procedure prevailed. For example, in Bengal alone, there were as many as nine<sup>2</sup> systems of procedure simultaneously in force. The first effort in the direction of evolving a uniform procedure was made when Sir Charles Wood, then President of the Board for the Affairs of India, directed<sup>3</sup> the Second Law Commission to address themselves to the preparation of "a Code of simple and uniform procedure" applicable to all the courts. The Commission prepared four draft Codes of procedure, which were intended to apply to ordinary civil courts of the lower provinces of Bengal, the Presidencies of Madras and Bombay and the North-Western Provinces. Four Bills based on these drafts were ultimately amalgamated and enacted as the Code of Civil Procedure, 1859. The Code of 1859 was, however, not applicable to the Supreme Courts in the Presidency Towns and to the Presidency Small Cause Courts. Soon after it was passed, it was subjected to a series of amendments. In the meantime, it was extended, subject to some modifications, to the whole of British India and to the High Courts in the exercise of their civil, intestate, testamentary and matrimonial jurisdiction<sup>4</sup>. The new Letters Patent of 1865, however, modi-

Historical background—the 1859 Code.

<sup>1</sup>Sir Henry Maine, *Dissertations on Early Law and Custom* (1883), page 389.

<sup>2</sup>Whitley Stokes : *The Anglo-Indian Codes* (1888) Vol. II, page 381.

<sup>3</sup>Whitley Stokes : *The Anglo-Indian Codes* (1888) Vol. II, page 384.

<sup>4</sup>See the revoked Letters Patent of 1862, e.g., section 37 of the Calcutta Letters Patent, 1862.

fied this position, and empowered the High Courts to make their own rules and orders for regulating civil proceedings. At the same time, it imposed a duty on them to be guided by the provisions of the Code of 1859, as amended from time to time.

The 1877  
Code.

3. The 1859 Code was soon found to be "ill-drawn, ill-arranged and incomplete<sup>1</sup>." In 1863-64, a fairly comprehensive Bill was prepared by Mr. Harrington (afterwards Sir Heway Harrington) to replace it. But, for some reason, the enactment of the Bill into law was deferred. In the meantime Acts dealing with particular branches of law were enacted, and these necessitated corresponding changes in the Code. The work of revision was taken up seriously when Dr. Whitley Stokes, at that time Secretary to the Government of India in the Legislative Department, was permitted by the Law Member to recast the draft Bill prepared by Mr. Harrington. He re-arranged<sup>2</sup> in a systematic manner the provisions of the Code of 1859. He introduced a number of new provisions based on orders and rules made in England under the Judicature Acts. He also borrowed some provisions of the New York Civil Code. Sir Arthur Hobhouse (later Lord Hobhouse), who was the then Law Member, made substantial contribution to the draft Bill. With certain modifications, the Bill was enacted as the Code of Civil Procedure, 1877.

The 1882  
Code.

4. Soon after the enactment of the Code of 1877, it was realised that the new Code required several amendments. As many as 130 sections of the Code were amended<sup>3</sup> in 1879. Further amendments were proposed in 1882. It was then decided, that the Code should be completely re-cast. It was in these circumstances that the Code of Civil Procedure, 1882, was enacted.

The 1908  
Code.

5. Experience of a quarter of a century of the working of the Code of 1882 showed that the general lines on which it proceeded were sound<sup>4</sup>. It was, however, discovered, that in respect of some matters the provisions of the Code were too rigid to meet sufficiently the varying needs of the different areas of the country. Moreover, there was some conflict of judicial opinion on the interpretation of certain provisions of the Code. To remedy these and other defects, a comprehensive revision of the Code was undertaken in the first decade of this century. The revision was undertaken by a Select Committee, which collected valuable material on the subject and prepared a draft Bill. A Special Committee presided over by Sir Earle

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<sup>1</sup>Whitley Stokes : Op. cit. page 385.

<sup>2</sup>Whitley Stokes : Op. cit. page 386.

<sup>3</sup>Whitley Stokes : Op. cit., page 388.

<sup>4</sup>Report of the Special Committee appointed to consider the amendment of the Civil Procedure Code, Gazette of India, 1907, Part V, page 179.



Richards, which included Dr. Rashbehari Ghose, examined the Bill carefully. This Committee, while giving due regard to the provisions of the Bill, relied upon the Code of 1852 as the basis of revision. It re-arranged all the provisions of the Code into two parts—

- I. "the body of the Code" and
- II. "the Schedule".

The Committee explained the principle underlying the re-arrangement thus :

"The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the province in which the court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill, stating in general terms the powers of the court and of leaving the details to the rules<sup>1</sup>."

In the proposed revised Code the provisions pertaining to details of procedure and other matters of minor character were relegated to rules contained in a Schedule. The object of the re-arrangement was to separate the fundamental and basic provisions, which could not be amended except by the legislative process, from the comparatively minor and detailed provisions in respect of which it was desirable to provide a more elastic and speedy machinery for modification than the tardy process of legislation. Sir Earle Richards, Law Member, while moving for leave to introduce the Bill which ultimately became the Code of Civil Procedure 1908, observed as follows<sup>1</sup>:—

"They (the Special Committee) do not desire to do away with uniformity in main principles..... But they think that, with due regard to those considerations, it is possible to confer a power to change the less important provisions of the Code in order that defects in them can be remedied at once as they are discovered and in order that in special circumstances the courts may have power to simplify our legal machinery and to make it more adapted to the wants of less advanced communities<sup>2</sup>".

It was accordingly proposed, that the new Code should empower the High Courts to make rules for regulating their own procedure and the procedure of subordinate courts and to modify the rules contained in the first Schedule to the Code. Provision was also made for a Rules Committee to report to the High Court on all proposals for making new rules or modifying the existing rules.

<sup>1</sup>Report of the Special Committee, Gazette of India, 1907, Part V, page 179 (at p. 185), para. 12.

<sup>2</sup>Gazette of India, 1907, Part VI, pages 136-137.

Apart from the re-arrangement of the provisions of the Code into sections and rules, the Committee did not make many changes of a radical character. Its approach was justifiably conservative. The Bill, as settled by the Special Committee, was enacted as the Code of Civil Procedure, 1908, without any substantial modifications.

Present  
Code well-  
thought  
out.

6. The foregoing survey reveals that the Code of 1908 is a product of well-thought out efforts and experimentation extending over more than half a century. The Code has stood the test of time. It has on the whole worked satisfactorily and smoothly and has evoked the admiration of many distinguished authorities. An eminent Chief Justice of a High Court observed recently thus<sup>1</sup>:

“The more you study the Civil Procedure Code the more you realise what an admirable piece of legislation it is.”

Similar views were expressed in the course of the evidence given before the Law Commission in connection with the preparation of its Report on the Reform of Judicial Administration<sup>2</sup>. We have, therefore, been very cautious in proposing any radical changes in the Code of 1908.

Scheme of  
revision.

7. The Law Commission has, in its Fourteenth Report, indicated the broad lines on which the Code should be revised. Before making its Report, the Commission toured the whole country and elicited public opinion on some of the important problems relating to the Reform of Judicial Administration. In making our recommendations for the revision of the Code, we have taken the following materials into consideration—

(i) The recommendations made in the Fourteenth Report, in so far as those recommendations contemplated changes in the law of civil procedure;

(ii) The amendments made by State Legislatures in the body of the Code;

(iii) The amendments made by the various High Courts in the rules contained in the First Schedule to the Code;

(iv) The new Rules of the Supreme Court in England which are based largely on the recommendations contained in the Evershed Report<sup>3</sup> and which came into force on the 1st January, 1964;

(v) The County Court Rules, 1936, as amended up-to-date;

<sup>1</sup>Chagla C. J. (as he then was) in his foreword to Soonvala's Treatise on the Law of Execution Proceedings (1958).

<sup>2</sup>14th Report, Vol. I, page 263, para. 10.

<sup>3</sup>Final Report of the Committee on Supreme Court Practice and Procedure (1953), Cmd. 8878.

(vi) The conflict of judicial opinion on the interpretation of various provisions of the Code;

(vii) The suggestions received by us for amendment of the Code.

8. Justice should be cheap and expeditious. That is what the common man wants. Lord Evershed has observed—

Twin  
problem  
of costs  
and delay.

“Expedition and cost to the community and the litigant alike are factors of ever present import” (in maintaining the respect of the citizen for the law).<sup>1</sup>

Two important problems which, therefore, arise for consideration are—(i) costs, and (ii) delay. Costs of litigation mainly consist of (1) court-fees, (2) lawyer's fees, and (3) expenses incurred in calling witnesses. The question of court-fees has been exhaustively dealt with by the Law Commission in the Fourteenth Report<sup>2</sup>. The main recommendations in that Report are the following:—

(1) It is one of the primary duties of the State to provide the machinery for the administration of justice, and on principle it is not proper for the State to charge fees from suitors in courts.

(2) Even if court-fees are charged, the revenue derived from them should not exceed the cost of the administration of civil justice.

(3) The making of a profit by the State from the administration of justice is not justified.

(4) Steps should be taken to reduce court-fees, so that the revenue from them is sufficient to cover the cost of the civil judicial establishment. Principles analogous to those applied in England<sup>3</sup> should be applied to measure the cost of such establishment. The salaries of judicial officers should be a charge on the general tax-payer.

(5) There should be a broad measure of equality in the scales of court-fees all over the country. There should also be a fixed maximum to the fee chargeable.

(6) The rates of court-fees on petitions under articles 32 and 226 of the Constitution should be very low, if not nominal.

(7) The fees which are now levied at various stages, such as the stamp to be affixed on certified copies and exhibits and the like, should be abolished.

(8) When a case is disposed of *ex parte* or is compromised before the actual hearing, half the court-fee should be refunded to the plaintiff.

<sup>1</sup>Lord Evershed, in the Foreword to Delmar Karlen, “Appellate Courts in the United States and England”.

<sup>2</sup>14th Report, Vol. I, pages 487 to 509, and summary at page 509, para. 42.

<sup>3</sup>See 14th Report, Vol. I, page 505, para. 30.

(9) The court-fee payable in an appeal should be half the amount levied in the trial court<sup>1</sup>.

A brief reference is also made in the Fourteenth Report<sup>2</sup> to lawyers' fee in the following terms:—

“The fees paid to a lawyer so long as they do not exceed the amounts prescribed by the rules framed by the several High Courts under the Legal Practitioners Act, 1879 are also recoverable from the opposite party, if a certificate is filed to the effect that the lawyer has actually received the fee claimed. No doubt the successful litigant does often pay higher fees to his lawyer than he gets from his opponent on taxation. These are however luxury expenses incurred by him for his convenience in respect of which he is not entitled to an indemnity. It may be that if the scales of lawyer's fees have for legitimate reasons risen in particular States, alterations may have to be made in the percentages prescribed by the High Courts under the rules.”

In order to indemnify the successful party for all necessary expenses incurred by him, we propose<sup>3</sup> that certain items of lawful expenditure, such as (i) expenditure incurred in giving notice before a suit is filed; (ii) expenditure incurred on the typing of pleadings; (iii) charges paid for inspection of the records of the Court; (iv) expenditure incurred for bringing witnesses to Court though not summoned through the Court, which are not at present allowed as costs may, if the Court so directs form part of the taxed costs.

The best method, however, of reducing costs is to improve the rules of procedure so that the length of trial is reduced, because costs increase in direct proportion to the length of a trial. If cases are adjourned from time to time and witnesses have to come to court a number of times before they are examined, the costs incurred in calling them will necessarily increase. So far as the Code is concerned, the problem of costs is, therefore, intimately connected with the problem of delay, to which we now address ourselves.

Problem  
of delay.

9. Although the provisions of the Code of Civil Procedure, 1908 are basically sound, it cannot be gainsaid that in view of the appalling back-log of cases which has unfortunately become a normal feature of nearly all the courts of the country, the problem of delay in the law

<sup>1</sup>See 14th Report, Vol. I, page 509, para. 41.

<sup>2</sup>14th Report, Vol. I, page 481, para. 13.

<sup>3</sup>Appendix I, Order 20A.

courts has assumed great importance. Lord Evershed's observation quoted earlier is worth repetition:

"Expedition and cost to the community and the litigant alike are factors of ever present import" (in maintaining the respect of the citizens for the law).

We have, therefore, while making our recommendations, paid special attention to this problem.<sup>1</sup>

10. The problem of delay is not a new problem. It is as old as the law courts. Nor is the problem peculiar to our country. Lord Devlin in his speech before the Thirteenth Legal Convention of the Law Council of Australia admitted that even in England cases are taking longer to be decided<sup>2</sup>. In India, Committee after Committee<sup>3</sup> has been appointed to tackle this problem. The Rankin Committee appointed in 1923 devoted a large part of its Report to this problem<sup>4</sup>. The problem has been examined in some detail in the Fourteenth Report of the Law Commission on the Reform of administration of justice. Some States appointed their own Committees to deal with this problem. Various suggestions have been made by all these Committees. Many of them have been implemented. But the problem still remains. The problem is complex, and does not admit of a simple solution. The Fourteenth Report contains several recommendations for eliminating delay. We have further examined these recommendations in some detail. We have carried out many of them. We have ventured to make a few more suggestions, which we think, will help in the solution of the problem. We have also taken into consideration the suggestions for eliminating delay made at the recent seminar on Civil Procedure Code held in New Delhi under the auspices of the Bar Association of India.

Reports of previous Committees and Commissions.

11. There is a school of thought which believes that our procedural laws, which are based on the English system, are not suited to the genius of our people. The alternatives to the English system are (i) the indigenous system, and (ii) the continental system.

System of administration of justice and procedure.

12. The indigenous system has been rejected by the Law Commission in the Fourteenth Report. The reasons for rejecting that system are well brought out in the following passages from that Report<sup>5</sup>:

Indigenous system.

"The answers we have received state with almost complete unanimity that the system which has prevailed in our country for nearly two centuries, though

<sup>1</sup>Lord Evershed, in the Foreward to Delmar Karlen, "Appellate Courts in the United States and England".

<sup>2</sup>36 Australian Law Journal, pages 277, 279.

<sup>3</sup>For details, see 14th Report, Vol. I, pages 14-15, paras. 11 to 13.

<sup>4</sup>Civil Justice Committee (1924-25), Report, pages 1-446.

<sup>5</sup>14th Report, Vol. I, page 24, para. 3.

British in its origin, has grown and developed in Indian conditions and is now firmly rooted in the Indian soil. It would be disastrous and entirely destructive of our future growth to think of a radical change at this stage of the development of our economy. It has been pointed out that those who have supported a reversion to the indigenous system of judicial administration have not really applied their minds to the question. It would be ridiculous, it is said, for the social welfare State envisaged by our Constitution which itself is based largely on the Anglo-Saxon model to think of remodelling its system of judicial administration on ancient practices, adherence to which is totally unsuitable to modern conditions and ways of life. We may as well, it is said, think of rejecting modern medicine and surgery and content ourselves with what the ancient knew and practised."

It is to be noticed that the conclusion reached by the Law Commission not to depart from the Anglo-Saxon system of procedure is based on "almost complete unanimity" of public opinion.

Conti-  
nental  
system.

13. A brief resume of the continental system is given in the Report of the Evershed Committee in the following words<sup>1,2</sup>:

(b) In both France and Germany all (oral) witnesses are the Court's witnesses, though generally speaking they are tendered by the parties. In both countries the system is (as has been said), unlike the English system, "inquisitorial". There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes a deposition before the examining judge who decides what witnesses shall be summoned. The process of taking evidence is almost invariably at an early stage of the proceedings, long before the "trial" proper.

(c) The witness makes his statement in his own words—there being no "hearsay" rule. It is for the Court to decide the value of what has been said. It is, however, to be noted that the parties themselves are, generally, not competent witnesses in Germany; and in France parents, relatives and servants of the parties and certain other categories of persons are not competent.

(d) In both France and Germany oral testimony is regarded as of far less significance than in England (as will be apparent from the preceding paragraph).

<sup>1</sup>Final Report of the Committee on Supreme Court Practice and Procedure (1953) Cmd. 8878, pages 85-86, paras. 250 and 252.

<sup>2</sup>See also 14th Report, Vol. I, page 341, para. 73.

The main emphasis is on written evidence including notarially attested records of every sort of transaction.

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The oral evidence, as we have said, is taken more or less in the form of depositions by an examining magistrate before the "trial". The examining magistrate decides what he shall receive and what he shall not receive and makes his report thereon. So far as regards oral evidence that is the end of the matter, and it follows that there is no room for the characteristic English rule about hearsay.

The system in Eastern European countries is also not very different.

14. We think that on merits the English system is to be preferred, because it ensures fair trial. English system preferred.

If the rule of law is to be maintained, if a democratic social order is our political objective and "if justice must be done in a way which will satisfy the minds of the public that it is not only being done but is obviously and clearly being done", we cannot think of any legal system other than the English without imperilling the very foundations of our legal structure and the great principles which are enshrined in our Constitution. Most of our laws, both procedural and substantive, are based upon English jurisprudence. It is too late in the day to shift to the Continental system, unless we are prepared to revise our entire body of laws.

15. If the English system is to be adopted, some delay is inherent in that system itself. The essence of the English system is a "fair trial". A "fair trial" means that each party must know the case of the other party (pleadings) that each party must disclose to the other party all documents which are relevant to the subject-matter of the dispute between them (discovery and inspection), that the Court should determine the points of difference between the parties (issues), that each party should be permitted to lead evidence in support of its case (examination of witnesses) and, finally, that each party should be heard before judgment is delivered. An ideal Code is one which strikes a just balance between a fair trial and expedition. Subject to the necessary safeguards to ensure a "fair trial", the procedure should be so simple that "it is easier to decide a case than to invent reasons for not deciding it". Some delay inherent in English system.

16. The causes of delay may be divided under four heads (1) insufficient number of judges, (2) inadequate ministerial staff, (3) personal factors, and (4) defects in procedure: Causes of delay—personal factors and defects in procedure.

(1) There is congestion of work in several courts. The only way of removing such congestion is to appoint additional judges. Unless the arrears in any court are wiped out by the appointment of additional Judges, any improvements in procedure will not result in the expeditious disposal of cases in that Court.

(2) The remuneration at present payable to Judges is grossly inadequate. The Law Commission, has in its Fourteenth Report<sup>1</sup>, made certain recommendations on this subject. If Judges are expected to work efficiently and honestly, they should be properly paid, having regard to their status and the nature of work done by them.

(3) A great deal of preliminary work for getting cases ready for disposal is done by the ministerial staff. The ministerial staff should be of sufficient strength to handle such work properly and expeditiously. The emoluments paid to the ministerial staff in subordinate courts are near the starvation level. A great deal of corruption among the ministerial staff in subordinate courts is due to this factor. It is, therefore, imperative that the conditions of service of such ministerial staff should be improved<sup>2</sup>.

(4) Under the head "personal factors" fall such causes of delay as (1) inexperienced Judges, (2) inefficient ministerial staff, and (3) **delaying tactics adopted by litigants**. The first cause of delay is outside the scope of our inquiry. As regards the second cause, a great deal of delay caused by this factor could be avoided if in every court there is a well-organised office which is equipped with trained staff and is properly supervised. We shall, therefore, proceed to deal with cause (3), which is sometimes erroneously attributed to defects in procedure.

Delaying tactics.

17. A leader of the New York Bar is said to have begun his practice with the following motto on his wall :

"If I am plaintiff, nothing can stop me. If I am defendant, nothing can move me."

There is a popular belief that the technicalities of legal procedure can be exploited and a case continued almost indefinitely if so desired. In a weak case, apart from numerous applications for adjournment, frivolous interlocutory applications are made, e.g. applications for amendment of the pleadings or for amendment of issues, examination of witnesses on commission, summoning unnecessary witnesses, etc. These tactics do not succeed before an experienced and astute Judge. They succeed

<sup>1</sup>14th Report, Vol. I, pages 163-164 and pages 193-201.

<sup>2</sup>14th Report, Vol. I, page 224, para. 126.



only before Judges who have no adequate experience. And such tactics succeed not because of the observance, but because of the non-observance, of the rules of procedure. Delay under this item is, therefore, not due to any defects in procedure. Rules of procedure are intended to subserve, and not to delay or defeat justice.

18. The Law Commission, after eliciting public opinion, came to the following conclusion in the Fourteenth Report<sup>1</sup>:—

Defects  
in pro-  
cedure.

“It was generally agreed that the Code of Civil Procedure is an exhaustive and carefully devised enactment, the provisions of which if properly and rigidly followed are designed to expedite rather than delay the disposal of cases. Delay results not from the procedure laid down by it but by reason of the non-observance of many of its important provisions, particularly those intended to expedite the disposal of proceedings.”

While we generally agree with the above conclusion, we think that for better subserving the ends of justice and for eliminating delay, some of the provisions of the Code are capable of improvement.

19. The problem of delay due to defects in procedure may be examined with reference to three stages:—

Problem  
examined  
under  
three  
stages.

- (1) delay in the trial of suits;
- (2) delay at the appellate stage; and
- (3) delay in execution proceedings.

20. Statistics collected by the Law Commission for the purposes of the Fourteenth Report<sup>2</sup> revealed, that 65 to 70 per cent. of suits are disposed of within one or two years.<sup>3,4</sup> It is, however, possible to improve the procedure so that suits can be disposed of in a shorter period. Delay in the trial of suits may be divided under two heads—(i) delay before trial and (ii) delay during trial.

Delay in  
trial of  
suits.

21. “Delay before trial” may be considered with reference to the following items—(i) service of summonses and other processes, (ii) filing of written statements, (iii) filing of documents, and (iv) issues. Each of these items may be dealt with separately.

Delay  
before  
trial.

22. Delay under the first item can be further sub-divided under two heads—(i) delay in payment of process fee and preparation of process, and (ii) delay in the actual service of summonses. Process fee must be paid when the

Service  
of sum-  
mons—  
process  
fee and  
forms.

<sup>1</sup>14th Report, Vol. I, page 253, para. 10.

<sup>2</sup>14th Report, Vol. I, page 263, para. 10.

<sup>3</sup>14th Report, Vol. I, page 258, para. 7.

<sup>4</sup>We tried to secure up-to-date figures on the subject, but replies in respect of several States have not yet been received.

plaint is filed. As recommended in the Fourteenth Report<sup>1</sup>, a rule should be made by the High Courts requiring the parties or their pleaders to file with the plaint printed forms of process legibly filled in, leaving only the date of appearance of the defendant and the date of issue of process blank. Such a rule has been made in several States. The printed forms of summonses should be available free of cost or on a small payment in the Nazir's office.

Service of summons—procedure for.

23. Order V, rule 20A provides for the service of summons by registered post either in lieu of or in addition to the normal manner of service where for any reason whatsoever the summons is unserved. We have, after taking into account the recommendation in the Fourteenth Report<sup>2</sup>, proposed a rule<sup>3</sup> whereunder a summons by post may be issued simultaneously with the summons in the ordinary manner. The Court can then act on whichever return shows effective service.

Service by the police.

24. We have considered the suggestion made in a leading law journal<sup>4</sup> that summonses be served through the agency of the Police. But, in our view, this is not a practicable suggestion. The police force in this country is not adequate even to discharge its ordinary duty of maintaining law and order. It will not be possible to so enlarge the police force as to enable it to discharge the additional burden that is proposed to be imposed on it. Apart from the inadequacy of the police force, since the police will not be under the control of civil courts it will not be a suitable agency for the service of summons in civil cases. It is also not proper or desirable to associate the police with the execution of civil processes. We are not aware of any Commonwealth country utilizing the services of the police for the purpose.

Filing of written statement.

25. We have not carried out the suggestion made in the Fourteenth Report<sup>5</sup>, that instead of a separate order requiring the defendant to file a written statement the summons by which the plaint is served on the defendant should itself require him to file a written statement within a specified time. We think, that no useful purpose will be served by making this provision. Written statements are rarely filed at the first hearing, and in practice, not much time will be saved if this proposal is accepted. Moreover, under the Code the filing of a written statement is not compulsory. We are, however, recommending a clarification in the law as to the effect of failure to file a written statement<sup>6</sup>.

<sup>1</sup>14th Report, Vol. I, page 304, para. 15.

<sup>2</sup>14th Report, Vol. I, page 310, para. 24.

<sup>3</sup>See Appendix I, Order 5, rule 19A.

<sup>4</sup>68 Calcutta Weekly Notes, Editorial Notes xxxii (13-4-1964).

<sup>5</sup>14th Report, Vol. I, page 302, para. 11.

<sup>6</sup>Appendix I, Order 8, rule 10.

26. Order VII, rule 14 provides that where a plaintiff produces upon a document in his possession or power, he shall produce it in Court when the plaint is presented. Where the plaintiff relies on any other documents (whether in his possession or power or not), as evidence in support of his claim, he has to enter such documents in a list to be added or annexed to the plaint. The Fourteenth Report<sup>1</sup> recommended, that a similar provision should be made in the case of a defendant. We feel, that the distinction between a document upon which the plaintiff relies cannot properly be made in the case of a written statement. The only manner in which such a distinction can be made is between documents on which a defendant bases his defence and other documents on which he relies as evidence in support of his defence. In our opinion such a distinction would be unrealistic and impractical. A written statement merely answers the claim made in the plaint. In practice, it would be difficult to distinguish between documents on which the defence "is based" from other documents of purely evidentiary value. We, however, think<sup>2</sup> that a defendant should enter in a list to be added or annexed to the written statement all documents on which he relies in support of his defence.

Documents to be filed by defendant.

27. The framing of issues is an important step in the trial of a suit. Sufficient attention is often not paid to this matter. The result is, that in most cases some unnecessary issues are raised which delay the completion of the trial. The framing of issues should be done carefully after a detailed consideration of the pleadings and the examination of the parties, and the other materials referred to in Order XIV, rule 1(5) and rules 3 and 4. Even where what are known as "consent issues" are put in by the Advocates of the parties, the presiding officer should satisfy himself that they—

Framing of issues.

- (i) bring out all the points in controversy; and
- (ii) raise no unnecessary issues which would delay the trial.

This could be achieved by a strict observance of the provisions of Order XIV.

28. Before the issues are framed, some kind of a weeding out process seems to be necessary. This is done both in England and in America. In England the object is achieved by what is known as summons for directions<sup>3</sup>. The original side rules of High Courts also contain such a provision<sup>4</sup>. The object of a summons for directions is a general stock-taking of the case with a view to arriving at the essentials of the dispute. In America the same

Summons for directions and "pre-trial conferences" considered.

<sup>1</sup>14th Report, Vol. I, page 316, para. 32.

<sup>2</sup>Appendix I, Order 8, rule 1.

<sup>3</sup>Order 25, rules 1 to 4, R.S.C. (Revisions), 1962.

<sup>4</sup>See, e.g. Bombay High Court Original Side Rules (1957), rule 147.

object is achieved by what are known as "pre-trial conferences". The relevant rule relating to pre-trial conferences is in the following terms<sup>1</sup>:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider—

- (1) the simplification of the issues;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admission of fact and of documents which will avoid unnecessary proof;
- (4) the limitation of the number of expert witnesses;
- (5) the advisability of a preliminary reference of issues to a master for findings to be used in evidence when the trial is to be by jury;
- (6) such other matters as may aid in the disposition of the action."

In America, pre-trial conferences have resulted in a large number of arrears being wiped out<sup>2</sup>. The Law Commission has, in the Fourteenth Report,<sup>3</sup> rejected the proposal for pre-trial conferences. It was of the opinion, that Order X which provides for the examination of parties by the court, can serve the same purpose. We generally agree with this view.

Exami-  
nation  
under  
Order X.

29. The object of the examination under Order X is to ascertain precisely the matters which are in dispute between the parties. If a proper use is made of the provisions contained in this Order, the Judge will, at an early stage of the suit, be in a position to sift the chaff from the grain, and to pinpoint his attention on the matters on which the parties are at variance. A complete grasp of the case at an early stage of the suit will enable the Judge, when the suit comes up for hearing, to dispose it of expeditiously. It will enable him to narrow down the issues between the parties, and eliminate the need for recording formal or irrelevant evidence. The parties to the suit can also benefit by the examination under Order X. After such examination, they will know exactly which of their contentions have survived the examination and what they

<sup>1</sup>Rules of Civil Procedure for the United States District Courts, Rule 16 (14th Report, Vol. I, pages 321-322).

<sup>2</sup>See articles in the Annual Magazine of the American Judicature Society, October—December 1956, particularly the one under the caption "Calendar Decongestion in the Southern Districts of New York" by Irving R. Kaufman.

<sup>3</sup>14th Report, Vol. I, pages 311—313.

have to prove in support of their case. The Law Commission in its Fourteenth Report<sup>1</sup>, therefore, rightly stressed the importance of the provisions of Order X.

Under Order X, however, it is discretionary for the Court to examine the parties. In practice the salutary provisions of this Order are rarely used. The Courts often get over these provisions by observing, that since the pleadings are clear it is not necessary to examine the parties. We think, that in order that the provisions of Order X may be effective and achieve the object in view, the examination of parties by the Court should be made mandatory. The Law should also briefly indicate the purpose for which the parties should be examined. We recommend that Order X should be amended on these lines<sup>2</sup>.

30. Delay during trial is often caused by unnecessary adjournments. Delay during trial.

31. Order XVII, rule 1(2), proviso, enacts that when the hearing of evidence has once begun, hearing of the suit shall be continued from day to day. In practice, this provision is rarely observed<sup>3</sup>. The practice which prevails in England should be followed, i.e. the evidence should be recorded continuously without any break, except in very exceptional circumstances such as the illness of a party, his witnesses or the advocate appearing in the case. Adjournments.

There are far too many adjournments on the ground of (a) non-attendance of witnesses, (b) want of time, and (c) convenience of counsel.

32. Order XVI, rules 1 and 2 should be amended<sup>4</sup> so as to provide that the list of witnesses to be summoned by any party should be filed within a specified time. The date of hearing should be fixed only after such a list is filed and having regard to the time that may be reasonably required for summoning the witnesses. The date of hearing should be fixed in consultation with the advocates of both sides. Where a party has applied late for summoning his witnesses, the summons should be issued at his risk<sup>5</sup>. A provision should be made in the Code enabling the parties to serve their own witnesses<sup>6</sup>. Penal action should be taken against witnesses who fail to attend though duly served (Order XVI, rules 10 to 13). Non-attendance of witnesses.

<sup>1</sup>14th Report, Vol. I, page 313, para. 28.

<sup>2</sup>See Appendix I, Order 10, rule 2.

<sup>3</sup>14th Report, Vol. I, page 335, para. 63.

<sup>4</sup>See Appendix I, Order 16, rule 1.

<sup>5</sup>Cf. 14th Report, Vol. I, page 325, para. 45, middle.

<sup>6</sup>See Appendix I, Order 16, rule 7A.

Adjournments for want of time. 33. The remedy for adjournment for want of time is a proper and careful preparation of the cause list<sup>1</sup>. The cause list should be prepared after making an estimate of the time that each case will take. Such estimate may be made in consultation with the advocates of both the sides. Only such number of cases should be fixed for day as are likely to be finished on that day. The Judge himself should supervise the preparation of the cause list and not leave it entirely to a ministerial officer. The cause list should be scrutinized and, if necessary, revised before the date of hearing.

Adjournments on account of convenience of counsel. 34. Grant of adjournments for convenience of counsel is a practical and not a legal problem. Civil work is generally concentrated among a few leading lawyers. There is always the desire of the members of the Bar to accommodate each other. Although, under the law, a Judge can refuse an adjournment on the ground of convenience of counsel, in practice he rarely does so. A Judge becomes unpopular if he refuses adjournments on such grounds. The remedy for this evil lies in the hands of the Bar and a strong judiciary<sup>2</sup>.

Delay at the appellate stage. 35. One obvious remedy for eliminating delays at the appellate stage is to restrict the number of appeals available to a litigant under the existing law. It is often complained that in this country there are far too many appeals. There is some justification in this complaint. Where the value of a suit tried by a subordinate judge is less than Rs. 5,000 or Rs. 10,000 in some States, a litigant has a right of first appeal to the district court on facts and law and of a second appeal to the High Court on a point of law only. If the second appeal in the High Court is heard by a single Judge, the party can file a further appeal known as the Letters Patent appeal to a Divisional Bench of the High Court except where such appeals have been abolished<sup>3</sup>. Where the value of a suit tried by a subordinate judge exceeds Rs. 5,000, or in some States Rs. 10,000, the first appeal lies direct to the High Court both on facts and on law. In both cases, there is a further right of appeal, subject to certain conditions, to the Supreme Court under article 133 of the Constitution and section 109 of the Code of Civil Procedure, 1908.

Appeals in England. 36. Compared with the multiplicity of appeals in this country, the right of appeal in England is very much restricted. In that country, in cases which originate in the High Court, there is a right of appeal to the Court of Appeal

<sup>1</sup>See 14th Report, Vol. I, page 330, paras. 54 and 57.

<sup>2</sup>Cf. 14th Report, Vol. I, pages 337-338, para. 66.

<sup>3</sup>14th Report, Vol. I, pages 378-381, paras. 28 and 31.

both on facts and on law from a final judgment of the High Court. From the Court of Appeal a litigant may appeal to the House of Lords, subject to leave being granted by the Court of Appeal or the House of Lords. This leave is very sparingly granted and, accordingly very few cases go to the House of Lords<sup>1</sup>. For all practical purposes, there is, therefore, only one appeal from a judgment of the High Court. In cases decided by a county court, an appeal lies to the Court of Appeal on a question of law only.

37. The proposal to curtail the right of appeal in this country was fully examined in some detail by the Law Commission in the Fourteenth Report<sup>2</sup>. We agree with their conclusion that, considering the conditions in this country there is not much scope for curtailing the right of appeal. The only change proposed by the Law Commission in the Fourteenth Report was in section 102 of the Code (apart from enlargement of appellate jurisdiction of District Courts and abolition of certain Letters Patent Appeals). Section 102 provides, that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed one thousand rupees. The Law Commission recommended in the Fourteenth Report<sup>3</sup>, that the limit of Rs. 1,000 may be raised to Rs. 2,000. We think that in view of the further fall in the value of money since the making of the Fourteenth Report, the limit should be raised to Rs. 3,000. The Law Commission further recommended, that there should be no second appeal even in the case of suits of a value exceeding that prescribed by section 102 which are not of a small cause nature and in which no right to immovable property is involved. A second appeal lies on a question of law only. We do not think that a litigant should be deprived of this limited right of appeal in the case of suits other than those of the nature cognizable by a Court of Small Causes. For the purpose of an appeal, no distinction can, in principle, be made between suits involving a right to immovable property and other suits. If a question of law arises in either case there should be a right of second appeal. We are, therefore, of the opinion that apart from raising the limit of Rs. 1,000 to Rs. 3,000, no further amendment should be made in section 102 of the Code.

38. The Law Commission in the Fourteenth Report recommended<sup>4</sup> the abolition of Letters Patent Appeals from the judgment of a single Judge of a High Court exercising appellate jurisdiction. We express no opinion on this

<sup>1</sup>For details, see "Right of appeal etc." in 1958 Current Legal Problems<sup>\*</sup>  
<sup>2</sup>14th Report, Vol. I, pages 364—384, particularly paras. 10, 16, 20 and 35.

<sup>3</sup>14th Report, Vol. I page 377, para. 23-24.

<sup>4</sup>14th Report, Vol. I, pages 378—381, paras. 28 and 31.

Curtail-  
ment of  
right of  
appeal.

Letters  
Patent  
Appeals.

question, because we think that amendment of the Letters Patents of High Courts should be dealt with separately and should not be mixed up with the revision of the Code of Civil Procedure.

Delay in disposal of appeals by High Courts. 39. Relying on the statistics collected by it, the Law Commission expressed the conclusion in the Fourteenth Report<sup>1</sup> that delays in the disposal of appeals are far greater in the High Courts than in the District Courts. On an average an appeal in the District Court is disposed of within a period of one or two years. The problem of delay in appeals arises in High Courts only. In the High Courts appeals take a much longer time. The duration of a first appeal in a High Court ranges from 289 days to 2503 days and that of a second appeal from 113 days to 2038 days<sup>2</sup>. We understand that, the average duration of an appeal in the Court of Appeal in England is about three months only. It seems to us, that the delay in the disposal of appeals in the High Courts is not due to any defects in procedure. The delay is also not due to the time taken in the preparation of paper books<sup>3</sup>.

Appellate procedure. 40. Order XLI lays down the procedure for hearing appeals. The provisions of this Order are basic and fundamental, and are not capable of improvement except in some minor details. The Law Commission in the Fourteenth Report recommended some small amendments in this Order<sup>4</sup>. We have incorporated some of these amendments with which we agree in the draft Bill prepared by us. In our opinion the delay in the disposal of appeals in High Courts is mainly due to congestion of work, which is not in any way connected with the procedure prescribed by Order XLI.

The congestion of work is mainly due to increase in the number of appeals and the big addition of petitions under articles 226 and 227 of the Constitution. The latter class of petitions naturally and rightly take precedence over other work, and often involve complicated questions which consume a great deal of judicial time. We think that the remedy for reducing the arrears of appeals in High Courts lies elsewhere than in the amendment of the Code, e.g., by increase in the number of Judges.

Delay in execution—Order 21, rule 58 and rule 97. 41. Delay in execution proceedings is mainly due to certain dilatory tactics adopted by judgment-debtors. When in execution proceedings any property is attached, there is generally a claim filed under Order XXI, rule 58. If this claim is rejected, a suit is filed under rule 63 of that Order. If the attachment of the property is finally upheld, there

<sup>1</sup>14th Report, Vol. I, page 261, para. 8.

<sup>2</sup>Based on statistics collected for 1954-55, 14th Report, Vol. I, pages 260, 261 and pages 366-369, 374, 379, 380.

<sup>3</sup>14th Report, Vol. I, page 394, para. 25.

<sup>4</sup>14th Report, Vol. I, pages 385-412.



are obstruction proceedings under rule 97, followed by a suit under rule 103. The Fourteenth Report<sup>1</sup>, contains a recommendation that claim proceedings or obstruction proceedings should be finally determined by the execution court, and that where they are so determined, there should be no right of suit. This recommendation has been made with a view to eliminating delay in execution proceedings. Unfortunately, we have no statistics to indicate in what percentage of cases a suit is filed under rule 63 or rule 103. We are, however, in agreement with the recommendation in the Fourteenth Report, which is based upon certain evidence recorded by the Commission.

42. We further recommend<sup>2</sup>, that when an appeal is filed against any order made under Order XXI, rule 58 or Order XXI, rule 97, the court-fee payable should be the same as is at present payable in the case of an appeal from an order under section 47. The State Governments have, by notifications issued under the Court-fees Act, reduced the court-fee payable in respect of appeals against orders under section 47. We recommend that the State Governments should issue a similar notification in respect of appeals against orders under Order XXI, rule 58 *et seq* or Order XXI, rule 97 *et seq*, as proposed to be revised.

Court-fees on appeals from orders under Order XXI, rule 58, etc.

43. We also recommend<sup>3</sup>, that where a judgment-debt remains unpaid for a certain period, the decree-holder should be entitled to call upon the judgment-debtor to make an affidavit of his assets. The filing of such an affidavit will expediate execution proceedings. In many cases, the judgment-debtor would, for obvious reasons, be unwilling to file such an affidavit, and would be prepared to pay the decretal amount. He cannot also file a false affidavit regarding his assets, because, if he omits any of his assets from his affidavit, he may have to face the risk of other people claiming as their own the assets which he has omitted. Another advantage accruing from such an affidavit would be, that a judgment-debtor who has disclosed any assets in his affidavit will not be in a position to instigate a claim by third persons in respect of such assets under Order XXI, rule 58.

Affidavit of assets by judgment-debtor.

44. The provisions of Order XXI, rule 2 are at present responsible for considerable delay in execution proceedings. A judgment-debtor against whom an execution application is filed generally sets up a plea of oral adjustment. In most cases such a plea is wholly without substance, and is deliberately set up to delay the execution proceedings. When such a plea is set up, the court has no option but to record oral evidence which is generally false and worthless.

Delay caused by pleas of payment or adjustment.

<sup>1</sup>14th Report, Vol. I, pages 453-454, para. 49.

<sup>2</sup>For action by State Governments.

<sup>3</sup>Appendix I, Order 21, rule 41.

A plea of oral adjustment thus enables a dishonest and unscrupulous judgment-debtor to drag on execution proceedings indefinitely. The Law Commission in its Fourteenth Report recommended<sup>1</sup>, that in order that a payment or an adjustment may be recognised by the executing court, it must be in writing. We have proposed the necessary amendment in pursuance thereof<sup>2</sup>.

Other changes suggested in Order 21 to avoid delay.

45. Apart from these principal amendment, we have suggested some other amendments in Order XXI, which in our opinion, will expedite execution proceedings<sup>3</sup>.

Human factor re-emphasised.

46. Before parting with the topic of delay, we would again emphasise the part which the human factor plays in the efficient and impartial administration of justice. It need hardly be stated, that the success or failure of any procedural law depends upon the men who administer it. A law of procedure, however perfect, will fail in its purpose unless the men who administer it are men of ability and are imbued with a missionary zeal for doing justice, and unless they receive in this task the co-operation of members of the Bar. If the Judges are high-minded, able and fearless, and if the members of the Bar also share their zeal, we have no doubt that the problem of delay, which now threatens to bring the entire administration of justice into disrepute, will be solved to the satisfaction of the litigating public and the community at large.

Other main changes.

47. Having dealt with the question of delay, we now proceed to explain the other main changes proposed by us in the Code of Civil Procedure, 1908.

Section 47 and constructive *res judicata*.

48. It has been held in several decisions, including one of the Supreme Court<sup>4</sup>, that the principle of constructive *res judicata* applies to execution proceedings. The Law Commission in its Fourteenth Report<sup>5</sup>, has recommended that statutory effect should be given to these decisions. We have, in pursuance of this recommendation<sup>6</sup>, proposed the necessary amendment.

Section 60.

49. *Explanation I* to section 60 provides that in the case of salary other than salary of a servant of the Government or a servant of a railway company or local authority, the attachable portion thereof is exempt from attachment until it is actually payable. The result is that while the salary of a Government servant, etc., is attachable before it

<sup>1</sup>14th Report, Vol. I, pages 443-444, para. 25.

<sup>2</sup>See Appendix I, Order 21, rules 1 and 2.

<sup>3</sup>See Appendix I, Order 21, various rules.

<sup>4</sup>*Mohan Lal v. Benoy Krishna*, 1953 S.C.R. 377 ; A.I.R. 1953 Supreme Court 65.

<sup>5</sup>14th Report, Vol. I, page 440, para. 18.

<sup>6</sup>Appendix I, section 47.

is actually payable, the salary of other employees in not attachable until it is actually payable. Whatever may have been the reasons for this distinction in the past between the salary of a Government servant and other employees, those reasons no longer exist. In actual practice, it is well-nigh impossible to attach a salary when it is actually payable. In the case of employees other than Government servants, the condition that the salary cannot be attached until it is actually payable renders the provisions regarding attachment illusory and nugatory. We, therefore, recommend<sup>1</sup> that the distinction between the attachability of the salary of a Government servant, etc., and other employees in this respect should be abolished.

50. Section 80 of the Code enacts that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months after a notice in writing has been given. We have tried to trace the history of this section. The Code of 1859 or its later amendments did not contain this section. The section was for the first time introduced in the Code of 1877 by the Select Committee. The Select Committee, while recommending the insertion of such a provision, made the following observations:—

Section-  
80.

“We have provided (section 424) that no suit shall be brought against Government or against a public officer as such until two months next after delivery of a notice in writing, stating the cause of action and the name and residence of the intending plaintiff. We have also provided that every suit against a public officer must be commenced within six months next after the accrual of the cause of action. Similar provisions are contained in the Police Act (V of 1861), section 42 and in the various Municipal Acts.”

The period of limitation of six months proposed by the Select Committee seems to have been omitted when the Code of 1877 was finally enacted. The provisions of section 424 of the Code of 1877 were re-enacted in the Code of 1882, and now find a place in section 80 of the Code of 1908.

51. The object of section 80 is to give to the Government or the public officer an opportunity to examine the legal position and to settle the claim, if so advised, without litigation. The Law Commission in the Fourteenth Report stated as follows<sup>2</sup>:—

“The evidence disclosed that in a large majority of cases the Government or the public officer made no

<sup>1</sup>Appendix I, section 60.

<sup>2</sup>14th Report, Vol. I, pages 475-476.

use of the opportunity afforded by the section. In most cases the notice given under section 80 remained unanswered till the expiry of the period of two months provided by the section. It was also clear that in a large number of cases, Governments and public offices utilised the section merely to raise technical defences contending either that no notice had been given or that the notice actually given did not comply with the requirements of the section. These technical defences appeared to have succeeded in a number of cases defeating the just claims of the citizens."

52. The Fourteenth Report accordingly contains a recommendation that section 80 should be omitted. We have been unable to find a parallel provision in any other country in which the Anglo-Saxon system of law prevails. We think that in a democratic country like ours there should, ordinarily, be no distinction of the kind envisaged in section 80 between the citizen and the State.

When section 80 was originally enacted, India was a dependency under foreign rule and the main function of the Government was the maintenance of law and order. India is now a free country and a welfare State. It engages in trade and business like any other individual. A welfare State should have no such privileges in the matter of litigation as against a citizen, and should have no higher status than an ordinary litigant in this respect. Experience has also shown that the provision of this section has worked great hardship, particularly in suits relating to injunctions. For these reasons, we have recommended omission of the section. While recommending the omission of the section, the Fourteenth Report suggested the insertion of a provision in the Code to the effect that if a suit against the Government or a public officer is filed without reasonable notice, the plaintiff should be deprived of his costs in the event of a settlement of the claim by the Government or public officer before the date fixed for the settlement of issue. We do not think that such a statutory provision is necessary. In another place the Fourteenth Report contains the following passage<sup>1</sup> :—

"Generally the filing of suit is preceded by an advocate's or a solicitor's notice demanding redress, and these notices form the foundation of the suit which is filed subsequently.

To rush to court without sending a lawyer's notice in advance is to invite a disallowance by the court of the costs incurred in the suit."

Costs are always in the discretion of the court, and where a suit is instituted against the Government without adequate notice, the courts will no doubt deal with the question

<sup>1</sup>14th Report, Vol. I, page 480, para. 11, first sub-para.

of costs in a proper and just manner. If any provision regarding costs is to be made, it should not only deprive the plaintiff of his costs, but also provide for costs being paid to the Government irrespective of the result of the suit. In this connection we may invite attention to section 1(d) of the Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61) which was in the following words:—

“(d) If, in the opinion of the court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the court may award to the defendant costs to be taxed as between solicitor and client;”

The Act has, however, been repealed by section 1(a), Law Reform (Limitation etc.) Act, 1954 (2 and 3 Eliz. c. 36).

53. Section 87B extends to Rulers of former Indian States, in respect of institution of suits against them, the same protection that has been conferred by certain other provisions of the Code on Rulers of foreign States. The constitutional validity of this section came up for consideration in a recent decision of the Supreme Court<sup>1</sup>. In that decision the Supreme Court, while upholding the validity of the section with reference to article 14 of the Constitution in the light of the historical considerations that led to its enactment, expressed the opinion, that with the passage of time those historical considerations may lose their validity, and the continuance of this section may then become open to serious challenge. The Supreme Court has suggested, that the Central Government may examine the question whether, in respect of transactions subsequent to the 26th January, 1950, this protection need or should be continued. Since the constitutionality of the section, in the circumstances existing at present, has been upheld, we are not suggesting any change in the section<sup>2</sup>. Section 87B.

54. Section 115 of the Code has been very narrowly interpreted by the Privy Council. In one case<sup>3</sup>, the Privy Council pointed out, that where a court has jurisdiction to decide a question before it and it decides the question, it cannot be regarded as acting in the exercise of its jurisdiction “illegally or with material irregularity” within the meaning of clause (c) of section 115. In another case<sup>4</sup>, the Privy Council laid down, that the section applies to jurisdiction alone, to the irregular exercise or non-exercise of it Section 115.

<sup>1</sup>*Narottam Kishore Deb v. Union of India*, A.I.R. 1964 S.C. 1590 (October, 1964).

<sup>2</sup>For a detailed discussion, see Appendix II, notes on clauses, section 87B.

<sup>3</sup>*Anir Hassan Khan v. Sheo Baksh Singh* (1885) 11 I.A. 237 ; I.L.R. 11 Cal. 6 (P.C.).

<sup>4</sup>*Balakrishna Udayyar v. Vasudeva Aiyar*, 44 I.A. 261 ; I.L.R. 40 Mad. 793 ; A.I.R. 1917 P.C. 71 (P.C.).

or the illegal assumption of it, and is not directed against erroneous conclusions of law or fact in which the question of jurisdiction is not involved. These principles have been re-iterated in subsequent decisions of the Privy Council<sup>1</sup> and the Supreme Court<sup>2,3</sup>. In spite of these rulings, the High Courts have continued to exercise a very wide and extensive jurisdiction under this section. The result is, that the High Courts are flooded with revision applications, most of which are frivolous, and are filed with a view to delaying the conclusion of litigation. We may, in this connection, quote a passage from the Fourteenth Report, which reveals a telling picture<sup>4</sup>:—

“The statement shows that over fifty per cent. of these applications are dismissed summarily by the High Courts and that the percentage of ultimate success is very low even out of those in which a rule nisi is issued. For instance, in Bihar, out of 1,020 applications under section 115 of the Code disposed of in 1954, 546 were dismissed summarily and out of the rest the rule was made absolute only in 152 applications. In Bombay, out of a total of 1,711 applications disposed of in the same year, as many as 1,245 applications were summarily dismissed and orders were reversed only in 145 applications. In Madhya Pradesh, the total number of applications disposed of was 631, out of which 351 were summarily dismissed and the orders were reversed only in 79 applications. In Madras, excluding 1,447 applications transferred in that year to Andhra, 1,826 applications were disposed of, out of which 605 were summarily dismissed and the orders were reversed only in 219 applications.”

The provisions of section 115 are particularly misused in the case of revision applications against interlocutory orders.

Questions to be considered as to revision.

55. Two questions arise for consideration: (1) whether it is at all necessary to retain section 115, (2) whether the right of revision applications against interlocutory orders should be curtailed and if so, in what manner.

Retention of section 115.

As regards the first question, it may be argued, that in view of articles 226 and 227 of the Constitution, section 115 of the Code of Civil Procedure is no longer necessary. Article 226 empowers the High Court to issue a writ of *certiorari*. Article 227 vests in the High Courts the power of superintendence over all such courts. We, however,

<sup>1</sup>*Venkatagiri v. Hindu Religious Endowments Board*, Madras 76 I.A. 67 ; A.I.R. 1949 P.C. 156, 158 ; I.L.R. (1950) Mad. 1 (P.C.).

<sup>2</sup>*Keshardeo v. Radha Krishan*, (1953) S.C.R. 136 ; A.I.R. 1953 S.C. 23, 28.

<sup>3</sup>See also *Manindra Land, etc., Corporation v. Bhutnath*, A.I.R. 1964 S.C. 1226.

<sup>4</sup>14th Report, Vol. I, page 416, para. 4.

think that in addition to articles 226 and 227, the jurisdiction conferred upon the High Courts by section 115 serves a useful purpose.

56. As regards the second question, the Law Commission, after carefully considering the views expressed before it, came to the conclusion that the right of revision against an interlocutory order is a valuable right which should not be abolished. The case for retaining the right of revision against an interlocutory order was fairly put by an experienced Chief Justice who made the following statement before the Law Commission<sup>1</sup> :—

Revision  
against  
interlocu-  
tory  
orders.

“It is not unoften that a very wrong order is made. If it be made impossible to challenge the order immediately and have it set aside and if the error is left to be corrected in the appeal from the final order if and when such an appeal is taken, the intermediate proceedings will necessarily all be on an erroneous basis and it can hardly be just to compel the parties to submit to the order without any chance of instant redress.”

The Law Commission in the Fourteenth Report accordingly recommended that the expression “case decided” in section 115 should be so defined as to include an interlocutory order<sup>2</sup>. Necessary amendment is proposed in section 115<sup>3</sup>.

57. We think that some restriction should be placed on revision applications against interlocutory orders. We have given anxious thought to this matter, but we have come to the conclusion that it is not possible to impose any greater restrictions than those proposed by the Law Commission in the Fourteenth Report<sup>4</sup>. These restrictions are, that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied :—

Restriction  
on  
revision  
against  
interlocu-  
tory  
orders.

(i) that if the order were made in favour of the applicant, it would finally dispose of the suit or other proceeding, or

(ii) that the order, if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury<sup>5</sup>.

We may make it clear, that these restrictions are in addition to those imposed by the terms of section 115 itself, that is to say, a revision application against an interlocutory order must first fall within clause (a), (b) or clause (c) of that section, and then it should further satisfy either of the two conditions set out above.

<sup>1</sup>14th Report, Vol. I, page 419.

<sup>2</sup>See now *Major S. S. Khanna v. Brigadier Dhillon*. A.I.R. 1964 S.C.

497.

<sup>3</sup>Appendix I, section 115.

<sup>4</sup>14th Report, Vol. I, page 422, para. 19.

<sup>5</sup>See Appendix I, section 115.

Stay in re-  
vision—  
security.

58. The Law Commission proposed in the Fourteenth Report<sup>1</sup>, that a provision regarding stay of proceedings similar to Order XLI, rule 5 should be made in the case of revision applications. We do not think that any such provision is necessary. Unlike an appeal, the exercise of jurisdiction in a revision application under section 115 is a matter of discretion. Since the main jurisdiction rests upon the discretion of the Court, it is not necessary to expressly provide for any incidental matters like stay, etc. Powers of the High Court under the existing Code are wide enough to impose such terms as it considers just when granting stay.

Calling  
for  
records  
in  
revision.

59. Connected with the question of revision application against an interlocutory order is the question of calling for the original record and proceedings from the lower court. If the original record and proceedings are called for from the lower court either before or immediately after the revision application is admitted, the further progress of the suit or other proceeding from which the revision application arises is automatically delayed and therefore unnecessarily held up. We, however, do not think that any statutory provision is necessary to regulate the circumstances in which the High Courts should call for the records and proceedings in a revision application against an interlocutory order. This matter may be best left to the discretion of the High Courts. We may, however, in this connection, invite attention to the practice prevailing in the Bombay High Court which is as follows<sup>2</sup>:—

“In revision applications from decrees and orders in cases which have been finally disposed of in the lower court, this Court (Bombay High Court) invariably calls for the original records and proceedings for disposal of the said application. In regard to revision applications against interlocutory orders, the records and proceedings are not called for unless the Court of its own motion or on an application of a party, orders them to be sent for; otherwise ordinarily certified copies of the relevant papers are considered sufficient for the disposal of the revision application.”

Stay by  
the High  
Court in  
revision—  
real  
remedy.

60. The Law Commission has, in the Fourteenth Report<sup>3,4</sup>, made certain suggestions as to how delay resulting from stay granted by the High Court in exercise of its revisional jurisdiction could be reduced. The real remedy, as observed in that Report, lies in the superior courts

<sup>1</sup>14th Report, Vol. I, page 420, para. 14.

<sup>2</sup>Extracted from the reply of the Additional Registrar, Bombay High Court, to our letter asking for information on the subject.

<sup>3</sup>14th Report, Vol. I, page 419, para. 11 and page 420, para. 14.

<sup>4</sup>See also Civil Justice Committee (1924-25), Report, pages 372-373, paras. 17-18.



keeping in view the following essential rules in dealing with these revisions :—

(1) That the rule *nisi* should not be issued except upon a very careful and strict scrutiny.

(2) That where a stay is not granted, the records of the subordinate courts should not be called for and when the records are necessary, only copies of the records should be required to be produced.

(3) That whenever a rule *nisi* is granted and a stay order issued, every effort should be made to dispose of the revision application within two or three months.

61. Sections 121 to 128 empower the High Courts to annul, alter or add to all or any of the rules in the First Schedule to the Code. In the draft Report circulated for comments, it was proposed, that this power, which at present vests in the High Courts, should vest in an all-India committee. The object of this proposal was to achieve uniformity. On further consideration, we think that while uniformity is desirable, there are other weighty reasons why the rule-making power should continue to vest in the High Courts. We will briefly set out these reasons. First, local conditions vary from State to State, and it is not possible to achieve complete uniformity. Secondly, after the Code is revised in the manner proposed by us, there is no serious danger of divergent rules being made by the various High Courts on any important matter. We have examined the various amendments made by the High Courts so far. We have adopted many of these amendments of a general character, which should in our view apply to the whole of India. There will, therefore, be little scope for further amendments of the rules by the High Courts. Thirdly, article 227 of the Constitution empowers the High Courts to make and issue general rules and prescribe forms for regulating the practice and proceedings of all courts subordinate to them. In conformity with the spirit of this article, it is desirable that the rule-making power under the Code of Civil Procedure should also vest in the High Courts. Fourthly, the revision of the Code was considered in some detail by the Law Commission in the Fourteenth Report. That Report did not suggest the constitution of an all-India committee for the purpose of making rules. Fifthly, there are practical difficulties in the constitution of an all-India committee. The committee proposed in the draft Report consisted of twenty-seven members. The committee included only six advocates from the whole of India. It has been represented to us, that the committee should include one advocate from each State. If this proposal is accepted, the committee would become still more unwieldy. In our opinion, an all-India committee which is fully representative of all interests will consist of not less than thirty-five members. Such a committee will not be a suitable agency for annulling, altering or adding to the rules in the

Sections  
121 to 128.

Fifth Schedule to the Code. The committee must necessarily consist of busy judges and advocates, who will hardly have any time to meet together, much less to initiate and consider amendments to the rules. Moreover, the all-India committee, by the very nature of its constitution, will not be in a position to initiate amendments. The proposals for amendments must necessarily come from the High Courts which in their experience come across any difficulties in the working of the rules. It follows, that though the power to make rules would not formally vest in the High Courts, the moving spirit behind the committee would be the High Courts.

We may point out that in Canada<sup>1</sup> it is the "provincial diversity rather than federal uniformity that prevails" in the law of procedure and administration. The problem is not in any way different in the several federating States in U.S.A.

For these reasons, we recommend that the existing provisions conferring the rule-making power on the High Courts should not be disturbed.

Order I,  
rule 8.

62. Order I, rule 8 deals with what are known as "representative suits" filed by or against numerous persons having the same interests. We have proposed some changes in this rule<sup>2</sup>. The main change to which we would like to draw attention is the proposed provision to the effect, that while a judgment under this rule should be binding on all persons on whose behalf the suit is brought or is defended, it shall not, except with the leave of the court, be executed against any such person who is not actually a party to the suit. In suggesting this amendment, we have followed the provisions of Order XV, rule 12(2) of the Revised Supreme Court Rules of England.

Order VI,  
rule 17.

63. Order VI, rule 17 deals with amendment of pleadings. A question has arisen whether the court can allow amendment of a plaint where the effect of the amendment would be to render that court incompetent to try the suit. One view is, that the court cannot grant such an amendment. Another view is that the court can grant such amendment, but the plaint should after the amendment, be returned for presentation to the proper court<sup>3</sup>. We propose that statutory effect should be given to the latter view, by a suitable amendment of Order VI, rule 17<sup>4</sup>.

<sup>1</sup>Canadian Jurisprudence. The Civil Law and Common Law in Canada, by Edward Mc Whinney (1958), page 301.

<sup>2</sup>Appendix I, Order I, rule 8.

<sup>3</sup>For details see Appendix II, notes on clauses, Order VI, rule 17

<sup>4</sup>Appendix I, Order VI, rule 17.

64. There is at present no express provision for the filing of a counter-claim except the rule-making power in section 128(2)(c). The present position has been summed up by Mulla<sup>1</sup> thus:

“Though the Code does not provide for counter-claims, there is nothing to prevent a Court from treating the counter-claim as a plaint in a cross-suit and hearing the two suits together, provided the requisite court-fee on the counter-claim has been paid.”

High Courts which exercise original jurisdiction have made rules which provide for counter-claims (e.g. Bombay High Court Original Side Rules, 1957, Rules 137 *et seq.*). We are of the opinion that in order to avoid multiplicity of proceedings and to dispel doubts that counter-claims cannot be entertained, an express provision<sup>2</sup> should be inserted in the Code for this purpose.

65. The provisions of rules 2 and 3 of Order XVII have given rise to considerable difficulty. It is not clear in which cases rule 2 applies and in which cases rule 3 applies<sup>3</sup>. There is considerable conflict of judicial opinion on this matter. We recommend<sup>4</sup>, that the law on the subject should be clarified. Stated broadly, the effect of our proposal is, that where the parties are present, rule 3 should apply, and where the parties are absent, rule 2 should apply notwithstanding that there has been a “default” in terms of rule 3.

66. Under the existing law, if a “garnishee” denies the debt, the executing court has no power to determine whether the debt exists or not. This position is not satisfactory. Certain High Courts have framed rules under section 128(2)(d), whereunder if a “garnishee” denies the debt, an issue about the existence of the debt can be framed and decided by the executing court itself. A right of appeal is however provided in such a case. In pursuance of the recommendation made in the Fourteenth Report<sup>5</sup>, we have proposed a provision<sup>6</sup> on the lines of Order XXI, rules 46A to 46H inserted by the Calcutta High Court on the subject.

67. Under Order XXIII, rule 1, the next friend of a minor can, in collusion with the defendant, withdraw a suit filed on behalf of a minor although such withdrawal is not in the interests of the minor. No suit to which a minor is a party can be compromised except with the leave of the Court. (Order XXXII, rule 7). *A fortiori* such leave should be necessary when a suit is *withdrawn* on behalf of a minor.

<sup>1</sup>Mulla, Code of Civil Procedure (1953), page 634

<sup>2</sup>Appendix I, Order 8, rules 6A *et seq.*

<sup>3</sup>See Appendix II, notes on clauses, Order 17, rules 2 and 3.

<sup>4</sup>Appendix I, Order 17, rule 3.

<sup>5</sup>14th Report, Vol. I, page 451, para. 45.

<sup>6</sup>Appendix I, Order 21, rules 46A *et seq.*

Order VIII  
and coun-  
ter-claim.

Order  
XVII,  
rules 2  
and 3.

Order XXI  
and  
'garnishee'  
proceed-  
ings.

Order  
XXIII,  
rule 1 and  
minor  
plaintiff.

We, therefore, recommend<sup>1</sup>, that the necessary amendment may be made in Order XXIII, rule 1.

Order  
XLI, rule  
11 and  
appeals  
against  
orders in  
execution  
of money  
decrees.

68. The Law Commission in its Fourteenth Report<sup>2-3</sup> recommended that certain conditions should be imposed before an appeal arising from an order made under section 47 in execution of a money decree is admitted at the stage of preliminary hearing under Order XLI, rule 11. The Law Commission gave the following reasons in support of its recommendation:—

“The Civil Justice Committee proposed that in the case of *orders of execution* of money decrees restrictions should be placed on the right of appeal by requiring the appellant judgment-debtor to deposit or at least give security for the decretal amount as a condition precedent to the admission of an appeal. We recommend the acceptance of this proposal by an amendment of the Code.”

This recommendation was made with a view to discouraging the filing of frivolous execution appeals and the delaying tactics often resorted to by judgment-debtors. The Civil Justice Committee also took the view, that it seemed only just that after trial this protection should be given to the successful decree-holder. On further consideration, it seemed to us that such a provision might prove, at least in some cases, to be so onerous that it may render the right of appeal wholly illusory. The mere filing of an appeal, or even its admission, does not automatically operate as a stay of execution proceedings (See Order XLI, rule 4). It is the order of stay and not the filing of an appeal which may defeat the ends of justice. Under Order XLI, rule 5, the Appellate Court is required before granting stay to exercise its discretion in accordance with principles which are well recognised. Order XLI, rule 5(3) provides that no order for stay of execution shall be made 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) .....

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

In our opinion, the provisions of Order XLI, rule 5, particularly sub-rule (3), read with Order XLI, rule 8, are sufficient to safeguard the interests of the decree-holder when an appeal is filed from an order made in execution proceedings in respect of a money-decree.

<sup>1</sup>Appendix I, Order XXIII, rule 1.

<sup>2</sup>14th Report, Vol. I, page 442, para. 21.

<sup>3</sup>See also Civil Justice Committee (1924-25), Report page 401.

69. The power of the Appellate Court to remand a case is at present confined to the circumstances mentioned in Order XLI, rule 23. The Law Commission in its Fourteenth Report observed<sup>1</sup>:—

Order XLI  
rule 23  
and  
remand.

“In practice, cases often arise in which a remand is necessitated for some other reason (than the reversal of the finding on a preliminary point). In such cases in order to make a remand the Courts have resorted to their inherent power under section 151 of the Code. This is not a satisfactory position. Further, an order of remand under the inherent power of the Court is not appealable like an order under rule 23.”

We recommend, that a provision may be added<sup>2</sup> to Order XLI under which the Appellate Court can remand a case in circumstances other than those mentioned in rule 23.

70. Order XLI, rule 27 prescribes the circumstances in which an Appellate Court may take additional evidence. The provisions of this rule are stringent and have been strictly construed<sup>3-4-5-6</sup>. The Law Commission in its Fourteenth Report stated as follows:—

Order  
XLI, rule  
27.

“Thus the right to adduce additional evidence (under rule 27) is strictly limited. A party who has discovered new evidence of high probative value which he could not, with due diligence, have produced in the lower court, will be unable to produce it in the Appellate Court as a matter of right. It is true that Order XLVII, rule 1 gives a right of review in such cases, but that right cannot be availed of in an appeal. The High Courts of Madras, Allahabad, Patna, Orissa and Andhra Pradesh have amended Order XLI, rule 27 so as to permit a party to an appeal to adduce additional evidence if he satisfies the Appellate Court that he could not, in spite of due diligence, produce such evidence at the time of original hearing or that it was not within his knowledge at that time. We are not aware of this amendment having resulted in an increase in the number of applications to receive additional evidence. In our view, it makes a very necessary improvement in the appellate procedure and we recommend its general adoption by a suitable amendment to the Code.”

<sup>1</sup>14th Report, Vol. I, page 405, para. 46.

<sup>2</sup>Appendix I, Order 41, rule 23A.

<sup>3</sup>Mulla, C.P.C. (1953), page 122.

<sup>4</sup>*Parsotim v. Lal Mohan*, 58 I.A. 254 ; I.L.R. 10 Pat. 654 ; A.I.R. 1931 P.C. 143, criticising *Indrajit's case*, 50 I.A. 183 ; I.L.R. 2 Pat. 674 ; A.I.R. 1923 P.C. 128.

<sup>5</sup>*Bombay Sizing Co. v. Kusumgar* I.L.R. 47 Bom. 674 ; A.I.R. 1923 Bom. 227.

<sup>6</sup>As to mis-construction of a document, see *Bhusawal Borough Municipality v. Amalgamated Electricity Co. Ltd.* (1964) 1 M.L.J., Notes of recent cases, 60 (Supreme Court).

<sup>7</sup>14th Report, Vol. I, page 405, para. 45.

We recommend<sup>1</sup> that Order XLI, rule 27 should be so amended as to give effect to the recommendation made in the Fourteenth Report. Such an amendment would avoid multiplicity of proceedings. We may add, that in England the corresponding rule<sup>2</sup> is couched in very wide terms.

Order  
XLVII,  
rule 7.

71. Under Order XLIII, rule 1(w), an appeal lies from an order under Order XLVII, rule 4 granting an application for review, but the scope of such appeal is limited to the grounds specified in clauses (b) and (c) of Order XLVII, rule 7. It follows, that where a review is granted on the ground of a mistake or error apparent on the face of the record, or "for any other sufficient reason", no appeal would lie against the order granting review. This is not a satisfactory position. There does not seem to be any valid reason why an appeal should lie when a review is granted on certain grounds, and not where it is granted on other grounds. We recommend<sup>3</sup>, that the restriction at present imposed by Order XLVII, rule 7 on the right of appeal against an order granting review should be removed.

Other  
changes.

72. We have explained above the principal amendments that we have proposed. The other changes proposed by us can be seen from Appendix I, and the reasons therefor in the Notes on Clauses in Appendix II.

Other  
points  
considered.

73. There are certain other points which we have considered, though we have not recommended any amendment of the law on those points. These have been discussed in the Notes<sup>4</sup>.

Appen-  
dices.

74. In order to give a concrete shape to our recommendations, we have, in Appendix I, put them in the form of draft amendments to the existing Code.

Appendix II contains Notes on Clauses, explaining, with reference to the amendments in Appendix I, any points that might need elucidation.

Appendix III gives a comparative table, showing the recommendations made in the Fourteenth Report and the amendments, if any, proposed by us in pursuance thereof.

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<sup>1</sup>Appendix I, Order 41, rule 27.

<sup>2</sup>Order 58, rule 9 (2), R.S.C. which continues after the 1962 Revision.

<sup>3</sup>Appendix I, Order 47, rule 7.

<sup>4</sup>Appendix II, notes on clauses.

Appendix IV summarises our recommendations in respect of other Acts.

1. J. L. KAPUR.—*Chairman.*
  2. K. G. DATAR.
  - \*3. S. K. HIRANANDANI.
  4. S. P. SEN-VARMA.
  - \*\*5. NIREN DE.
  6. T. K. TOPE.
- } *Members.*

P. M. BAKSHI,  
*Joint Secretary and Draftsman.*

NEW DELHI;

The 13th December, 1964.

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\*Member Shri Hiranandani has signed the Report subject to a separate note.

\*\*Member Shri De could not attend the meeting at which the Report was finalised. He has, therefore, been unable to sign the Report.

## APPENDIX I

### PROPOSALS AS SHOWN IN THE FORM OF DRAFT AMENDMENTS TO THE EXISTING CODE

(This is a tentative draft only)

#### Section 1

5 of 1908. In section 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the principal Act), for sub-section (3), the following sub-section shall be substituted, namely:—

“(3) It extends to the whole of India except—

(a) the State of Jammu and Kashmir;

(b) the tribal areas in the State of Assam:

(c) save as hereinafter provided; *the Union territory of Laccadive, Minicoy and Amindivi Islands, and the Scheduled areas comprising the East Godavari, West Godavari and Visakhapatnam Agencies in the State of Andhra Pradesh:*

Provided that sections 36 to 43 and Order XXXIV in the First Schedule shall extend also to the *Union territory of Laccadive, Minicoy and Amindivi Islands and the Scheduled areas comprising the East Godavari, West Godavari, and Visakhapatnam Agencies.*”

#### Section 2(17)

In section 2 of the principal Act in clause (17) in paragraph (b), for the words “the Indian Civil Service”, the words “an All-India Service” shall be substituted.

#### Section 8

In section 8 of the principal Act, for the words and figures “and 155 to 158”, the word and figures “157 and 158” shall be substituted.

#### Section 21A

After section 21 of the principal Act, the following section shall be inserted, namely:—

Bar of  
suit to  
set aside  
decree on  
objection  
as to  
place of  
suing.

‘21A. No party to a suit shall be allowed to attack the validity of a decree passed in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

*Explanation.*—The expression “former suit” shall denote a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.’



## Section 24

In section 24, for sub-section (2), the following sub-section shall be substituted, namely:—

“(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries or disposes of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.”.

## Section 25

For section 25 of the principal Act, the following section shall be substituted, namely:—

“25. (1) On the application of the Attorney-General of India or of a party, and after notice to the parties and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any particular suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State. Power of Supreme Court to transfer suits.

(2) Every application under this section shall be made by motion which shall, except when the applicant is the Attorney-General of India or the Advocate-General, be supported by affidavit or affirmation.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either re-try it or proceed from the point at which it was transferred. Cf. Section 24(2) C.P.C.

(4) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding two thousand rupees as it may consider appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.”. Cf. existing Section 25(2).

## Section 35A

In section 35A of the principal Act,—

(a) in sub-section (1), for the words “excluding an appeal”, the words “excluding an appeal or a revision”

shall be substituted;

(b) in sub-section (2), for the words "one thousand rupees", the words "two thousand rupees" shall be substituted.

#### Section 36

For section 36 of the principal Act, the following section shall be substituted, namely:—

Applica-  
tion to  
orders.

"36. The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to execution of orders (including payment under an order)."

#### Section 37

To section 37 of the principal Act, the following Explanation shall be added, namely:—

"Explanation.—The Court of first instance does not cease to have jurisdiction to execute a decree on the ground merely that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit."

#### Section 39

In section 39 of the principal Act,—

(a) in sub-section (1), after the words "to another court", the words "of competent jurisdiction" shall be inserted;

(b) the following Explanation shall be inserted at the end, namely:—

"Explanation.—For the purposes of this section, a Court shall be deemed to be a "court of competent jurisdiction", if the amount or value of the subject-matter of the suit wherein the decree was passed does not exceed the pecuniary limits (if any) of its ordinary jurisdiction."

#### Section 42

Section 42 of the principal Act shall be re-numbered as sub-section (1) thereof, and after sub-section (1) as so re-numbered the following sub-sections shall be inserted, namely:—

"(2) Without prejudice to the generality of the provisions of sub-section (1), the powers of the court

under that sub-section shall include the following powers of the court which passed the decree, namely:—

(a) power to send the decree for execution to another court under section 39;

(b) power to execute the decree against the legal representative of the deceased under section 50;

(c) power to order attachment of a decree in accordance with the prescribed procedure.

(3) A court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the court to which a decree is sent for execution any of the following powers, namely;—

(a) power to order execution at the instance of the transferee of a decree;

(b) power to grant leave to execute a decree against a firm, in relation to a person who, though a partner in the firm, has not appeared in his own name or admitted on the pleadings that he is a partner and has not been adjudged to be a partner and has not been served individually as a partner."

#### Section 47

In section 47 of the principal Act,—

(a) after sub-section (3), the following sub-section shall be inserted, namely:—

"(4) The provisions of section 11 shall, so far as may be, apply in relation to proceedings under this section, as they apply to suits.";

(b) for the Explanation, the following Explanations shall be substituted, namely:—

"Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed.....are parties to the suit. Cf. section 47 Expl. earlier half.

Explanation II.—.....For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed, and all questions relating to delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section." Cf. section 47 Expl. latter half.

## Section 58

In section 58 of the principal Act, in sub-section (1), in clause (a), for the words "fifty rupees", the words "two hundred rupees" shall be substituted.

## Section 60

In section 60 of the principal Act, in sub-section (1),—

(a) in the proviso,—

(i) in clause (g), after the words "pensioners of the Government", the words "*or of a local authority or of any other employer*" shall be inserted;

(ii) in clause (i), for the proviso, the following proviso shall be substituted, namely:—

"Provided that where.....the whole or any part of the portion of such salary 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 be finally exempt from attachment in execution of that decree.";

(iii) in clause (j), for the words and figures "the Indian Navy (Discipline) Act, 1934", the words and figures "*the Navy Act, 1957*" shall be substituted; 62 of 1957.

(b) for *Explanation 1*, the following *Explanation* shall be substituted, namely:—

"*Explanation 1*.—The particulars mentioned in clauses (g), (h), (i), (ia), (j), (l) and (o) are exempt from attachment or sale whether before or after they are payable, and in the case of all salaries the attachable portion thereof is liable to attachment whether before or after it is actually payable.";

(c) In *Explanation 2*, for the words, brackets and letters "clauses (h) and (i)", the words, brackets and letters "clauses (i) and (ia)" shall be substituted.

## Section 80

Section 80 of the principal Act shall be omitted.

## Section 82

For section 82 of the principal Act, the following section shall be substituted, namely:—

“82. (1) Where in a suit by or against the Govern- *Execution of decree against Government or public officer.*  
 ment, or by or against a public officer in respect of any act purporting to be done by him in his official capacity, a decree is passed against the Union of India or a State or, as the case may be, the public officer, . . . . . *execution shall not be issued on the decree unless it remains unsatisfied for a period of three months, or such other period as the Court may fix in a particular case, computed from the date of the decree.* Cf. section 82(1) and 82(2).”

(2) The provisions of sub-section (1) shall apply in relation to an order or award as they apply in relation to a decree, if the order or award—

(a) is passed or made against the Union of India or a State or a public officer in respect of any such act as aforesaid, whether by a Court or by any other authority, and

(b) is capable of being executed under the provisions of this Code or of any other law for the time being in force as if it were a decree.

(3) *The Court may, in its discretion, from time to time, enlarge the period specified in sub-section (1) or fixed by the Court under that sub-section, even though the period so specified or fixed may have expired.* Cf. section 148 C.P.C.”

## Section 95

In section 95 of the principal Act, after sub-section (1), the following *Explanation* shall be inserted at the end, namely:—

“*Explanation.—Compensation may be awarded under this section for injury to reputation.*”

## Section 97

In section 97 of the principal Act, the words “passed after the commencement of this Code” shall be omitted.

## Section 98

In section 98 of the principal Act, in sub-section (2), in the proviso,—

(a) for the words “composed of two Judges belonging to a Court consisting of more than two Judges”, the words “composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench” shall be substituted;

(b) for the words "differ in opinion on a point of law, they may state the point of law", the words "differ in opinion on a point....., they may state the point" shall be substituted.

#### Section 102

In section 102 of the principal Act, for the words "one thousand rupees", the words "three thousand rupees" shall be substituted.

#### Section 105

In section 105 of the principal Act, in sub-section (2), the words "made after the commencement of this Code" shall be omitted.

#### Section 115

Revision For section 115 of the principal Act, the following section shall be substituted, namely:—

"115. (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 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—*

(a) *the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or*

(b) *the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.*

(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.*

*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."*

## Section 135A

In section 135A of the principal Act, in sub-section (1), for the word "fourteen", the word "forty" shall be substituted.

## Section 144

In section 144 of the principal Act,—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) Where and in so far as a decree or an order is varied or reversed, or is set aside or modified in any suit or proceeding instituted for the purpose, the Court of first instance, or, as the case may be, the Court whose decree or order is set aside or modified, 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 consequential on the variation, reversal, setting aside or modification of the decree or order."

## Section 145

For section 145 of the principal Act, the following section shall be substituted, namely:—

"145. Where any person has furnished security—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed in the manner herein provided for the execution of decrees,—

(i) if he has rendered himself personally liable, against him to that extent; and

(ii) if he has furnished any property as security, by sale of such property to the extent of the security;

Enforce-  
ment of  
liability of  
surety.

(iii) if the case falls both under clause (i) and under clause (ii), then to the extent specified in those clauses;

and such person shall, for the purposes of appeal, be deemed to be a party within the meaning of section 74:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.”.

#### Order I, rule 1

For rule 1 of Order I of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Who may be joined as plaintiffs.

Cf. Order XV, rule 4(1) R.S.C. (Revision), 1962.

“1. All persons may be joined in one suit as plaintiffs *where*—

(a) any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative, and

(b) if such persons brought separate suits, any common question of law or fact would arise.”.

#### Order I, rule 3

For rule 3 of Order I of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Who may be joined as defendants.

“3. All persons may be joined in one suit as defendants *where*—

(a) any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist against such persons whether jointly, severally or in the alternative, and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.”.

#### Order I, rule 3A

In Order I of the First Schedule to the principal Act, after rule 3, the following rule shall be inserted, namely:—

Power to order separate trials where joinder of defendants may embarrass or delay trial. Cf. Order XV, rule 5(1) R.S.C. (Revision) 1962.

“3A. *Where it appears to the Court that any joinder of defendants may embarrass or delay the trial of the suit, the Court may order separate trials or make such other order as may be expedient.*”.



## Order I, rule 8

For rule 8 of Order I of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

“8. (1) Where there are numerous persons having the same interest in one suit,—

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested;

One person may sue or defend on behalf of all in same interest. Cf. Order I, rule 8(1), earlier half, C.P.C.

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

Cf. Bombay and Calcutta amendments.

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

Cf. Order I, rule 8(1), latter half, C.P.C.

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

Cf. Order I, rule 8(2), C.P.C.

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

Cf. Order XVI, rule 9A, R.S.C. (old) and Revised R.S.C. (1962), Order XV, rule 13(3).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

Cf. section 92, Presidency Towns Insolvency Act, 1909.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf or for whose benefit the suit is instituted or defended, as the case may be; but such decree shall not be executed by or against any person not a party to the suit except with the leave of the Court.

Cf. Order XV, rule 12(3) and Revised R.S.C. (1962).

Cf. Order XV, rule 12(4), R.S.C.

(7) Notice of an application for the grant of leave under sub-rule (6) shall be served on the person against whom the decree is sought to be executed in the manner provided in this Code for the service of a summons.

Cf. R.S.C. (Revision) 1962, Order XV, rule 12(5).

(8) Notwithstanding that a decree to which any application for the grant of leave under sub-rule (6) relates is binding on the person against whom the application is made, that person may dispute liability to have the decree executed against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability."

#### Order I, rule 10

In rule 10 of Order I of the First Schedule to the principal Act,—

(i) for sub-rule (2), the following sub-rule shall be substituted, namely:—

Cf. R.S.C. Revision (1962), Order XV, rule 6(2) (a).

"(2) The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just,—

(a) order that the name of any person who has been improperly or unnecessarily joined, whether as plaintiff or defendant, or who has for any reason ceased to be a proper or necessary party, be struck out;

(b) order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

(ii) in sub-rule (5), for the words and figures "Indian Limitation Act, 1877, section 22", the words and figures "section 21 of the Limitation Act, 1963" 36 of 1963. shall be substituted.

#### Order I, rule 11

Cf. Order XV, rule 18 R.S.C. Revision (1962).

In rule 11 of Order I, of the First Schedule to the principal Act, for the words "the suit", the words "a suit" shall be substituted.

## Order II, rule 6

For rule 6 of Order II of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

“6. Where it appears to the Court that the joinder of causes of action in one suit *may embarrass or delay the trial or is otherwise inconvenient*, the Court may order separate trials or make such other order as may be expedient.”

Power of Court to order separate trials. Cf. Order XV, rule 5(2), R.S.C. Revision (1962).

## Order III, rule 4

In rule 4 of Order III of the First Schedule to the principal Act, for sub-rule (3), the following sub-rule shall be substituted, namely:—

“(3) For the purposes of sub-rule (2),—

- (a) an application for review of judgment,
- (b) an application under section 144 or section 152 of this Code,
- (c) any appeal or application for revision from any decree or order in the suit and any application relating to such appeal or revision, and
- (d) any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit,

shall be deemed to be proceedings in the suit.”

## Order III, rule 5

In rule 5 of Order III of the First Schedule to the principal Act, for the words “any process served on the pleader of any party”, the words “any process served on the pleader who has been duly appointed to act for any party” shall be substituted.

Cf. Order III, rule 4(5) proviso.

## Order III, rule 6

In rule 6 of Order III of the First Schedule to the principal Act, the following sub-rule shall be inserted at the end, namely:—

“(3) The Court may, at any stage of a suit, order any party to the suit not having a recognised agent residing within the jurisdiction of the Court, to appoint within a specified time an agent within the jurisdiction of the Court, to accept service of process on his behalf.”

Cf. Bombay Amendment.

## Order V, rule 15

For rule 15 of Order V of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Service  
on male  
member.

“15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time, and the defendant has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

*Explanation.*—A servant is not a member of the family within the meaning of this rule.”

## Order V, rule 17

In rule 17 of Order V of the First Schedule to the principal Act, for the words “or where the serving officer, after using all due and reasonable diligence, cannot find the defendant”, the words “or where the defendant is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time” shall be substituted.

## Order V, rule 19A

After rule 19 of Order V of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Simul-  
taneous  
issue of  
summons  
for service  
by post in  
addition to  
personal  
service.

“19A. (1) The Court shall, in addition to and simultaneously with the issue of summons for service in the manner provided in rules 9 to 19, also direct the summons to be served by registered post addressed to the defendant or his agent empowered to accept the service at the place where the defendant or his agent ordinarily resides or carries on business or personally works for gain:

*Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where, in the circumstances of the case, the Court regards it as unnecessary.*

Cf. Order  
V, rule  
20A(2),  
C.P.C.

(2) When an acknowledgment purporting to be signed by the defendant or the agent or an endorsement purporting to be made by a postal employee that the defendant or the agent refused to take delivery has been received, the Court issuing the summons may declare that there has been valid service.”

## Order V, rule 20

In rule 20 of Order V of the First Schedule to the principal Act, after sub-rule (1), the following sub-rule shall be inserted, namely:—

“(1A) Where under sub-rule (1) the Court orders service by advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the neighbourhood of the place in which the defendant is last known to have resided, carried on business or personally worked for gain.”

Cf. section 53(3), Companies Act, 1956.

## Order V, rule 20A

Rule 20A of Order V of the First Schedule to the principal Act shall be omitted.

## Order V, rule 26

For rule 26 of Order V of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

“26. Where—

(a) in the exercise of any foreign jurisdiction vested in the Central Government, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Service in foreign territory through Political Agent or Court.

(b) the Central Government has, by notification in the Official Gazette, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service,

the summons may be sent to such Political Agent or Court, by post or otherwise, or if so directed by the Central Government, through the Ministry of that Government dealing with foreign affairs or in such other manner as may be specified by the Central Government, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.”

## Order V, rule 26A (New)

After rule 26 of Order V of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Summon-  
ses to be  
sent to  
officers of  
foreign  
countries.

"26A. Where the Central Government has, by notification in the Official Gazette, declared in respect of any foreign territory that summonses to be served on defendants residing in that foreign territory may be sent to an officer of the foreign territory specified by the Central Government, the summonses may be sent to the officer of the foreign territory so specified, through the Ministry of the Government of India dealing with foreign affairs or in such other manner as may be specified by the Central Government; and if such officer returns the summons with an endorsement signed by him that the summons has been served on the defendant, such endorsement shall be deemed to be evidence of service."

## Order VI, rule 2

For rule 2 of Order VI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Pleading  
to state  
material  
facts and  
not evi-  
dence.

"2. (1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

Cf. Order  
XVIII,  
rule 6(2)  
R.S.C.  
Revision  
(1962).

(2) Every pleading shall, when necessary, be divided into paragraphs numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures."

## Order VI, rule 14A

Order VI,  
rule 14A  
(New).

After rule 14 of Order VI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Address  
for ser-  
vice of  
notice.

"14A. (1) Every pleading when filed by a party shall be accompanied by a statement in the prescribed form, signed as provided in rule 14, and the party's address for service.

(2) Such address may, from time to time, be changed by lodging in court a form duly filled up and stating the new address of the party and accompanied by a verified petition.

(3) The address so given shall be called the "registered address" of the party, and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good, subject as aforesaid, for a period of two years after the final determination of the cause or matter.

Cf. Order VI, rule 14A (Calcutta).

(4) Service of any process may be effected upon a party at his registered address in all respects as though such party resided thereat.

(5) Where a party files an address for service under this rule, which is to be discovered false, fictitious or illusory, he shall, if he is a plaintiff, be liable to have his suit stayed, or if a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended; and an order saying his suit or striking out his defence may be passed by the Court of its own motion, or on the application of any party.

(6) Where a suit is stayed or a defence struck out under sub-rule (5), the plaintiff or defendant, as the case may be, may apply for an order to set aside the stay or striking out; and if files the true address and satisfies the Court that he was prevented by any sufficient cause from filing the true address at the proper time, the Court shall set aside the stay or striking out on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or defence as the case may require.

Cf. Madhya Pradesh Amendment, Order VII, rule 21(2).

(7) The provisions of this rule for service at the registered address shall be without prejudice to any other mode of service."

Cf. Order VII, rule 25, Bombay, Allahabad, Patna, etc., amendment.

#### Order VI, rule 16

For rule 16 of Order VI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"16. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading—

Striking out pleadings.

(a) which may be unnecessary or scandalous, frivolous or vexatious, or

Cf. Order XVIII, rule 19, R.S.C. (Revised) 1962.

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

(c) which is otherwise an abuse of the process of the Court.”.

Order VI, rule 17

Rule 17 of Order VI of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

“(2) The Court may allow an alteration or amendment of the plaint under this rule notwithstanding that after such alteration or amendment the Court would not be competent to try the suit; and where the Court allows such alteration or amendment, it shall, after allowing the alteration or amendment, return the plaint for presentation to the proper Court, and the provisions of rule 10 of Order VII shall apply to an order so returning the plaint.”.

Order VII, rule 9

In rule 9 of Order VII of the First Schedule to the principal Act, for sub-rule (1), the following sub-rules shall be substituted, namely:—

“(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any), which he has produced along with it, and shall within such time as may be fixed by the Court or extended by it from time to time, present as many copies on plain paper of the plaint as there are defendants, unless the Court, by reason of the length of the plaint or the number of the defendants or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit, in which case he shall present such statements.

(1A) The plaintiff shall also pay the court-fees and postal charges chargeable for the service of summons on the defendants before or at the time when he presents copies of the plaint or concise statements under sub-rule (1).”.

Cf. Order IX, rule 2.

Order VIII, written statement and set-off

For the heading to Order VIII of the First Schedule to the principal Act, the following heading shall be substituted, namely:—

“WRITTEN STATEMENT,.....SET-OFF AND COUNTER-CLAIM”.



Order VIII, rule 1

Rule 1 of Order VIII of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rules shall be inserted, namely:—

“(2) Where the defendant relies on any document (whether in his possession or power or not) in support of his defence or claim for set off, he shall enter such documents in a list, and shall—

Cf. Order VII, rule 14.

(a) if a written statement is presented, add or annex the list to the written statement;

(b) if a written statement is not presented, present it to Court at the first hearing of the suit.

(3) Where any such document is not in the possession or power of the defendant, he shall, if possible, state in whose possession or power it is.

Cf. Order VII, rule 15.

(4) If no such list is so added or annexed or presented, the defendant shall be allowed such further period as the Court may allow to file his list of documents.

Cf. Punjab Amendment, Order VIII, rule 1(2), latter half.

(5) A document which ought to be entered in the list referred to in sub-rule (2), and which is not entered accordingly, shall not, without the leave of the Court, be received in evidence on behalf of the defendant at the hearing of the suit.

Cf. Punjab Amendment, Order VIII, rule 1(3).

(6) Nothing in sub-rule (5) applies to documents produced for cross-examination of the plaintiff's witnesses or handed to a witness merely to refresh his memory.

Cf. Punjab Amendment, Order VIII, rule 1(4).

(7) Where a Court grants leave under sub-rule (5), it shall record its reasons for so doing, and no such leave shall be granted unless good cause is shown to the satisfaction of the Court for the non-entry of the document.”.

Order VIII, rules 6A to 6G (New)

After rule 6 of Order VIII of the First Schedule to the principal Act, the following rules shall be inserted, namely:—

(New)

“6A. (1) A defendant in a suit, in addition to his right of pleading a set-off under rule 6, may set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant either before or after the filing of the suit but before the defendant has delivered his defence and before the time limited for delivering his defence has expired, whether such counter-claim sounds in damages or not.

Counter-claim by defendant .

Cf.  
Order VIII  
rule 6(2).

(2) Such counter-claim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

Cf.  
Order VIII,  
rule 6(1).

(3) The plaintiff (if so advised) shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

Cf.  
Order VIII,  
rule 6(1).

(4) The claim made in the counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(5) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

Counter-  
claim to  
be stated.

6B. Where any defendant seeks to reply upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

Exclusion  
of counter-  
claim.

6C. Where a defendant sets up a counter-claim, if the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, he may, at any time before trial, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application, make such order as shall be just.

Disconti-  
nuance  
of suit.  
Cf. R.S.C.  
(Revision)  
1962.  
Order XV,  
rule 2(3).

6D. If in any case in which the defendant sets up a counter-claim, judgment is given for the plaintiff or the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

Default by  
defendant  
to counter-  
claim.  
Cf.  
Order VIII,  
rule 10.

6E. If the defendant to the counter-claim makes default in putting in a reply to the counter-claim, the Court may pronounce judgment against him or make such order in relation to the counter-claim as it thinks fit.

Cf.  
Order XX,  
rule 19  
also.

6F. Where in any suit a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

Rules  
relating  
to written  
statement  
to apply.

6G. The rules relating to a written statement by a defendant apply to a written statement in answer to a counter-claim."

#### Order VIII, rule 7

Cf.  
Order VIII,  
rule 6(3).

In rule 7 of Order VIII of the First Schedule to the principal Act, after the word "set-off", the words "or counter-claim" shall be inserted.

*Order VIII, rule 8*

In rule 8 of Order VIII of the First Schedule to the principal Act, after the word "set-off", the words "or counter-claim" shall be inserted.

*Order VIII, rule 9*

In rule 9 of Order VIII of the First Schedule to the principal Act, after the word "set-off", the words "or counter-claim" shall be inserted.

*Order VIII, rule 10*

In rule 10 of Order VIII of the First Schedule to the principal Act, for the words "is so required fails to present the same within the time fixed by the Court", the words and figures "is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be", shall be substituted.

*Order IX, rule 2*

For rule 2 of Order IX of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"2. Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or to present copies of the plaint or concise statements, as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed: Provided that no such order shall be made..... if, notwithstanding such failure, the defendant..... attends in person (or by agent when he is allowed to appear by agent) on the day fixed for him to appear and answer."

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

*Order IX, rule 4*

In rule 4 of Order IX of the First Schedule to the principal Act, for the words "his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons", the words "such failure as is referred to in rule 2" shall be substituted.

*Order IX, rule 5*

In rule 5 of Order IX of the First Schedule to the principal Act in sub-rule (5), for the words "three months", the words "two months" shall be substituted.

*Order IX, rule 13*

To rule 13 of Order IX of the First Schedule to the principal Act, the following proviso shall be added, namely:—

"Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

Cf. the Amendments in Madras, Orissa, Allahabad, Madhya Pradesh and Andhra Pradesh.

## Order X, rule 2

For rule 2 of Order X of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Oral  
examina-  
tion of  
party or  
compa-  
nion of  
party.

Order X,  
rule 2  
earlier  
half,  
modified.

“2. (1) At the first hearing of the suit, the Court—

(a) shall, with a view to elucidating the matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit, and

(b) may orally examine any person able to answer any material questions relating to the suit by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied.

Cf.  
Order X,  
rule 2,  
latter half.

(3) The Court may, if it thinks fit, put in the course of an examination *under this rule* questions suggested by either party.”.

## Order XI, rule 6

Cf.  
Order  
XXVI,  
rule 4(1),  
R.S.C.  
Revision  
(1962).

In rule 6 of Order XI of the First Schedule to the principal Act, after the words “at that stage”, the words “or on the ground of privilege” shall be inserted.

## Order XI, rule 15

Cf.  
also Order  
XI,  
rule 19(2).

In rule 15 of Order XI of the First Schedule to the principal Act, after the words “in whose pleadings or affidavits reference is made to any document”, the words “or who has entered any document in any lists added or annexed to his pleadings” shall be inserted.

## Order XI, rule 19

Cf. sec-  
tion 162  
Evidence  
Act.

In rule 19 of Order XI of the First Schedule to the principal Act, in sub-rule (2), the words “unless the document relates to matters of State” shall be inserted at the end.

## Order XIII, rule 2

Rule 2 of Order XIII of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

“(2) Nothing in sub-rule (1) applies, in relation to any party, to documents produced for cross-examination of the witnesses of the other party or handed to a witness merely to refresh his memory.”.

## Order XIII, rule 9

In rule 9 of Order XIII of the First Schedule to the principal Act, in sub-rule (1), for the first proviso, the following proviso shall be substituted, namely:—

“Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor—

(a) delivers to the proper officer for being substituted for the original,

(i) in the case of a party to the suit, a certified copy, and

(ii) in the case of any other person, an ordinary copy which has been examined, compared and certified in the manner mentioned in Rule 17 of Order VII, and

(b) undertakes to produce the original if required to do so.”.

## Order XIV, rule 1

In rule 1 of Order XIV of the First Schedule to the principal Act, in sub-rule (5), for the words “after such examination of the parties as may appear necessary”, the words and figures “after examination under rule 2 of Order X and after hearing the parties or their pleaders” shall be substituted.

## Order XVI, rule 1

For rule 1 of Order XVI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

“1. (1) On or before such date as the Court may appoint and not later than ten days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents. List of witnesses and summons to witnesses.

(2) A party desirous of calling, whether by summoning through Court or otherwise, any witness other than those whose names appear in the said list, may be permitted to do so by the Court, if he shows good cause for the omission of the said witness from the list.

(3) Where the Court grants any such permission, it shall record its reasons for so doing.

(4) On application to the Court or to such officer as it appoints in this behalf, and subject to the provisions of sub-rule (2), parties may obtain summonses to persons whose attendance is required either to give evidence or to produce documents.”. Cf. existing Order XVI, rule 1.

## Order XVI, rule 1A

For rule 1A of Order XVI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

“1A. Subject to the provisions of sub-rule (2) of rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.”. Production of witnesses without summons through court.

## Order XVI, rule 2

In rule 2 of Order XVI of the First Schedule to the principal Act, the following sub-rule shall be inserted at the end, namely:—

Cf. the Madras Amendment to Order XVI, rule 2.

“(4) Where the summons is served on the witness by the party directly, the expenses mentioned in sub-rule (1) shall be paid to the witness by the party or his agent.”

## Order XVI, rule 7A

After rule 7 of Order XVI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Summons given to party for service.

“7A. (1) The Court may, on the application of any party for the issue of a summons for the attendance of any person, permit such party to effect service of such summons by such party, and shall in such a case deliver the summons to such party for service.

Cf. Bombay Amendment, Order XVI, rule 1B.

(2) The service of such summons shall be effected by or on behalf of such party by delivering or tendering to the witness personally a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

Cf. Madras Amendment to Order XVIII, rule 8.

(3) The provisions of rules 16 and 18 of Order V shall apply to a summons personally served under this rule, as if the person effecting service were a serving officer.

Cf. Calcutta Amendment to Order XVI, rule 8.

(4) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.

(5) Where a summons is served by a party under this rule, the party shall not be required to pay the fees otherwise chargeable for the service of summons.”

## Order XVI, rule 8

For rule 8 of Order XVI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Summons how served.

“8. Every summons under this Order, not being a summons delivered to a party for service under rule 7A, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.”

## Order XVI, rule 10

In rule 10 of Order XVI of the First Schedule to the principal Act,—

(a) in sub-rule (1)—

(i) after the words “if the certificate of the serving officer has not been verified by affidavit”,

the words "or if service of the summons has been effected by a party or his agent" shall be inserted;

(ii) after the words "examine the serving officer", the words "or the party or his agent who has effected service, as the case may be," shall be inserted;

(b) the following sub-rule shall be inserted at the end, namely:—

"(4) Notwithstanding anything contained in rule 1 of Order XLVIII, no court-fee shall be charged for the issue of any process under this rule unless the Court otherwise directs."

Order XVI, rule 12

Rule 12 of Order XVI of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

"(2) Where the Court has not issued a proclamation under sub-rule (2) of rule 10 nor issued a warrant nor ordered attachment under sub-rule (3) of that rule, the Court shall not impose fine under this rule unless the person upon whom the fine is to be imposed has been given notice to show cause why the fine should not be imposed."

Order XVII, rule 2

To rule 2 of Order XVII of the First Schedule to the principal Act, the following Explanation shall be added, namely:—

"Explanation.—Where the evidence or a substantial portion of the evidence of any party has already been recorded, and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present."

Order XVII, rule 3

For rule 3 of Order XVII of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default,—

(a) if the parties are present, proceed to decide the suit forthwith;

(b) if the parties or any of them is absent, proceed under rule 2."

Power of Court to proceed notwithstanding the party's failure to produce evidence, etc.

## Order XVIII, rule 2

To rule 2 of Order XVIII of the First Schedule to the principal Act, the following sub-rule shall be added, namely:—

*“(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage.”.*

## Order XX, rule 1

Rule 1 of Order XX in the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

*“(2) Where a written judgment is to be pronounced, it shall be sufficient if the findings of the Court on each issue and the final order passed in the case are read out, and it shall not be necessary for the Court to read out the whole judgment; but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced.”.*

## Order XX, rule 12A

After rule 12 of Order XX of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

*“12A. Where a decree for specific performance of a contract for the sale or lease of immovable property orders that the purchase-money or other sum be paid by the purchaser or lessee, it shall specify the period within which the payment shall be made.”.*

Decree for specific performance of contract for the sale or lease of immovable property.

## Order XX, rule 19

In rule 19 of Order XX of the First Schedule to the principal Act, in sub-rules (1) and (2), after the word “set-off” wherever it occurs, the words “or counter-claim” shall be inserted.

## Order XXA (New)

After Order XX of the First Schedule to the principal Act, the following Order shall be inserted, namely:—

## “ORDER XXA

## COSTS

1. (1) Without prejudice to the generality of the provisions of this Code relating to costs, the Court may award costs in respect of—

(a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit;

(b) expenditure incurred on any notice which, though not required to be given by law, has been

Provisions relating to certain items.



given by any party to the suit to any other party before the institution of the suit;

(c) expenditure incurred on the typing of pleadings filed by any party;

(d) charges paid by a party for inspection of the records of the Court for the purposes of the suit;

(e) expenditure incurred by a party for producing witnesses, even though not summoned through Court; and

(f) in the cases of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal.

(2) The award of costs under the rule shall be in accordance with such rules as the High Court may make in that behalf.

2. In calculating costs, no amount shall be included as pleader's fees unless a receipt signed by the pleader, or a certificate in writing signed by him and stating the amount received, has been filed in court " Pleader's fees.

#### Order XXI, rule 1

For rule 1 of Order XXI in the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"1. (1) All money payable under a decree shall be paid as follows, namely:—

(a) by deposit into or by postal money-order sent to the Court whose duty it is to execute the decree, or through bank to that Court;

(b) out of Court to the decree-holder through a bank or by postal money-order or by any other mode wherein the payment is evidenced in writing;

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) or clause (c) of sub-rule (1), the judgment-debtor shall give notice thereof to the decree-holder either through the Court, or by registered post direct.

(3) Where money is paid by postal money-order under clause (a) or clause (b) of sub-rule (1), the money-order shall accurately state the following particulars, namely:—

- (i) the number of the original suit;
- (ii) the names of the parties;
- (iii) how the money remitted is to be adjusted, that is to say, whether it includes the principal, interest or costs;

Modes of paying money under a decree.

(iv) the number of the execution case of the Court, where such a case is pending;

(v) the name and address of the payer.

(4) On any amount paid under clause (a) or clause (c) of sub-rule (1), interest (if any) shall cease to run from the date of service of the notice under sub-rule (2).".

Order XXI, rule 2

In rule 2 of Order XXI of the First Schedule to the principal Act,—

(a) in sub-rule (1), for the words "or the decree is otherwise adjusted", the words "or a decree of any kind is otherwise adjusted" shall be substituted;

(b) after sub-rule (2), the following sub-rule shall be inserted, namely:—

"(2A) No payment or adjustment shall be recorded at the instance of the judgment-debtor unless—

(a) the payment is made in the manner provided in rule 1, or

(b) the adjustment is proved by documentary evidence, or

(c) the payment or adjustment is admitted by or on behalf of the decree-holder in his reply to the notice or before the Court."

Order XXI, rule 11A (New)

After rule 11 of Order XXI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Applica-  
tion for  
arrest to  
state  
grounds.

"11A. Where an application is made for the arrest and detention in prison of the judgment-debtor, it shall state, or be accompanied by an affidavit stating, the grounds on which arrest is applied for."

Order XXI, rule 17

For sub-rule (1) of rule 17 of Order XXI of the First Schedule to the principal Act, the following sub-rules shall be substituted, namely:—

"(1) On receiving an application for the execution of a decree as provided by sub-rule (2) of rule 11, the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court...shall allow the defect to be remedied then and there or within a time to be fixed by it.

(1A) If the defect is not so remedied, the Court may reject the application....:

*Provided that where the Court is of the opinion that the amount stated in the application as the amount due under the decree is not correct, the Court shall either—*

(a) decide what the correct amount is and allow the defect to be remedied as aforesaid, before rejecting the application, or

(b) pass an order that the execution of the decree should, subject to the other provisions of this Code, issue for the amount provisionally decided by the Court as the correct amount, subject to the right of the applicant to get the question of the amount determined in the course of the proceedings.”.

*Order XXI, rule 22*

In rule 22 of Order XXI of the First Schedule to the principal Act, in sub-rule (1),—

(a) in clause (a) and in the proviso, for the words “one year”, wherever they occur, the words “two years” shall be substituted,

(b) the word “or” shall be inserted at the end of clause (b);

(c) after clause (b), the following clause shall be inserted, namely:—

“(c) Where the party to the decree has been adjudged to be an insolvent against the assignee or receiver in insolvency.”.

*Order XXI, rule 29*

In rule 29 of Order XXI of the First Schedule to the principal Act, after the words “a decree of such Court”, the words “or a decree which is being executed by such Court” shall be inserted.

*Order XXI, rule 31*

In rule 31 of Order XXI of the First Schedule to the principal Act, in sub-rules (2) and (3), for the words “six months”, the words “three months” shall be substituted.

*Order XXI, rule 32*

In rule 32 of Order XXI of the First Schedule to the principal Act, in sub-rules (3) and (4), for the words “one year”, the words “six months” shall be substituted.

## Order XXI, rule 41

Rule 41 of Order XXI of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

“(2) Where a decree for the payment of money has remained unsatisfied for a period of thirty days, the Court may, on the application of the decree-holder, order that the judgment-debtor, or in the case of a corporation, any officer thereof, shall make an affidavit stating particulars of his assets; and the power of the Court to make any such order shall be without prejudice to its power under sub-rule (1).”.

## Order XXI, rule 43A

After rule 43 of Order XXI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Custody of  
movable  
property.

“43A. (1) When the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to rule 43, he may, at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property, leave it in the village or place where it has been attached in the custody of any respectable person.

(2) If the custodian fails, after due notice, to produce such property at the place named by the Court to the officer deputed for the purpose or to restore it to the owner if so ordered by the Court, or if the property, though so produced or restored, is not in the same condition as it was when it was entrusted to him,—

(a) the custodian shall be liable to pay compensation to the decree-holder, judgment-debtor or any other person who is found to be the owner thereof, for any loss caused by his fault; and

(b) such liability may be enforced—

(i) at the instance of the decree-holder, as if the custodian were a surety under section 145;

(ii) at the instance of the judgment-debtor or such other person, on an application in execution; and

(c) any order determining such liability shall be appealable as a decree.”.

## Order XXI, rule 46A to 46I (New)

After rule 46 of Order XXI of the First Schedule to the principal Act, the following rules shall be inserted, namely:—

"46A. (1) The Court may in the case of a debt (other than a debt secured by a mortgage or a charge) which has been attached under rule 46, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt, calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

Notice to garnishee.  
Cf. R.S.C. 1883. Order XLV and County Courts Rules. Order 27.

(2) An application under sub-rule (1) shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

(3) Where the garnishee pays in the Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of the execution, the Court may direct that the amount may be paid to the decree-holder towards satisfaction of the decree and the costs of the execution.

46B. Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution, and does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

Order against garnishee.

46C. Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just:

Trial of disputed questions.

Provided that, if the debt in respect of which the application under rule 46A is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge shall deal with it in the same manner as if the case had been originally instituted in that Court.

Procedure where debt belongs to third person.

46D. Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

Order as regards third person.

46E. After hearing such third person and any person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, if any, of such third or other person or persons as may seem fit and proper.

Payment by garnishee to be valid discharge.

46F. Payment made by the garnishee on notice under rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid for the amount paid or levied, although the decree in execution of which the application under rule 46A was made, or the order passed in the proceedings on such application, may be set aside or reversed.

Costs.

46G. The costs of any application made under rule 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the Court.

Appeal.

46H. An order made under rule 46B, 46C or rule 46E shall be appealable as a decree.

Application to negotiable instruments.

46I. The provisions of rules 46A to 46H shall, so far as may be, apply in relation to negotiable instruments attached under rule 5i as they apply in relation to debts."

#### Order XXI, rule 48

In rule 48 of Order XXI of the First Schedule to the principal Act,—

(a) in sub-rule (1), after the words "local authority", the words and figures "or of a servant of a corporation engaged in any trade or industry which is established by a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 shall be inserted;

1 of 1956.

(b) for sub-rule (3), the following sub-rule shall be substituted, namely:—

"(3) Every order made under this rule, unless it is returned in accordance with the provisions of

sub-rule (2), shall, without further notice or other process, bind the appropriate Government or the railway company or local authority or corporation or Government company, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of the revenues of the Central Government or a State Government or the funds of a railway company carrying on business in any part of India or local authority or corporation or Government company in India; and the appropriate Government or the railway company or local authority or corporation or Government company, as the case may be, shall be liable for any sum paid in contravention of this rule.”;

(c) for the Explanation, the following Explanation shall be substituted, namely:—

‘Explanation.—In this rule, “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, or any servant of a corporation engaged in any trade or industry which is established by a Central Act, or any servant of a Government company in which any part of the share capital is held by the Central Government or by more than one State Governments or partly by the Central Government and partly by one or more State Governments, the Central Government;

Cf. section 617 Companies Act, 1956.

(ii) as respects any other servant of the Government, or a servant of any other local authority, or any servant of a corporation engaged in any trade or industry which is established by a Provincial or State Act, or a servant of any other Government company, the State Government.”.

Order XXI, rule 48A (New)

After rule 48 of Order XXI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“48A. (1) Where the property to be attached is the salary or allowances of a servant other than a servant to whom rule 48 applies, the Court, where the disbursing officer of the employed is within the local limits of the Court’s jurisdiction, may order that the amount shall, subject to the provisions of section 60, be

Attachment of salary or allowances of private employees.

withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of the order to such disbursing officer, such disbursing officer shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld or remitted to the Court in pursuance of a previous and unsatisfied order of attachment, the disbursing officer shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2) shall, without further notice or other process, bind the employer while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits, if he is in receipt of salary or allowances payable out of the funds of an employer in any part of India; and the employer shall be liable for any sum paid in contravention of this rule."

#### Order XXI, rule 50

In rule 50 of Order XXI of the First Schedule to the principal Act,—

(a) in the proviso to sub-rule (1), for the words and figures "section 247 of the Indian Contract Act, 1872", the words and figures "section 30 of the Indian Partnership Act, 1932" shall be substituted; 9 of 1872.  
9 of 1932.

(b) the following sub-rule shall be inserted at the end, namely:—

"(5) Nothing in this rule applies to a decree passed against a Hindu undivided family by virtue of the provisions of rule 10 of Order XXX."

#### Order XXI, rule 53

In rule 53 of Order XXI of the First Schedule to the principal Act,—

(a) in sub-rule (1),—

(i) for clause (b), the following clause shall be substituted, namely:—

"(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) the holder of the decree sought to be executed, or his judgment-debtor if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court, applies to the Court receiving such notice to execute the attached decree;”;

(b) in sub-rule (6), after the words “in contravention of such order”, the words “with knowledge thereof or” shall be inserted.

*Order XXI, rule 54*

In rule 54 of Order XXI of the First Schedule to the principal Act,—

(a) after sub-rule (1), the following sub-rule shall be inserted namely:—

“(1A) The order shall also require the judgment-debtor to attend Court on a date to be fixed by the Court, to take notice of the date fixed for settling the terms of the proclamation of sale.”;

(b) in sub-rule (2), after the words “in the office of the Collector of the district in which the land is situate”, the following words shall be inserted, namely:—

“and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.”.

*Order XXI, rules 58 to 63*

In Order XXI of the First Schedule to the principal Act, for rules 58 to 63 (both inclusive), the following rules shall be substituted, namely:—

“58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to *adjudicate upon the claim or objection in accordance with the provisions herein contained*: Adjudication of claims to, or objections to attachment of, attached property.

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding under this rule or their representatives and relevant to the adjudication of the claim or objection shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2) the Court shall in accordance with such determination—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

Cf.  
Order XXI,  
rule 50(3).

(4) Where any claim or objection has been adjudicated upon under this rule, 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.

Cf.  
Order XXI,  
rule 63.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

Stay of  
sale.

Cf.  
Order XXI,  
rule 58(1),  
proviso.

59. Where before the claim was preferred or the objection was made, the property attached had already been advertised for sale, the Court may—

(a) if the property is movable, make an order postponing the sale pending the adjudication of the claim or objection; or

(b) if the property is immovable, make an order that pending the adjudication of the claim.

## Order XXI, rule 90

For rule 90 of Order XXI of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Applica-  
tion to set  
aside sale  
on ground  
of irregu-  
larity or  
fraud.

“90. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) .....No sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the proclamation of sale was drawn up.”.

## Order XXI, rule 92

In rule 92 of Order XXI of the First Schedule to the principal Act,—

(a) in sub-rule (1), after the words “the Court shall”, the words and figures “subject to the provisions of rule 59” shall be inserted;

(b) for sub-rule (2), the following sub-rule shall be substituted, namely:—

“(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor, such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.”.

## Order XXI, rule 97

of Order XXI of the First Schedule to the Act, for sub-rule (2), the following sub-rule shall be substituted, namely:—

“(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.”.

Order XXI,  
rule 97,  
modified.

## Order XXI, rules 98 to 103

For rules 98 to 103 of Order XXI of the First Schedule to the principal Act, the following rules shall be substituted, namely:—

Order to  
be passed  
upon appli-  
cation com-  
plaining of  
resistance.

“98. (1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination, and subject to the provisions of sub-rule (2),—

Order XXI,  
rule 99,  
modified.

(a) allow the application and direct that the applicant be put into possession of the property; or

(b) dismiss the application; or

(c) pass such order as in the circumstances of the case it deems fit.

(2) Where upon such determination the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

Cf.  
Order XXI,  
rule 98.

99. (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by  
decree-  
holder or  
purchaser.  
Order XXI,  
rule 100,  
modified.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Upon the determination of the application referred to in rule 101, the Court shall, in accordance with such determination,—

(a) allow the application and direct the applicant to be put back into possession of the property; or

(b) dismiss the application; or

(c) pass such order as in the circumstances of the case it deems fit.

Questions to be determined. [New]

101. All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit.

Rules not applicable to transferee *lite pendente*. Cf. Order XXI, rule 102.

102. Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Orders to be treated as decrees. Order XXI, rule 103, modified.

103. Where any application has been adjudicated upon under rule 98 or rule 100, 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.”

Cf. Order XXI, rule 50(3).

#### Order XXI, rules 104 and 105 (New)

In order XXI of the First Schedule to the principal Act, after rule 103, the following rules shall be inserted, namely:—

Hearing of application.

“104. (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.

*Explanation.*—An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

105. (1) *The applicant against whom an order is made under sub-rule (2) of rule 104 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.*

Setting  
aside  
orders  
passed  
ex parte,  
etc.

(2) *No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.*

(3) *An application under sub-rule (1) shall be made within thirty days of the date of the order, or where in the case of an ex parte order the notice was not duly served, the date when the applicant had knowledge of the order.*

(4) *The provisions of section 5 of the Limitation Act, 1963, shall apply to applications under sub-rule (1)."*

36 of 1963.

#### *Order XXII, rule 5*

In rule 5 of Order XXII of the First Schedule to the principal Act, the following proviso shall be inserted at the end, namely:—

*“Provided that, where such question arises before an Appellate Court, that Court may, before determining it, direct any subordinate court to try the question and to return the evidence, if any, taken on the question together with its finding and reasons therefor and may take the same into consideration in determining the question.”*

#### *Order XXIII, rule 1*

In rule 1 of Order XXIII of the First Schedule to the principal Act, after sub-rule (3), the following sub-rules shall be inserted, namely:—

*“(3A) Where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, the suit shall not be withdrawn under this rule, nor shall any part of the claim be abandoned, without the leave of the Court.*

*(3B) An application for leave under sub-rule (3A) shall be accompanied by an affidavit of the next*

friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader, to the effect that the withdrawal proposed is, in his opinion, for the benefit of the minor or such other person.”.

Order XXIII, rule 3

In rule 3 of Order XXIII of the First Schedule to the principal Act,—

(a) after the words “lawful agreement or compromise”, the words “in writing and signed by the parties” shall be inserted;

(b) the following Explanation shall be inserted at the end, namely:—

*“Explanation.—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful 9 of 1872, within the meaning of this rule.”.*

Order XXVI, rule 7

In rule 7 of Order XXVI of the First Schedule to the principal Act, for the words “subject to the provisions of the next following rule”, the words and figure “subject to the provisions of rule 8” shall be substituted.

Order XXVI, rule 16A (New)

After rule 16 of Order XXVI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“16A. (1) Where any question put to a witness is objected to by a party or his pleader in proceedings before a Commissioner appointed under this Order, the Commissioner shall take down the question, the answer, the objection and the name of the person making it.

(2) No answer taken down under sub-rule (1) shall be read as evidence in the suit except by the order of the Court.”.

Order XXVI, rule 18A

After rule 18 of Order XXVI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“18A. The provisions of this Order shall apply, so far as may be, to proceedings in execution of a decree or order.”.

Questions  
objected  
to before  
the Com-  
missioner.  
Cf.  
Order 18,  
rule 11.

Applica-  
tion of  
order to  
execution  
proceed-  
ings.

## Order XXVI, rule 22

In rule 22 of Order XXVI of the First Schedule to the principal Act, after the figures "16", the words and figures "sub-rule (1) of rule 16A" shall be inserted.

## Order XXX, rule 8

For rule 8 of Order XXX of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"8. (1) Any person served with summons as a partner under rule 3 may enter an appearance under protest, denying that he was a partner at any material time. **Appearance under protest.**

(2) On such appearance being filed, either the plaintiff or the person entering the appearance may, at any time before the date fixed for hearing and final disposal of the suit, apply to the Court for determining the question whether the person so served was a partner of the firm and liable as such.

(3) If on such application the Court holds that he was a partner at the material time, that shall not preclude that person from filing a defence denying the liability of the firm in respect of the claim of the defendant.

(4) If, however, the Court holds that such person was not a partner of the firm and was not liable as such, that shall not preclude the plaintiff from otherwise serving a summons on the firm and proceeding with the suit; but in that event the plaintiff shall be precluded from alleging the liability of that person as a partner of the firm in execution of any decree that may be passed against the firm."

## Order XXX, rule 10

For rule 10 of Order XXX of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"10. Any person carrying on business in a name or style other than his own name or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as such nature of the case will permit, all rules under this Order shall apply." **Suit against Hindu undivided family or person carrying on business in name other than his own.**



## Order XXXII, rule 1

To rule 1 of Order XXXII of the First Schedule to the principal Act, the following *Explanation* shall be added, namely:—

*Explanation.*—In this Order, the expression “minor” means a person who has not attained his majority within the meaning of sections 3 and 4 of the Indian Majority Act, 1875, whether the suit relates to any of the matters mentioned in clauses (a) and (b) of section 2 of that Act, or to any other matter. 9 of 1875.

## Order XXXII, rule 2A (New)

After rule 2 of Order XXXII of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Security to be furnished by the next friend when so ordered.

“2A. (1) Where a suit has been instituted on behalf of the minor by his next friend, the Court may, at any stage of the suit, either of its own motion or on the application of any defendant, and for reasons to be recorded, order the next friend to give security for the payment of all costs incurred or likely to be incurred by the defendant.

(2) Where such a suit is instituted in forma pauperis, the security shall include the court-fees payable to the Government.

(3) The provisions of rule 2 of Order XXV shall, so far as may be, apply to a suit where the Court makes an order under this rule directing security to be furnished.”.

## Order XXXII, rule 3

In rule 3 of Order XXXII of the First Schedule to the principal Act, for sub-rule (4), the following sub-rules shall be substituted, namely:—

“(4) No order shall be made on any application under this rule except upon notice to .....any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, ..... the father or other natural guardian of the minor, or, where there is no father or other natural guardian ..... the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.”.

*Order XXXII, rule 4(3)*

In rule 4 of Order XXXII of the First Schedule to the principal Act, in sub-rule (3), after the word "consent", the words "expressed in writing" shall be inserted.

*Order XXXII, rule 4(4)*

In rule 4 of Order XXXII of the First Schedule to the principal Act, in sub-rule (4), after the words "any fund in Court in which the minor is interested", the words "or from the minor's property" shall be inserted.

*Order XXXII, rule 6*

In rule 6 of Order XXXII of the First Schedule to the principal Act, to sub-rule (2), the following proviso shall be added, namely:—

*"Provided that the Court may, in its discretion, for reasons to be recorded, dispense with such security while granting leave to the next friend or guardian for the suit to receive money or other movable property under a decree or order, where such next friend or guardian—*

*(a) is the manager of a Hindu undivided family, and the decree or order relates to the property or business of the family; or*

*(b) is the parent of the minor."*

*Order XXXII, rule 7*

In rule 7 of Order XXXII of the First Schedule to the principal Act, the following sub-rule shall be inserted at the end, namely:—

*"(3) An application for leave under sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor."*

*Order XXXII, rule 16*

For rule 16 of Order XXXII of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

"16 (1) Nothing in this Order shall apply—

(a) to the Ruler of a foreign State suing or being sued in the name of his State, or being sued by the direction of the Central Government in the name of an agent or in any other name; or

Savings  
regarding  
Rulers.  
Cf.  
section 87.

Cf.  
section  
87B.

(b) to the Ruler of any former Indian State suing or being sued in his name.

(2) Nothing in this Order shall be construed as affecting or in any way derogating from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind."

Order XXXIII, rule 1

For rule 1 of Order XXXIII of the First Schedule to the principal Act, the following rule shall be substituted, namely:—

Suits in  
forma  
pauperis.

"1. Subject to the following provisions, any suit may be instituted by a pauper.

*Explanation 1.*—A person is a "pauper"—

Cf.  
Bombay  
and Kerala  
Amend-  
ments.

(a) when he is not possessed of sufficient means other than his necessary wearing-apparel and the subject-matter of the suit to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, when he is not entitled to property worth one thousand rupees other than his necessary wearing-apparel and the subject-matter of the suit.

*Explanation 2.*—Any property which is acquired by a person after the presentation of his application for permission to sue as a pauper and before the decision of the application, shall be taken into account in considering the question whether he is a pauper."

Order XXXIII, rule 11

In rule 11 of Order XXXIII of the First Schedule to the principal Act, in clause (a), after the words "such service", the words "or to present copies of the plaint or concise statement" shall be inserted.

Order XXXIII, rule 15

Rule 15 of Order XXXIII of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and—

(a) in sub-rule (1) as so re-numbered, the word "first" shall be omitted;

(b) after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

"(2) Where the applicant has not, before the institution of the suit, paid the costs referred to in sub-rule (1), the Court may, if it thinks fit, allow him such time as it thinks fit to pay such costs."

## Order XXXIII, rule 15A (New)

After rule 15 of Order XXXIII of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“15A. Nothing in rules 5, 7 or 15 shall prevent a Court while rejecting an application under rule 5 or refusing an application under rule 7 from granting time to the applicant to pay the requisite court-fee within such time as may be fixed by the Court or extended by it from time to time: and upon such payment and on payment of the costs referred to in sub-rule (1) within that time, the suit shall be deemed to have been instituted on the date on which the application was presented.”

Grant of  
time for  
payment of  
court-fees.

## Order XXXIII, rule 17 (New)

After rule 16 of Order XXXIII of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“17. Any defendant who desires to plead a set-off or counter-claim may be allowed to defend as a pauper, and the rules in this Order shall, so far as may be, apply to him as if he were a plaintiff and his written statement were a plaint.”

Defence by  
pauper.

## Order XXXIV, rule 3

In rule 3 of Order XXXIV of the First Schedule to the principal Act, in sub-rule (2), after the words “on application made by the plaintiff in this behalf”, the words “and after notice to all parties” shall be inserted.

## Order XXXIV, rule 5

In rule 5 of Order XXXIV of the First Schedule to the principal Act, in sub-rule (3), after the words “on application made by the plaintiff in this behalf”, the words “and after notice to all parties” shall be inserted.

## Order XXXIV, rule 8

In rule 8 of Order XXXIV of the First Schedule to the principal Act, in sub-rule (3), after the words “on application made by the defendant in this behalf”, the words “and after notice to all parties” shall be inserted.

## Order XXXIV, rule 15

Rule 15 of Order XXXIV of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

“(2) Where a decree orders payment of money and charges it on immovable property on default of pay-

ment, the amount may be realised by sale of that property in execution of that decree.”.

Order XXXVIII, rule 8

In Order XXXVIII of the First Schedule to the principal Act, for rule 8, the following rule shall be substituted, namely:—

Adjudication of claim to property attached before judgment.

“8. Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.”.

Order XXXVIII, rule 11A (New)

In Order XXXVIII of the First Schedule to the principal Act, after rule 11, the following rule shall be inserted, namely:—

Provisions applicable to attachment.

“11A. The provisions of this Code applicable to an attachment made in execution of a decree shall, as far as may be, apply to an attachment made before judgment which continues after judgment by virtue of the provisions of rule 11.”.

Order XXXIX, rule 2

In rule 2 of Order XXXIX of the First Schedule to the principal Act, sub-rules (3) and (4) shall be omitted.

Order XXXIX, rule 2A (New)

After rule 2 of Order XXXIX of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Consequences of disobedience or breach of injunction.  
Cf. Order XXXIX rule 2(3) and 2(4).

“2A. (1) In case of disobedience to any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit to the injured party, and shall pay the balance, if any, to the party entitled thereto.”.

## Order XXXIX, rule 8

In rule 8 of Order XXXIX of the First Schedule to the principal Act,—

(a) in sub-rule (1), the words “after notice to the defendant” shall be omitted;

(b) in sub-rule (2), the words “after notice to the plaintiff” shall be omitted;

(c) after sub-rule (2), the following sub-rule shall be inserted, namely:—

“(3) The Court shall in all cases, except where it appears that the object of making the order would be defeated by the delay before making the order, direct notice of the application for the same to be given to the opposite party.”

Cf.  
Order  
XXXIX  
rule 4.

## Order XLI, rule 1

In rule 1 of Order XLI of the First Schedule to the principal Act, to sub-rule (1), the following proviso shall be added, namely:—

“Provided that where two or more cases have been tried together and decided by the same judgment and two or more appeals are filed together against the decree, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.”

## Order XLI, rule 3A

After rule 3 of Order XLI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

“3A. (1) When an appeal is presented after the period of limitation prescribed 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 not preferring the appeal within such period.

Applica-  
tion for  
condona-  
tion of  
delay.

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

## Order XLI, rule 5

In rule 5 of Order XLI of the First Schedule to the principal Act,—

(a) in sub-rule (1), after the words “order stay of execution of such decree”, the words “or, if such

decree is a preliminary decree, direct that proceedings for passing a final decree shall be stayed, or that such proceedings may continue but the making of the final decree shall be stayed" shall be inserted;

(b) in sub-rule (3), in the opening line and in clause (a), the words "of execution" shall be omitted;

(c) in sub-rule (4), the words "of execution" shall be omitted.

#### Order XLI, rule 11

To rule 11 of Order XLI of the First Schedule to the principal Act, the following sub-rule shall be added, namely:—

"(4) Where an Appellate Court subordinate to the High Court dismisses an appeal under sub-rule (1), it shall deliver a judgment recording in brief its grounds for doing so, and a formal decree shall be drawn up in accordance with the judgment."

#### Order XLI, rule 23A (New)

After rule 23 of Order XLI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Remand in other cases.

"23A. 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."

#### Order XLI, rule 25

In rule 25 of Order XLI of the First Schedule to the principal Act, after the words "and the reasons therefor", the words "within such time as may be fixed by the Appellate Court or extended by it from time to time" shall be inserted.

#### Order XLI, rule 26

After rule 26 of Order XLI of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

Order of remand to mention date of next hearing.

"26A. Wherever the Appellate Court remands a case under rule 23 or rule 23A, or frames issues and refers them for trial under rule 25, it shall fix a date for the appearance of the parties before the Court from whose decree the appeal was preferred for the purpose of receiving the directions of that Court as to further proceedings in the suit."

*Order XLI, rule 27*

in rule 27 of Order XLI of the First Schedule to the principal Act, in sub-rule (1), after clause (a), the following clause shall be inserted, namely:—

*“(aa) the party seeking additional evidence satisfies the Appellate Court that such evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree appealed against was passed, or”.*

*Order XLI, rule 30*

Rule 30 of Order XLI of the First Schedule to the principal Act shall be re-numbered as sub-rule (1) thereof, and after sub-rule (1) as so re-numbered, the following sub-rule shall be inserted, namely:—

*“(2) Where a written judgment 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 judgment; but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced.”.*

*Order XLIII, rule 1*

In rule 1 of Order XLIII of the First Schedule to the principal Act,—

(a) after clause (j), the following clause shall be inserted, namely:—

*“(jj) an order rejecting an application made under sub-rule (1) of rule 105 of Order XXI, provided an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 104 of that Order is appealable;”;*

(b) in clause (r), after the word and figure “rule 2”, the word, figure and letter “rule 2A” shall be inserted;

(c) in clause (u), after the figures “23”, the words, figures and letter “or rule 23A” shall be inserted.

*Order XLIV, rule 1A (New)*

After rule 1 of Order XLIV of the First Schedule to the principal Act, the following rule shall be inserted, namely:—

*“1A. Where an application is rejected under rule 1, the Court may, while rejecting the application, allow the applicant to pay the requisite court-fee within such time as may be fixed by the Court or extended*

**Grant of time for payment of court-fees.**



by it from time to time; and upon such payment the memorandum of appeal in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.”.

Order XLIV, rule 2

In rule 2 of Order XLIV of the First Schedule to the principal Act, in the proviso, after the words “sue or appeal”, the words “or defend the suit or appeal” shall be inserted.

Order XLVII, rule 7

In rule 7 of Order XLVII of the First Schedule to the principal Act, for sub-rule (1), the following sub-rule shall be substituted, namely:—

“(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to.....at once by an appeal from that order or in any appeal from the final decree or order passed or made in the suit.”.

First Schedule, Appendix E, Form No. 16A (New)

In Appendix E to the First Schedule to the principal Act, after Form No. 16, the following Form shall be inserted, namely:—

“No. 16A

AFFIDAVIT OF ASSETS TO BE MADE BY A JUDGMENT-DEBTOR

[O. XXI, r. 41(2)]

In the Court of

A.B., decree-holder

vs.

C.D., judgment-debtor

I \_\_\_\_\_ of  
oath  
state on \_\_\_\_\_ as follows:—  
solemn affirmation

1. My full name is

(Block capitals)

2. I live at

3. I am married

single

widower (widow)

divorced

} (delete as necessary).

4. The following persons are dependent upon me.

5. My employment, trade or profession is that of  
carried on by me at

I am a director of the following companies:—

6. My present annual/monthly/weekly income, after paying income-tax, is as follows:—

- (a) From my employment, trade or profession Rs.
- (b) From other sources Rs.

7. (a) I own the house in which I live; its value is Rs. I pay as outgoings by way of rates, mortgage interest, etc., the annual sum of Rs. } (delete as necessary).  
 (b) I pay as rent the annual sum of Rs. }

8. I possess the following:—

- (a) Banking accounts.
  - (b) Stocks and shares.
  - (c) Life and endowment policies.
  - (d) House property.
  - (e) Other property.
  - (f) Other securities.
- } (give particulars).

9. The following debts are owing to me:—  
 (give particulars)

- (a) From \_\_\_\_\_ of \_\_\_\_\_  
Rs. \_\_\_\_\_
- (b) From \_\_\_\_\_ of \_\_\_\_\_  
Rs. \_\_\_\_\_ (etc.).

Sworn, etc.”.

*First Schedule, Appendix E, Form No. 24*

In Form No. 24 (being the Form of attachment in execution—prohibitory order where the property consists of immovable property) in Appendix E to the First Schedule to the principal Act, after the first paragraph, the following paragraph shall be inserted, namely:—

“It is also ordered that you should attend Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, to take notice of the date fixed for settling the terms of the proclamation of sale.”.

*First Schedule. Appendix E, Form No. 29*

In Form No. 29 (being the Form of proclamation of sale) in Appendix E to the First Schedule to the principal Act, to the Schedule of Property appearing at the end of the Form, the following columns shall be added, namely:—

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The value of the property as stated by the decree-holder.	The value of the property as stated by the judgment-debtor.
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*First Schedule, Appendix H, Form No. 2A (New)*

In Appendix H to the First Schedule to the principal Act, after Form No. 2, the following Form shall be inserted, namely:—

## "No. 2A

LIST OF WITNESSES PROPOSED TO BE CALLED BY PLAINTIFF/DEFENDANT (O. 16, r. 1).

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Name of the party which proposes to call the witness.	Name and address of the witness.	Remarks
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*First Schedule, Appendix H, Forms Nos. 11 and 11A.*

For Form No. 11 (being the Form of notice to minor defendant and guardian) in Appendix H to the First Schedule to the principal Act, the following Forms shall be substituted, namely:—

## "No. 11

NOTICE TO CERTIFICATED, NATURAL OR *de facto* GUARDIAN.  
(O. 32, r. 3).

(Title)

To (Certificated/Natural/ *de facto* guardian).

WHEREAS an application has been presented on the part of the plaintiff<sup>1</sup>/on behalf of the minor defendant<sup>2</sup> in the above suit for the appointment of a guardian for the suit for the minor defendant , you (insert the name of the guardian appointed or declared by Court, or natural guardian, or the person in whose care the minor is) are hereby required to take notice that unless you

<sup>1,2</sup> Strike off what is inapplicable.

appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to act as guardian for the suit for the minor, the Court will proceed to appoint some other person to act as a guardian for the minor, for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this  
day of 19 .

*Judge.*

No. 11A

NOTICE TO MINOR DEFENDANT. (O. XXXII, r. 3)

(Title)

To *Minor defendant.*

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of <sup>1</sup> as guardian for the suit for you, the minor defendant, you are hereby required to take notice to appear in this Court in person on the day of 19 , at O'clock in the forenoon to show cause against the application, failing wherein the said application will be heard and determined ex parte.

GIVEN under my hand and the seal of the Court, this  
day of 19 .

*Judge."*

## APPENDIX II

### NOTES ON CLAUSES

#### Section 1 (Extent)

(i) It is understood that before enacting Act 2 of 1951, which amended the Code of Civil Procedure, 1908, it was specifically suggested to the State Governments that the Code may be made applicable to the whole of India except Jammu & Kashmir and Manipur, the former because of legislative incapacity and the latter because of the Part C States (Laws) Act, 1950, (now the Union Territories Laws Act, 1950). As a result of the replies received, it was found that the only areas to which the Code need not extend were the State of Jammu and Kashmir, the Union territory of Manipur, the tribal Areas in the State of Assam and the Scheduled Areas in the State of Madras. In answer to a further query as to whether there were any "former Scheduled Districts" or "present Scheduled Areas"

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<sup>1</sup> Here insert name and description of proposed guardian.

in the State of which the Code should not extend, the reply of the Government of Madras was:—

“The Laccadive Islands (including Minicoy), the Amindivi Islands and the East Godavari, West Godavari and Visakhapatnam agencies are the Scheduled areas within the Madras State and the Code of Civil Procedure is not in force in the Laccadive Islands (including Minicoy) while sections 36 to 43 (including Order XXXIV of the First Schedule and sections 36 to 43 and 48 (including Order XXXIV) are in force in the East Godavari, West Godavari and Visakhapatnam agencies. The intention is that the present position may continue.”

(ii) Whatever the earlier history with regard to Scheduled Districts may be, it is clear that after Act 2 of 1951 the question whether the Code did or did not extend to Scheduled Districts is hardly relevant. Apart from the Tribal Areas in Assam and the State of Jammu & Kashmir and the Union territory of Manipur, the only areas to which the Code was not intended to extend were the Scheduled Areas in Madras, which by the Scheduled Areas (Part A States) Order, 1950, (Gazette of India, Extraordinary, 1950, page 670) comorised the Laccadive Islands (including Minicoy) and Amindivi Islands, East Godavari, West Godavari and Visakhapatnam agencies.

(iii) Section 1(3) of the Code as amended by Act 2 of 1951 therefore continued the existing position with regard to these Islands. It may be recalled in this connection, that section 3 of the Laccadive and Minicoy Islands Regulation, 1912, provided that notwithstanding anything in any enactment now in force (that is on 22nd January, 1912) that Regulation and the enactments mentioned in section 3 (which did not include the Code of Civil Procedure) were to be the only enactments in force in the islands. Amindivi Islands were not included within the scope of the Regulation.

(iv) After the formation of Andhra State, the proviso to section 1(3) underwent a modification, so that the Amindivi Islands were shown as being in the State of Madras and the Agencies were shown as being in the State of Andhra Pradesh.

(v) After the passing of the States Reorganisation Act, 1956, the proviso underwent a further modification, as Amindivi Islands had ceased to be a part of the Madras State. But necessary amendments were not carried out in section 1(3) (b). As there are no *Scheduled Areas* in the State of Madras at present, sub-clause (b) appears to be meaningless and the proviso therefore does not fit in. Hence this opportunity has been taken of recasting sub-section (3).

(vi) Incidentally, it may be added that the Administrator of the Laccadive, Minicoy and Amindivi Islands has, in his suggestion relating to the Civil Procedure Code sent to the Commission, suggested that sections 36 to 43 should, for uniformity, extend also to Laccadive and Minicoy Islands. (At present, they extend only to Amindivi Islands). This has been accepted, and Order XXXIV also proposed to be extended to those Islands.

(vii) It may also be added, that from the 1st January, 1957, the Code extends to Manipur also.

(viii) Reference to section 48 has been omitted from the proviso, as section 48 is now omitted from the Code; see section 28, Limitation Act, 1963.

#### Section 2(2) "decree"

Regarding the definition of "decree" a recommendation has been made in an earlier Report of the Law Commission<sup>1</sup> for regarding awards in Land Acquisition proceedings as decrees. It suggested an amendment of the Land Acquisition Act for this purpose. This is a matter to be considered when final action for revising the Land Acquisition Act is taken.

2. The question whether an order rejecting a memorandum of appeal on the grounds of deficit in court-fees should be treated as a decree, has been considered. It would not, however, be convenient to insert a provision on the subject in the definition of "decree", as there is no specific provision in the body of the Code or in the rules relating to rejection of a memorandum of appeal (except Order XXI, rule 3 dealing with rejection on the ground of certain formal defects).

#### Section 2(17)(b)

The words "All-India Service" have been substituted, in conformity with the Constitution and present usage.

#### Section 7

It has been stated that the absence of a power to attach immovable property under section 94(b), read with Order XXXVIII, leads to injustice, because the creditor who sues in a Court of Small Causes does not have the benefit of attachment before judgment, with the result that when the decree is passed, the defendant would, in the meantime, have alienated all his immovable property. The question of making an amendment in the law so as to give the power to attach immovable property (before judgment) to Courts of Small Causes has therefore been considered.

One preliminary point may be considered. After the decree a Small Causes Court has no jurisdiction to execute the decree against immovable property, and it has to be transferred for that purpose to the regular side of the Court.

<sup>1</sup> 3rd Report (Limitation Act) page 59 para. 151.

But there may be no illogicality (as was suggested in some quarters) in making the suggested amendment, because, even after the suggested amendment, if a Small Causes Court attaches immovable property before judgment, the attachment will continue for the benefit of the decree-holder, and he can have the decree transferred to the regular side for execution against the immovable property.

The real point is, that the absence of such a power has not led to any difficulty. Hence no amendment is proposed.

#### Section 8

Reference to sections 155-156 has been deleted, as these have been already repealed.

#### Section 9

1. The question whether, regarding suits for offices, any clarification is necessary has been considered. The present position is stated below:—

(i) *Suits relating to religious offices to which fees are attached.*—Such Suits raise no difficulty.<sup>1-2,3.</sup>

(ii) *Suits relating to religious offices to which fees are not attached.*—These can be classified into:—

(a) offices which are attached to a sacred spot;

(b) offices which are not so attached.

2. The Bombay High Court seems to have recognised a distinction between (a) and (b) above, and the majority of the decisions of the High Court allow a suit for an office under (a) above but not for an office under (b) above<sup>4-5.</sup>

3. The other High Courts do not seem to recognise this distinction.<sup>6-7,8,9</sup>

<sup>1</sup>*Muhammad v. Syad Ahmed* (1861) 1 B.H.C. Appendix p. xviii, cited in Mulla, C.P.C. (1953), page 26.

<sup>2</sup>*Ghela Bhai v. Hargoyan*, I.L.R. 36 Bom. 94.

<sup>3</sup>*Girja Shankar v. Murlidhar*, I.L.R. 45 Bom. 234 ; A.I.R. 1921 Bom. 209.

<sup>4</sup>*Kasan Khan v. Kaji Isab*, I.L.R. 50 Bom. 148 ; A.I.R. 1926 Bom. 161, which recognises this distinction.

<sup>5</sup>For earlier cases, see—*Lima v. Rama*, I.L.R. 13 Bom. 548; *Gursangaya v. Tamana*, I.L.R. 16 Bom. 281 ; *Shankar v. Hemma*, I.L.R. 2 Bom. 470 ; *Murari v. Suba*, I.L.R. 6 Bom. 725 ; The decision in *Syad Hashim v. Hussein Sha*, I.L.R. 13 Bom. 429, 433, however, allowed a suit even for a personal office to which no fees were attached.

<sup>6</sup>*Mamat Ram v. Babu Ram*, I.L.R. 15 Cal. 159.

<sup>7</sup>*Tholapalla v. Venkata*, I.L.R. 19 Mad. 62.

<sup>8</sup>*Ranalingachi v. Ellayaperuma*, A.I.R. 1937 Mad. 403.

<sup>9</sup>*Chunnu Dat v. Babu Nandan*, I.L.R. 30 All. 527.

4. Since the distinction made between cases (a) and (b) is not recognised by the majority of the High Courts, it is unnecessary to amend the section.

It may be added, that the decision of the Privy Council<sup>1</sup> to the effect that a suit for pecuniary benefits is a civil suit, even if it becomes necessary to determine a right to perform religious services, does not imply that other suits relating to religious offices cannot be entertained. (In that case, the right claimed was that of—Adhyapaka Mirass—reciting certain religious texts, etc., in a temple—and the claim was for recovery of certain benefits in kind earned by the defendants by illegally exercising that right).

As to suits for religious rites, etc., (apart from office), see the recent decision of the Supreme Court<sup>2</sup>.

### Section 11

1. A suggestion has been made, that an express provision should be inserted extending the principle of *res judicata* not only to execution proceedings but to all independent proceedings. It is considered unnecessary to make any specific provision of this nature, and that the matter should be left to be dealt with by the Courts.

Application to independent proceedings.

2. The question whether an express provision should be made to lay down the rule applicable in cases where cross-suits have been filed between the same parties and have been disposed of by two judgments, has been examined. The point is, whether, if an appeal is filed from one judgment and is not filed from the other judgment, the matters decided in the other judgment becomes *res judicata*. It has been considered unnecessary to make a specific provision on this point, as the matter should be dealt with by the courts according to the facts of each case<sup>3</sup>.

Cross-suits.

### Section 15

It has been suggested that jurisdiction to entertain suits where the subject-matter is incapable of pecuniary valuation should not be left to the caprice of the plaintiff as at present, and that the rule-making power under section 9 of the Suits Valuation Act, 1887 (7 of 1887) should be utilized by the High Courts to lay down precise rules on the subject. (So far, only a few of the High Courts have made rules on the subject). The making of such rules would put the matter on a satisfactory basis. The suggestion is worth

<sup>1</sup>*Krishnama v. Krishnasami* (1879) I.L.R. 2 Mad. 62 (P.C.).

<sup>2</sup>*Sinha Ramanuja v. Ranga Ramanuja* A.I.R. 1961 S.C. 1720.

<sup>3</sup>*Cf.* amendment proposed to s. 47.

<sup>4</sup>*Cf. Narhari v. Shankar*, (1950) 1 S.C.R. 754 ; A.I.R. 1953 S.C. 419.



accepting. Necessary action should be initiated by the States, as the matter falls within entry No. 3 in the State List.

As an example of such rules, reference may be made to the rules made by the High Court of Lahore.<sup>1</sup> These rules cover, (besides other cases), suits asking for a decree establishing an adoption or declaring it to be void, suits for restitution of conjugal rights, suits for a decree establishing, annulling or dissolving a marriage or for a declaration that a marriage is void, etc., and suits by a reversioner to set aside an alienation of immovable property made by a limited owner, etc.

### Section 20

Certain changes have been suggested in the *Explanations I and II*. These have not been accepted. The matter is discussed below.

Explana-  
tion of the  
present  
position.

*Explanation I*.—This deals with the case of a person having a permanent dwelling place and a temporary residence. It provides that, (if the cause of action arises at the temporary residence), the person should be deemed to reside at both the places. This fiction of law created by the word "deemed" has the effect of treating his permanent *dwelling place* as his residence. It has also the effect of elevating his temporary residence, but that is not material, because the cause of action test would suffice to give jurisdiction in relation to the temporary residence. The emphasis in the *Explanation* is on the *permanent dwelling place*. Even though that dwelling is not his residence, it is deemed to be his residence within the meaning of section 20, clause (a). It was so held by B. R. Ghosh J. in one case.<sup>2</sup> There, the defendant had a permanent dwelling place in Gopalganj and carried on business and lived at Calcutta. He executed a promissory note at Calcutta in favour of the plaintiff. The plaintiff filed a suit on the pronote at Gopalganj (permanent dwelling place) and the suit was held to be properly instituted. The argument of the defendant's counsel was: "The mere fact that the defendant had his ancestral home within the local limits of the jurisdiction of a court, though he actually resided outside such local limits, would not give the court jurisdiction". This argument was rejected by the court, relying on *Explanation I* to section 20.

This view was followed in a Lahore case<sup>3</sup>. There the defendant had his original family residence in Tehsil Narowal, but was actually residing and carrying on business at Chapra. The plaintiff sold some goods to him at Chapra, and got him to execute some documents. On the basis of

<sup>1</sup>Collected in Row, Court-fees and Suits Valuation Acts, pages 839-840.

<sup>2</sup>*Sitanand v. Jatindranath* I.L.R. 57 Cal. 65 ; A.I.R. 1930 Cal. 3.

<sup>3</sup>*Nuruddin v. Jhairuddin*, A.I.R. 1933 Lahore, 130. (Jai Lal J.).

these documents he instituted a suit at Narowal. The court expressly agreed with the Calcutta decision cited above, and held that the Narowal court had jurisdiction since he had his ancestral or permanent dwelling at that place.

The Calcutta case was followed again in a latter case of the Lahore High Court.<sup>1</sup> There the defendants had joint family property at Lahore, but were residing and carrying on business at Karachi. The grandsons of the defendant filed a suit for recovery of maintenance and for expenses of certain religious ceremonies. The suit was filed at Lahore, and the objection that the suit was not maintainable in Lahore was repelled. Besides holding that a part of the cause of action arose at Lahore, the court also took the view, that under the *Explanation* to section 20 the defendant must be deemed to be residing voluntarily and actually at Lahore. (Even though defendant had not for 13 years visited Lahore, Lahore was held to be his permanent dwelling because at one time defendant did reside in Lahore and had no intention to abandon that place).

*Explanation II.*—The second *Explanation* can be split up into two parts, (i) a corporation is deemed to carry on business at its sole or principal office in India; (ii) it is deemed to carry on business at the place of subordinate office. The first half is obviously necessary, because it equates the sole or principal office with the place of carrying on business. This part of the legal fiction has nothing to do with the arising of the cause of action.

As regards the latter half of *Explanation II*, what it provides is that the corporation is deemed to carry on business at its subordinate office if the cause of action arises there. It is true that here the cause of action test and the business test coincide, so that the latter half does not primarily confer jurisdiction on a court which would not have jurisdiction in its absence. It has, however, got a secondary importance, in the sense that it fixes the place of business by legal fiction. As has been pointed out by B. K. Mukherjea J.,<sup>2</sup> once it is established that the corporation has got a branch office at a place, it should be deemed by law to carry on business at that place *irrespective of the nature of the work that is actually carried on there*. In that case, one Bidhu Bushan residing in the district of Dacca was insured by the insurance company having its insured office at Lahore and a branch office at Dacca. The insured died in Dacca district, and his heirs filed a suit in Dacca for the money due on the policy. The insurance company resisted the suit on the ground that the Dacca court had no jurisdiction. It was held, that death was part of the cause of action and as the assured died within the jurisdiction of the Dacca court, a part of the cause of action

<sup>1</sup>*Ramdas v. Lachmandas*, A.I.R. 1936 Lah. 53.

<sup>2</sup>*People's Insurance Co., v. Benoy Bushan*, A.I.R. 1943 Cal. 199, 203.

arose in Dacca. It was further held, that as the company had a branch office at Dacca, the suit could be instituted in Dacca under *Explanation II* to section 20. (Even though the Dacca office merely performed the function of collecting the premium and remitting them to the head office, it was held to be a subordinate office). The only point that arises is whether the *Explanation* is intended to expand the meaning or restrict it. The Nagpur High Court has observed<sup>1</sup> that the *Explanation* restricts the meaning of "carries on business" in relation to corporations. The court also observed, that the second part of the *Explanation* is obscure in view of the cause of action test contained in section 20(c). Further, the court said: "It is much to be regretted that an insurance company should not be amenable to the jurisdiction of the court at the place where it maintains a subordinate office irrespective of any question about the accrual of cause of action. But few policy holders realise the implications of the forms of the contract prepared by the insurance companies which, though operating all over the country by receiving proposals and premiums through their various subordinate offices carefully undertake to pay only at the head office situated in many cases far away from the policy holder or his assignee or nominee."

It has been suggested, that—

(1) in *Explanation I* the requirement that the cause of action should have arisen at the place of temporary residence is irrelevant and therefore is unnecessary and should be omitted, and

(2) in *Explanation II*, the requirement that the cause of action must have arisen at the place of subordinate office is not necessary and should be omitted.

The suggestion has not been accepted, as it has been considered that the omission of the requirement would unduly widen the scope of the section in both cases.

#### *Section 20 and suits against Government*

A suggestion for defining the place where the Government can be sued has been made. It is considered that such a definition is not practicable. How far the test of "carrying on business" would apply to Government undertakings must depend on the facts of each case. As regards Railways, the matter is now settled by a recent decision of the Supreme Court<sup>2,3</sup>.

<sup>1</sup>A.I.R. 1956 Nag. 200, 204.

<sup>2</sup>See *Union of India v. Ladu Lal Jain*, A.I.R. 1963, S.C. 1687.

<sup>3</sup>For previous conflict of decisions, see—

(i) *Azizuddin v. Union of India*, A.I.R. 1945 Madras 345.

(ii) *P. C. Biswas v. Union of India*, A.I.R. 1956 Assam 85.

In any case, the "cause of action" test would always be there to fall back upon, and the absence of a specific provision need not cause any serious hardship, in practice.

#### *Section 21 and execution*

1. The question has been considered whether to avoid delay in execution, objections as to the territorial competence of a court *executing a Decree* should not be allowed and that to achieve this purpose, a provision on the subject should be inserted.

2. At present, section 21 of the Civil Procedure Code deals only with objections as to place of suing.

3. The section does not apply *in terms* to execution proceedings, that is to say, where an attack is sought to be made on the validity of the *execution proceedings themselves* on the ground that they have been held in the wrong court.

4. The principle on which section 21 is based—namely, that no objection as to local jurisdiction of a court can be made<sup>1</sup>—has, however, been held to apply in relation to execution proceedings in a number of decisions. Thus, it has been held,<sup>2</sup> that the defect of jurisdiction arising by reason of the transfer of an area pending execution proceedings does not vitiate those proceedings. It has also been held,<sup>3</sup> that after sale an application to set aside the sale on the ground that the court had lost territorial jurisdiction, could not be made, and that such objection, if not taken at the earliest opportunity, cannot be raised subsequently.

5. Generally as to object of section 21, see the observations of the Supreme Court.<sup>4</sup> "The policy underlying sections 21 and 99, C.P.C. and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice, and the policy of the legislature has been to treat objection to jurisdiction, both territorial and pecuniary, as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits."

6. In a Madras case<sup>5</sup> relating to a mortgage decree, the absence of a formal transfer order under section 39 was

<sup>1</sup>*Cf. Hira Lal v. Kalinath*, A.I.R. 1962 S.C. 199, 201.

<sup>2</sup>*Rajagopala v. Tirupathia Pillai*, A.I.R. 1926 Mad. 421, 422, right-hand (D.B.).

<sup>3</sup>*Ayza v. Nagaratna*, A.I.R. 1934 Mad. 573, 575 (D.B.).

<sup>4</sup>*Kiran Singh v. Chaman Paswan*, (1955) 1 S.C.R. 117 ; A.I.R. 1954 S.C. 340, 342, para. 7 (section 11, Suits Valuation Act).

<sup>5</sup>A.I.R. 1956 Mad. 593, 594.

<sup>6</sup>*Balakrishnayya v. Linga Rao*, I.L.R. 1943 Mad. 804 ; A.I.R. 1943 Mad. 449, 451.

regarded as an irregularity in the assumption of jurisdiction, which could be waived. In that case, the order passed in execution proceedings after notice under Order 21, rule 22, was also held to operate as *res judicata*.

7. A few decisions apparently to the contrary may be noted. In one Madras case,<sup>1</sup> there are observations to the effect that section 21, which refers to objection as to the place of suing, will not apply to execution petition. (Many of the previous cases were not, however, considered). In that case, while an execution petition was pending for attachment and sale of immovable property in Court A, and after the order of attachment, the property was removed to the jurisdiction of Court B. An order for the sale of the property by Court A was held not to bind another execution creditor. This case can, however, be distinguished, as the person attacking the execution was not the judgment-debtor. To the same effect is an earlier Madras decision<sup>2</sup>, which was also a case of a rival auction purchaser. Greater difficulty is, however, caused by a Calcutta case,<sup>3</sup> where the sale by a court of property outside its jurisdiction was held to be void, and section 21 was held not to apply in execution proceedings. It was stated, that section 21 is an exception to the well-established rule that where the court has no inherent jurisdiction over the subject-matter of the suit, its decree is a nullity, even though the parties may have consented to the jurisdiction of the court. This exception cannot, it was observed, obviously be interpreted as to have a wider application than what is justified by its terms. It was pointed out, that the only case in which a court can in execution sell immovable property beyond the local limits of its jurisdiction was under Order XXI, rule 3, and in any other case such a sale would be a nullity, because if a court has no jurisdiction, its judgment is void.

8. The principle of section 21 has been applied to first appeals<sup>4</sup> and to applications under Order IX, rule 13<sup>5</sup>.

9. We are not here concerned with another aspect of the matter, namely, whether the territorial jurisdiction of the

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<sup>1</sup>*Srimanthu v. Venkatappayya*, A.I.R. (1948), Mad. 18 ; A.I.R. 1947 Mad. 347, 349, 352, Paras. 12 and 24 (F.B.).

<sup>2</sup>*Veerappa v. Ramaswami*, A.I.R. 1920 Mad. 505, 508, right-hand.

<sup>3</sup>*Kunj Mohan v. Mahindra Chandra*, A.I.R. 1923 Cal. 619, 621, 622 left (Asutosh Mukerjee and Chottnner JJ.). (Sale of tenancy rights in execution of a decree for rent, held to be void, in a suit brought by decree-holder auction purchaser to evict the tenant).

<sup>4</sup>*Makhanlal v. Pancham*, A.I.R. 1933 Nag. 318.

<sup>5</sup>*Dwarkan Das v. Pyare Lal*, I.L.R. 52 All. 947 ; A.I.R. 1930 All. 873, 874. (Sulaiman J.).

trial Court can be challenged in execution. The answer to this would, ordinarily, be "no".<sup>1-2-3-4.</sup>

10. It may be noted that under section 21, before the proceedings can be set aside, both the conditions must be fulfilled, namely, objection at the earliest stage and failure of justice<sup>5-6.</sup>

11. It is considered that no express provision is necessary, and that in most cases, courts will apply the principle of section 21 to execution also.

#### Section 21A (New)

This is intended to put at rest the conflict of decisions as to whether defect of jurisdiction can be made a ground of attack by a new suit. One view is, that if the defendant does not object to jurisdiction and a decree is passed against him, he cannot, in a subsequent suit, move for setting aside the decree for want of jurisdiction<sup>7-8-9-10-11.</sup> But, according to the Allahabad High Court, it is not legitimate to extend the bar of section 21 beyond the limits provided by the section, and in such a case the plaintiff is entitled to maintain an independent suit for the avoidance of the decree<sup>12.</sup> In a Calcutta case,<sup>13-14</sup> a landlord filed a suit for rent and ejection under section 66 of the Bengal Tenancy Act and obtained a decree, in execution of which the tenure was sold and purchased by himself. The land was situated in the jurisdiction of another court, but the defendant had raised no objection. When the landlord

<sup>1</sup>*Anand Rao v. Kishan Das*, A.I.R. 1954 Hyderabad 190 (F.B.) (Reviews case-law).

<sup>2</sup>*Ishwar v. Naipal*, A.I.R. 1956 Pat. 280.

<sup>3</sup>*Zamindar of Ettvapuram v. Chitambaram*, I.L.R. 43 Mad. 675 ; A.I.R. 1920 Mad. 1019 (F.B.).

<sup>4</sup>In *Gora Chand v. Prafulla Kumar*, A.I.R. 1925 Cal. 907, 909 (Full Bench of 5 Judges) there are observations that the executing court can take into account questions of jurisdiction—whether pecuniary or territorial or in respect of the judgment debtor's person. But the actual case was not one of territorial jurisdiction.

<sup>5</sup>*Hrishikesh v. Khantaman*, A.I.R. 1959 Cal. 257.

<sup>6</sup>*Kishori Lal v. Firm Gajja Ram*, A.I.R. 1951 Pun. 375.

<sup>7</sup>*Nageswara v. Ganesa*, A.I.R. 1942 Mad. 675 ; (Case of adjudication order), *Chokkalinga v. Velayudha*, A.I.R. 1925 Mad. 117.

<sup>8</sup>*Parshotam Das v. Radhu Kishan*, A.I.R. 1929 Lah. 449 (Execution).

<sup>9</sup>See also *Firm Jagbiram v. Ganpati Damaji*, A.I.R. 1941 Nag. 36 (F.B.).

<sup>10</sup>See also *Maqsood Ali v. Hunter*, A.I.R. 1943 Oudh 338, 342.

<sup>11</sup>On the general question of challenge on the ground of jurisdiction, see *Karashiddaya v. Shree Gajanan, etc., Bank*, A.I.R. 1943 Bom. 288.

<sup>12</sup>*Raghubir v. Horilal*, (1931) I.L.R. 53 All. 560 ; A.I.R. 1931 All. 454.

<sup>13</sup>*Kunja v. Manindra*, A.I.R. 1923 Cal. 619.

<sup>14</sup>As to position under the Letters Patent, see A.I.R. 1960 Cal. 33.

went to take possession, the tenant defendant filed a suit for a declaration that the decree had been passed and the sale held without jurisdiction. It was contended for the landlord that the sale was validated by section 21, but this contention was overruled. Mookerjee, J., said that section 21 "is an exception to the well-established rule that where the court has no inherent jurisdiction over the subject-matter of the suit its decree is a nullity, even though the parties may have consented to jurisdiction of the court. This exception cannot obviously be so interpreted as to have a wider application than what is justified by its terms. It is impossible for us to hold that section 21 debars the defendants from questioning the validity of the execution sale which is the root of the title of the plaintiff". In the view taken by the learned Judge the decree was valid in view of the relevant provisions of the Bengal Tenancy Act, but the execution sale was a nullity.

It is considered that the view taken by the Madras and Lahore High Courts is the correct one. If the defendant waives the objection, the matter should be regarded as closed. Hence the amendment. This is in conformity with the view expressed by Mulla<sup>1</sup>.

As to *res judicata* and jurisdiction, the under-mentioned decisions may be seen<sup>2-11</sup>.

#### Section 24 (2)

The latter part of section 24(2), as it stands at present, does not cover proceedings other than a suit, *vide* the words "the court which, thereafter tries such suit may". Since the earlier part speaks of "suit or proceeding", the latter part should also cover both. Necessary changes have been proposed.

#### Section 24 and execution proceedings

The question has been raised whether execution proceedings are covered by the words "other proceedings" in section 24. Under the old Code, section 25, execution proceedings were held not to be covered<sup>6</sup>. The Calcutta High Court has taken the same view under the existing section also<sup>7</sup>. But other courts have taken a different view<sup>8, 9, 10, 11</sup>.

<sup>1</sup>Mulla, C.P.C. (1953) page 133.

<sup>2</sup>*Newton v. Official Trustee*, A.I.R. 1954 Cal. 506.

<sup>3</sup>*Bank of Chettinad v. Chettiyar*, A.I.R. 1936 Rangoon 87 (S.B.).

<sup>4</sup>*Firm Annu Mal v. Brij Lal*, A.I.R. 1947 Mad. 410.

<sup>5</sup>*Rajaram v. Central Bank*, A.I.R. 1926 Bom. 481 (Fawcett J.).

<sup>6</sup>*Kishori Mohan v. Gul Mohammad*, I.L.R. 15 Cal. 177.

<sup>7</sup>*Ranjit Kumar v. Gour Hari Mukherji*, A.I.R. 1956 Cal. 655.

<sup>8</sup>*Mohammad Habibullah v. Tikam Chand*, A.I.R. 1925 All. 276.

<sup>9</sup>*Nasservanji v. Kharsedji*, I.L.R. 22 Bom. 778.

<sup>10</sup>*Rajagopala v. Turuphtia*, I.L.R. 49 Mad. 746 ; A.I.R. 1926 Mad.

<sup>11</sup> 421. A.I.R. 1926 Lah. 465.

Since the old section 25 did not contain the words "other proceedings", and the word "disposal", the Patna High Court has, in a recent case, dissenting from the Calcutta view, held that the existing section covers execution proceedings<sup>1</sup>.

The Calcutta decision mainly relies on the Privy Council case<sup>2</sup> under old section 647 (corresponding to existing section 141), where it was held that the words "other proceedings" in that section did not cover execution proceedings, but were confined to original matters in the nature of suits.

No specific clarification on this point is necessary in view of the decisions of the other High Courts.

#### Section 25

1. The object of this amendment is—

(a) to transfer to the Supreme Court the existing power vested in the State Government, and

(b) to confer on the Supreme Court the same wide powers of transfer as it has in criminal cases under section 527 of the Code of Criminal Procedure.

2. It is considered, that the section should cover transfer of cases from or to the original side of a High Court to or from any other civil court. It has, therefore, been framed in terms wider than those of section 527, Criminal Procedure Code.

3. In sub-section (1), it is considered unnecessary to use the word 'interested'. In sub-section (3), 'appeal' has been mentioned specifically.

4. The amount of compensation which the Supreme Court can award should, it is felt, be Rs. 2000 (instead of Rs. 1000 mentioned in section 527, Criminal Procedure Code). Sub-section (4) therefore differs on that point from section 527, Criminal Procedure Code.

#### Section 28

A suggestion has been made that when a summons is sent for execution to a court in another State, the return thereon should be made or translated in English so that the court which issued it may be able to understand the action taken on the summons. It is considered that this is a matter which can be dealt with by appropriate provision in the General Civil Rules and Orders in force in each State, without any amendment of the Civil Procedure Code.

<sup>1</sup>*Dashrath Prasad v. Vaidyanath*, A.I.R. 1960 Pat. 285.

<sup>2</sup>*Thakur Prasad v. Fakirullah*, (1895) 22 Indian Appeals 44 ; I.L.R. 17 All. 106.



*(After section 31)**New point—Evidence of officers regarding stamps, etc.*

The Law Commission has, in an earlier Report<sup>1</sup>, recommend the insertion of a special provision in the Criminal Procedure Code on the subject of evidence of officers of the Mint, Stamp Office, etc. The question, whether a similar provision should be inserted in the Civil Procedure Code also, has been considered. It is felt that it is not necessary to recommend the insertion of such a provision in the Civil Procedure Code.

*Section 35A*

1. It is considered that the provisions of section 35A should not apply to revisions, just as they do not apply to appeals. Necessary change has been proposed. Compare the U.P. amendment.

2. The limit of one thousand rupees has been increased to two thousand rupees, in view of the fall in the value of money.

*Section 36*

Section 36 speaks of provisions relating to 'execution' of decrees. It is not clear whether Order XXI, rules 1 and 2, fall within these words (as Order XXI, rules 1 and 2 relate to a stage before execution). An amendment is proposed to make the position clear.

*Section 37*

1. Section 37(b) provides that the expression "Court which, passed a decree" shall be deemed to include, where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed was instituted, etc., would have jurisdiction to try such suit. This section has caused a certain amount of controversy in cases where court A passes a decree, and a part of the area within the jurisdiction of the court A is later transferred to court B. The questions which have arisen are—

(i) whether court A continues to have jurisdiction to entertain an application for execution of the decree, and

(ii) whether the court to which the area is transferred, (court B) can entertain an application for execution without a formal transmission of the decree from Court A to Court B.

<sup>1</sup>25th Report of the Law Commission (Evidence of officers about forged currency stamps, etc.—section 509A, Cr. P.C. as proposed).

2. So far as the first question is concerned, an affirmative answer can now be given in view of the position of the case law. But a controversy still remains on the second question, and, as would be evident from a recent decision<sup>1</sup>, the controversy still survives, because in that case the court had to dissent from a Punjab case<sup>2</sup>.

The following extract from a Supreme Court decision<sup>3</sup> discusses the position on the first question.

"And it is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another court."<sup>4</sup>

But the court refrained from pronouncing on the second question, namely, whether the court to which the subject matter of the decree has been transferred can on its own authority execute the decree.

The court observed:—

"There is a long course of decisions in the High Court of Calcutta that when jurisdiction over the subject-matter of a decree is transferred to another Court that Court is also competent to entertain an application for execution of the decree<sup>5</sup>. But the Full Bench of the Madras High Court<sup>6</sup> has taken a different view, and held that in the absence of an order of transfer by the court which passed the decree, that court alone can entertain an application for execution and not the court to whose jurisdiction the subject matter has been transferred.

"This view is supported by the decision in a Calcutta case<sup>7</sup>. It is not necessary in this case to decide which of these two views is correct, because even assuming that the opinion expressed in the Madras case<sup>8</sup> is correct, the present case is governed by the principle laid down in the Madras case<sup>9</sup>."

<sup>1</sup>*Gopalkrishna v. Laxman*, A.I.R. 1964 Mysore 34 (Hedge and T. K. Tukol JJ.) (March, 1964 Issue).

<sup>2</sup>*Kasturi Rao v. Mehar Singh*, A.I.R. 1959 Pun. 350 (G. D. Khosla J.).

<sup>3</sup>*Merla Ramana v. Nallaparaju* (1955) 2 S.C.R. 938 ; A.I.R. 1956 S.C. 87, para. 12 (Venkatarama Ayyar J.).

<sup>4</sup>*Seeni Nandan v. Muthuswamy Pillai*, I.L.R. 42 Mad. 821 ; A.I.R. 1925 Mad. 427 ; *Masrab Khan v. Debnath Mali*, I.L.R. (1942) 1 Cal. 289 ; A.I.R. 1942 Cal. 321 and *Jagannath v. Ichharam*, A.I.R. 1925 Bom. 414.

<sup>5</sup>*Lutchman v. Maddan Mohun*, I.L.R. 6 Cal. 513, *Jahar v. Kamini Devi* I.L.R. 28 Cal. 238 and *Udit Narain v. Mathura Prasad*, I.L.R. 35 Cal. 974.

<sup>6</sup>*Ramier v. Muthukrishna Ayyar*, I.L.R. 55 Mad. 801 ; A.I.R. 1932 Mad. 418 (S.B.).

<sup>7</sup>I.L.R. (1942) 1 Cal. 289 ; A.I.R. Cal. 321.

<sup>8</sup>I.L.R. 55 Mad. 801 ; AIR 1932 Mad. 418 (S.B.).

<sup>9</sup>*Balrishnappa v. Linga Rao*, I.L.R. (1943) Mad. 804 ; A.I.R. 1943 Mad. 449.

It was held therein that the court to whose jurisdiction the subject-matter of the decree is transferred acquires inherent jurisdiction over the same by reason of such transfer, and that if it entertains an execution application with reference thereto, it would at the worst be an irregular assumption of jurisdiction and not a total absence of it, and if objection to it is not taken at the earliest opportunity, it must be deemed to have been waived, and cannot be raised at any later stage of the proceedings".

4. The whole controversy is based on the meaning of section 37, and particularly the word "include" in that section. B. K. Mukherjea J. (as he then was) had in the Calcutta case to dissent from the earlier view taken in I.L.R. 6 Cal. 513, and to point out that even after transfer of the area the court which passed the decree remained the competent court for purposes of execution, even though the decree-holder might have to apply for transmission of the decree to another court for obtaining the *desired relief*. The word "include" in section 37, though in a way extending the meaning of the expression "Court which passed the decree", was regarded in another sense as restricting it and as excluding to original court and substituting for it another court in the circumstances which came under clauses (a) and (b). The Madras Special Bench decision<sup>2</sup> expressly decides that the new court to which the area is transferred could not entertain an application to execute the decree without transmission by the original court.

5. As against this, the Punjab case<sup>3</sup> holds that jurisdiction to execute cannot be confined to entertaining the application, and points out, that if transfer of areas is taken out of section 37(b), hardly any case is left in which the court of first instance continues to exist and yet ceases to have jurisdiction within the meaning of section 37(b). According to this interpretation, section 37 enlarges the scope of the expression "Court which passed the decree" with the object of giving greater facilities to a decree-holder to realise his decree. Since execution involves delivery of possession or other action, it cannot be done unless the property is within the territorial jurisdiction of the court. According to the reasoning of the Punjab High Court, the decree will ultimately have to be executed by the second court, and it is a question of pure formality that the application should in the first instance be filed in the first court. A too narrow interpretation of section 37(b) was, it was pointed out, likely to defeat the object of the law rather than further the ends of justice.

<sup>1</sup> *Masrab Khan v. Debnath Mali* I.L.R. (1942) 1 Cal. 289 ; A.I.R. 1942 Cal. 321.

<sup>2</sup> *Ramier v. Muthukrishna Ayyar*, I.L.R. 55 Mad. 801 ; A.I.R. 1932 Mad. 418 (S.B.).

<sup>3</sup> *Kasturi Rao v. Mehar Singh*, A.I.R. 1959 Pun. 350 (G.D. Khosla J.).

6. In this position of the case law, a clarification on the subject is called for. Necessary change is proposed.

### Section 39

1. At present, there is a conflict of decisions on the question whether (i) the transferee court must be a court of competent pecuniary jurisdiction; and (ii) if so, whether the competence should be judged with reference to the decree or the suit.

2. One view is, that provisions of this section are controlled by section 6 and a decree cannot be transferred under sub-section (1) for execution to another court if the amount or value of the decree exceeds its pecuniary jurisdiction. See the under-mentioned cases.<sup>1</sup>

The contrary view was taken in a Madras case,<sup>2</sup> where the decree was sent on the applications of the decree-holder. Section 39(1), it was said, does not contain any such limitation, though section 39(2) does.

3. It has also been held, that the value of the suit in which the decree was passed must be within the pecuniary limits of the jurisdiction of the court to which the decree is proposed to be sent. See the under-mentioned cases.<sup>3</sup>

For a different view, to the effect that the decretal amount determines pecuniary jurisdiction, see the under-mentioned cases.<sup>4</sup>

4. See also the discussion about the section in a recent Supreme Court case<sup>5</sup>.

5. It is considered, that the position should be made clear and that the transferee court must have pecuniary competence to deal with the suit in which the decree was passed; amount of the decree is immaterial, as pecuniary jurisdiction of a court is ordinarily judged with reference to the nature of the claim in the suit, and not the nature of the relief decreed. Hence the amendment.

<sup>1</sup>*Shamsunder v. Anath Bandhu*, (1910) I.L.R. 37 Cal. 574.

*Durga Charan v. Uma Tara*, (1889), I.L.R. 16 Cal. 465, 467 (D.B.),  
*Firm Ganesh Das v. Amuluk Chand*, A.I.R. 1940 Cal. 161 (D.B.).

<sup>2</sup>*Abdulla Saheb v. Ahmed Hussain Saheb*, A.I.R. 1914 Mad. 206 (D.B.).  
(Sadasiva Aiyar and Spencer JJ.).

<sup>3</sup>*Mt. Anchahi v. (Firm) Brij Mohan Lal*, A.I.R. 1936 Pat. 177, 178 (D.B.).

*Matrumal v. Madanlal* A.I.R. 1957 Orissa 177 ; See also A.I.R. 1922 Pat. 189, 189 ;

*Gokul Kristo v. Aukhil Chander*, I.L.R. 16 Cal. 457, 461 to 463, (D.B.);  
*Rustomjee v. Mahadev*, A.I.R. 1940 Bom. 277.

<sup>4</sup>*Shanti Lal v. Jamzi Kuer* I.L.R. (1940, All. 318) 1940 All. 331, 334, (D.B.), which discusses the case law.

<sup>5</sup>*Ramesh v. Nilaparajit*, A.I.R. 1956 S.C. 87 (Venkatarama Ayyar J.).

## Section 42

1. Certain recommendations were made in the Fourteenth Report<sup>1-2</sup>, for amending section 42 so as to amplify the powers of the court to which execution has been transferred.

2. The amendments proposed in the Fourteenth Report, have been carried out in part and with certain modifications, as follows:—

(a) The transferee court will, under the proposed amendment, have power to—

- (i) transfer a decree *again* for execution;
- (ii) add legal representatives<sup>3-4</sup>; and
- (iii) attach a decree<sup>5</sup>.

(b) The Fourteenth Report had recommended, that the transferee court should have several other powers also, namely, power under Order XXI, rule 16 (execution at the instance of assignees), power under Order XXI, rule 50(2) (power to grant leave to execute decree against partner not served, etc.) and power under section 152 (correction of mistakes).

This recommendation has not been carried out.

So far as powers under Order XXI, rule 16 and Order XXI, rule 50(2) are concerned, it is considered that such powers need not be given to the transferee court. Whether the decree has been assigned or not, has nothing to do with execution and the power under Order XXI, rule 16, can therefore be left to the court which passed the decree. Determination of questions under Order XXI, rule 50, may involve a consideration of matters decided in the main suit. It will be better if such proceedings are held only by the court which passed the decree. It is also considered, that to put the matter beyond doubt, an express provision should be inserted excluding such matters from the purview of the transferee court. Necessary change is proposed.<sup>6-7</sup>

(c) The power to correct mistakes, etc., under section 152 must, it is considered, remain with the Court

<sup>1</sup>14th Report, Vol. I, pages 437-438, paras. 14 and 15.

<sup>2</sup>See also Civil Justice Committee (1924-25) Report, pages 386-387, para. 15.

<sup>3</sup>As to execution against legal representative, see *Jang Bahadur v. Bank of Upper India*, 55 I.A. 227 ; A.I.R. 1928 P.C. 162.

<sup>4</sup>For the conflict on this point, see *Punjab Co-operative Bank v. L. Vikram Lal*, A.I.R. 1959 Punj. 71 *Prasadi v. Ghulam* A.I.R. 1951 Pat. 618.

<sup>5</sup>*Prithi Raj v. Bal Mukand*, A.I.R. 1940 Pat. 557 recognises power to attach decree.

<sup>6</sup>As to the existing position regarding powers of the transferee court to grant leave under Order 21, rule 50, see *Santool Das v. Babubhai*, A.I.R. 1963 Punj. 395.

<sup>7</sup>See also notes to Order 21, rule 50.

which passed the decree. An express provision excluding that power is not, however, necessary.

3. A provision, it is considered, should be *added* to the effect that all steps taken by the transferee court under the specified powers should be intimated to the transferring Court. Necessary change is proposed.

4. The U.P. Legislature has made an amendment where- U.P. Amend-  
by the words "as the Court which passed the decree" have ment.  
been substituted for the words ".....as if had been passed by itself". It is considered unnecessary to adopt this amendment<sup>1</sup>, as the amendments already proposed to section 42 confer upon the transferee court some of the powers of the original court, and that will suffice.

#### Section 47

This carries out the recommendation in the Fourteenth Report<sup>2</sup>. The object is to clarify the application of the doctrine of *res judicata* to execution proceedings. The matter has come up again and again before the courts. Some recent decisions<sup>3</sup> review the case-law on the subject.

#### Section 47 and auction-purchasers

A question that has raised some controversy is, whether an application for possession by an auction-purchaser falls under section 47. The amendment of 1956 has touched the question, to some extent, and a discussion therefore of the position before and after the Amendment would be convenient.

#### I. Case-law before 1956 amendment

Some of the cases make a distinction between—

- (a) cases where the auction-purchaser is the decree-holder, and
- (b) other cases.

Further, some of the decisions hold, that an application for possession is a part of execution and therefore involves a question relating to "execution, discharge or satisfaction" of a decree; others take a different view. Thus, four points have to be considered.

- (a) (i) Is a decree-holder auction-purchaser a "party" to the suit within the meaning of section 47?

<sup>1</sup>See the amendments proposed to Section 42.

<sup>2</sup>14th Report, Vol. I, pages 439-440, para. 18.

<sup>3</sup>*Amar Singh v. Gulab Chand* A.I.R. 1960 Raj. 280.

*Palaniappa v. Mariappa*, A.I.R. 1960 Mad. 343.

*Mohan Lal Goenka v. Benoy* (1953) S.C.R. 377 ; A.I.R. 1953 S.C. 65.

*Gandhir Laxmichand v. Tulshidas*, A.I.R. 1963 Gujarat 1 (P. N. Bhagwati J.).

(ii) Is a stranger auction-purchaser a "party" to the suit?

(b) (i) If a decree-holder is a "party", is the delivery of possession to him a question between the parties and "relating to execution" etc.?

(ii) If a stranger auction-purchaser is a "party", is the delivery of possession to him a question between the parties and relating to "execution" etc.?

On the question (a) (i) above, there has been some controversy. In one case<sup>1</sup>, the court observed, that the view that he is not a party to the suit "must perhaps be regarded as no longer tenable" in view of the Privy Council decision in 45 Indian Appeals 54<sup>2</sup>, but the court also observed, that "however that may be", in the particular case before the court all the conditions of the section were not satisfied. On the other hand, there are decisions to the effect that even a decree-holder auction-purchaser applying for delivery of possession is not a party<sup>3-4</sup>.

The Calcutta view is that he is a party<sup>5</sup>. The Madras view is that he is a party<sup>6</sup>.

Again, as regards (a) (ii) above—stranger auction-purchaser—there has been a conflict<sup>7</sup>. One view is, that he is a representative of the decree-holder. Another view is, that he is a representative of the judgment-debtor. A third view is, that he represents both<sup>8-9</sup>.

On the point (b) (i)—whether a decree-holder auction-purchaser's application for possession is a question regarding "execution", etc.—there is difference of opinion.

<sup>1</sup>*Saularam v. Vishwa Nath*, A.I.R. 1945 Bombay 386 (Macklin and Lokur JJ.).

<sup>2</sup>*Ganpathy v. Krishnamachariar*, 45 I.A.54 ; A.I.R. 1917 P.C. 121; I.L.R. 41 Madras 403 (Sir John Edge).

<sup>3</sup>See the Allahabad cases referred to in *Mst. Suraj v. Mst. Gulab*, A.I.R. 1955 All. 49, 51 (F.B.).

<sup>4</sup>See *Sardar Mal v. Kartar Singh*, A.I.R. 1939 Lahore 211 and the cases cited therein.

<sup>5</sup>*Kailash Chandra v. Gopal Chandra*, I.L.R. 53 Cal. 781 ; A.I.R. 1926 Cal. 798 (F.B.) Also see *Debi Prasad v. Satish Chandra*, A.I.R. 1944 Cal. 328 (Rau and Biswas JJ.).

<sup>6</sup>*Veyindra Muthu v. Maya Nadan*, A.I.R. 1924 Madras 324 (F.B.).

<sup>7</sup>See *Ram Kumar v. Ram Charan*, A.I.R. 1930 Pat. 311 (Macpherson and Fazl Ali JJ.), and cases referred to therein.

<sup>8</sup>See *Bhagwati v. Banwari Lal*, I.L.R. 31 All. 82 (F.B.) and *Ram Kumar v. Ram Charan*, A.I.R. 1930 Pat. 311, 313.

<sup>9</sup>See in *Annamalai v. Ramswami*, A.I.R. 1941 Madras 161, 169 (F.B.) (Reviewed case-law).

One view is, that the matter is one relating to the execution of the decree<sup>1,2</sup>. On this reasoning, a separate suit by him would be barred<sup>3,4</sup>. Another view is that once the sale is confirmed, nothing further remains to be done towards "execution", etc., and the question of delivery to the auction-purchaser, even where he is the decree-holder, is not a question of "execution". The reasoning behind this is, that the decree-holder seeks possession not "in execution of his decree" but by virtue of a title acquired as purchaser<sup>5</sup>, and that unless the words "relating to" are unduly extended, it is not possible to hold that the question involved in giving possession is one relating to execution; the decree is satisfied not by possession but by sale<sup>6</sup>.

As regards (b) (ii) above—stranger auction-purchasers—one view is that a question for delivery of possession between him and the judgment-debtor is not one relating to execution, etc.<sup>7</sup> The reasoning is that a decree is executed and discharged or satisfied when the property is put to auction, and sold and somebody deposits the price and it is paid to the decree-holder. On the other hand, the view has been taken that such a dispute relates to execution<sup>8</sup>.

## II. Amendment of 1956

The amendment made in 1956 in section 47 by re-drafting the *Explanation* provides that the auction-purchaser is deemed to be a party to the suit. This disposes of the old controversy<sup>9</sup> whether the auction-purchaser was a representative of—

- (i) the decree-holder, or
- (ii) the judgment-debtor, or
- (iii) both.

The decisions relating to (a)(i)(ii) above are therefore not of much importance now. But the controversy under (b)(i)(ii) above is still important.

<sup>1</sup>See *Varalakshamma v. Jannayya*, A.I.R. 1943 Mad. 318, 321.

<sup>2</sup>See case-law discussed in *Krishna Iyer v. Subramaniam*, A.I.R. 1939, Mad. 369 (S.B.).

<sup>3</sup>*Kailash Chandra v. Gopal Chandra*, A.I.R. 1926 Cal. 798 (F.B.); *Debi Prasad v. Satish*, A.I.R. 1944 Cal. 328.

<sup>4</sup>*Varalakshamma v. Jannayya*, A.I.R. 1943 Mad. 318.

<sup>5</sup>*Hargovind v. Bhudar*, A.I.R. 1924 Bom. 429—48 Bom. 550 (F.B.) (McLeod C.J. Shah and Crump JJ.).

<sup>6</sup>*Sivaram v. Vishwa Nath*, A.I.R. 1945 Bom. 386 (Macklin and Lokur JJ.).

<sup>7</sup>*Hari Kishan v. Radha Kishan*, A.I.R. 1957 All. 251, 252, (Desai and Beg JJ.).

<sup>8</sup>*Ramautar v. Jagrani Bai*, A.I.R. 1956 Nag. 81, 83, para. 13.

<sup>9</sup>*Annamalai v. Ramaswami*, I.L.R. (1941) Mad. 438, A.I.R. 1941 Madras 461, 169, 170 (Full Bench of 5 Judges).



### III. Position after 1956 amendment

There have not been many cases directly dealing with the 1956 amendment. But a similar amendment was made in U.P. and it would be of interest to note that the Allahabad High Court has observed<sup>1</sup>, that "that does not settle the matter" and has held, that (i) the question of possession is one between the purchaser and the court, not one "between the parties" and (ii) the question has nothing to do with execution, etc. (In that case, the executing court had ordered delivery of possession to the auction-purchaser; an appeal from that order was held not maintainable, as the order could not be treated as one passed under section 47). On the other hand, it has been held by the Madhya Pradesh High Court<sup>2</sup>, dissenting from the Allahabad view, that after the 1956 amendment, a dispute regarding possession to be given to a stranger auction-purchaser is one "relating to execution" and falls under section 47.

To settle the position, the following changes have been proposed:—

(i) Section 47, Explanation 1 (existing) is confined to a plaintiff whose suit or a defendant against whom a suit has been dismissed. Portion relating to auction-purchaser is transferred to another. Explanation—See below.

(ii) Auction-purchasers are dealt with separately in another Explanation; and in view of the conflict of decisions on the point whether a claim for possession by an auction-purchaser is or is not a question falling under section 47, a specific clarification has been made on that point.

#### Section 47 and stay

Stay of execution.

The words "or to stay of execution thereof" which occurred in section 244 of the old Code, have been omitted in the present Code. Hence two divergent views have been taken as to whether such orders are appealable. One view is, that the words omitted may have been regarded as superfluous, because a contention that the execution be stayed is as good as saying that the decree should not be executed and it thus amounts to a question "relating to the execution of the decree"<sup>3</sup>. The other view is, that these words have been deliberately omitted and questions relating to stay of execution are no longer within this section and hence no appeal lies from orders determining such questions<sup>4</sup>. A third view can be taken<sup>5</sup>, namely, that whether an order of stay will amount to a decree depends

<sup>1</sup>*Hari Kishan v. Radha Kishan*, A.I.R. 1957 All. 251, 252, left, bottom (Desai and Beg. JJ.).

<sup>2</sup>*Wahidulla Khan v. Ramkishan*, 1962 M.P.L.J. Notes 8 (Yearly Digest, 1962, Col. 201.)

<sup>3</sup>*Subramania v. Kumaravelu*, I.L.R. 39 Mad. 541.

<sup>4</sup>*Janardhan v. Martand*, I.L.R. 45 Bom. 241.

<sup>5</sup>I.L.R. (1940) All. 517, A.I.R. 1940 All 326.

upon the question whether it conclusively determines the rights and liabilities of the parties in regard to the execution of the decree. The third view has been practically upheld by the Privy Council<sup>1</sup>, which has held that an order deciding that a person is an "agriculturist" within the meaning of the Madras Agriculturist Debtors' Relief Act and staying execution of a decree on that ground, is appealable. This view is in consonance with the language of section 47, and should be preferred. No amendment in the law is called for.

#### *Appeal against orders under section 47*

A recommendation has been made in the Fourteenth Report<sup>2</sup>, that an appeal should not be allowed against certain orders under section 47 where the question decided is one of payment of an amount not exceeding the Court's small cause powers. It is felt, that no amendment of this nature is called for in respect of decrees in regular suits, as a rigid provision would work hardship.

#### *Section 58*

Under section 58(1)(a), the period of detention in execution of a decree is six months if the decree is for a sum exceeding fifty rupees. This figure of fifty rupees was put with reference to economic conditions which existed at that time. Conditions have changed since, and what was 50 rupees at that time is equivalent to at least 200 rupees now. The figures should, therefore, be changed. Hence the amendment.

#### *Section 60*

1. *Pensions of private employees.*—Section 60(1), proviso (g) exempts from attachment stipends, etc., of Government pensioners. The amendments made by the Bombay and Madras Legislatures, by inserting clause (gg), extend it to pensioners of *local authorities*. It is considered that it should extend to *pensions of all employers*. Necessary change has been proposed.

2. *Private salaries.*—The object of the amendment to section 60(1), proviso clause (i) is to extend the existing proviso to private salaries also. It is considered that there is no reason why the exemption from repeated attachment, embodied in the proviso, should not extend to private salaries.

<sup>1</sup>*Adaikappa v. Chandrasekhar*, A.I.R. 1949 P.C. 12.

<sup>2</sup>14th Report, Vol. I, page 441, paragraph 26; second sub-para.

3. *Navy Act*.—The object of the amendment to clause (j) is merely to substitute a reference to the latest enactment on the subject.

4. *Right to future maintenance*.—A right to future maintenance is, by virtue of provisions of section 6(dd), *Transfer of Property Act*, not transferable, "whatever be the manner in which it is arising, secured, or determined". This is the effect of the amendment made to that Act by Act 10 of 1929. It has been suggested that the provision in the *Civil Procedure Code* on the subject should also be brought into line with the provision as contained in the *Transfer of Property Act*. It is, however, considered unnecessary to make any such change, which would be purely a verbal one, as the existing working has caused no difficulty.

5. *Explanation 1*.—The amendment to *Explanation 1* is intended to achieve the following objects:—

(i) To insert in *Explanation 1* a reference to clause (ia), which has been inserted in 1956, for exempting one-third of salary in execution of a decree for maintenance.

(ii) To provide that even private salaries can be attached before they are actually payable. At present, section 60(1), *Explanation I*, latter half, saves the attachable portion of private salaries from attachment until it is actually payable. The result of this provision, in practice is, that it is only when the salary is about to be paid on the 1st (or other appropriate date) of the month that the creditor can attach it. If the creditor obtains attachment on the 30th of the preceding month, he is too early; and if he is late even by a moment after the time fixed for payment on the 1st, he is too late. This practical difficulty was pointed by Chagla, C.J., in one case<sup>1-2</sup>. Attachment before the actual date of payment should therefore be available.

(iii) To make it clear that in the case of salaries of public servants, the attachable portion can be attached before or after it is actually payable. This proposition has, at present, to be deduced by inference from the earlier half of *Explanation 1*. As was pointed out by the Federal Court<sup>3</sup>, the implication of the *Explanation* is that the salary of a Government servant is attachable before it is due and payable. It is considered, that instead of leaving this proposition to be implied, it would be better if it is expressly enacted.

<sup>1</sup>*Varant v. Jaganmath*, A.I.R. 1955 Bom. 450, 451.

<sup>2</sup>See also *V. V. Subba Rao v. Mohammad Hussain*, A.I.R. 1964 Andhra Pradesh 395. (September).

<sup>3</sup>*State of Punjab v. Tarachand*, A.I.R. 1947 F.C. 23, 28.

6. *Explanation 2*.—*Explanation 2* to section 60(1) defines "salary". It contains a reference to clause (h), but clause (h) no longer contains the expression "salary" (after its amendment in 1937). The reference to that clause should therefore be omitted. Secondly, the *Explanation* makes no mention of clause (ia) inserted in 1956 which uses the expression "salary". The *Explanation* should refer to that clause also. Necessary changes have been proposed.

The question has been raised whether an agreement waiving an exemption granted by section 60 is valid. It is considered that the matter should be left to the courts for decision according to the object sought to be achieved by a particular exemption, etc. It is unnecessary to make any specific provision on the subject<sup>1</sup>, as has been done by the Punjab Amendment which has inserted section 60(3) making such agreements void.

Validity of agreements waiving the protection.

#### *Section 60 and policies of insurance*

In the Law Commission's Report on Insolvency Laws<sup>2</sup>, in the clause dealing with description of property of the insolvent divisible amongst his creditors, a provision has been proposed that policies of life insurance, etc., in respect of the insolvent's own life shall not be comprised in the property of the insolvent divisible among his creditors (except to the extent of a charge on the policies in respect of the amount of the premium paid on the policies during the two years preceding the insolvency). The question whether an exemption from attachment in respect of insurance policies should be given, either absolutely or subject to a certain maximum, has been considered. It has been decided not to recommend any such change. There are certain points of difference between insolvency on the one hand and execution by a single decree-holder on the other. In insolvency, the hypothesis is that the debtor has not sufficient assets for meeting his debts, and therefore (apart from the property specifically exempted), everything else goes for the satisfaction of the creditors. Secondly, in insolvency, the law has to strike a balance between the debtor's needs and the claims of the *whole* body of creditors, while that is not so in the case of execution of a single decree. Thirdly, in insolvency, the carrying on of business, the acquisition of property and other economic activities by the insolvent are subject to the control of the court, which is not the case in execution.

<sup>1</sup>As examples of the conflicting views held on the subject, the following decisions may be cited:—

A.I.R. 1948 Nag. 392 ;  
A.I.R. 1952 Pat. 78 ;  
A.I.R. 1940 Lah. 65.

For the opposite view, see—

A.I.R. 1950 Bom. 155 ;  
A.I.R. 1950 Mad. 114 ;  
A.I.R. 1952 All. 680.

<sup>2</sup>26th Report (Insolvency Laws) App. I, clause 48(1)(b).

*Section 60 and tenancies*

The question whether tenancies to which the Local Rent Control Act applies, should be exempt from attachment has been considered. A provision exempting them from vesting in the Official Assignee of insolvency has been proposed in the Law Commission's Report on Insolvency<sup>1</sup>, but the case of execution stands on a different footing, and no change is, therefore, considered necessary on this point.

*Section 63*

The question has been raised as to the effect of section 63(2), (which provides that nothing in the section shall be deemed to invalidate any "proceeding taken by a Court" executing one of the several decrees referred to in the section) on an order allowing a set-off to a decree-holder auction-purchaser. Does it accept the amount so allowed to be set-off from rateable distribution? Most High Courts<sup>2,3,4,5</sup> have answered the question in the negative, though the Calcutta High Court<sup>6</sup> takes a contrary view. The correct position seems to be, that the word "proceeding" does not include such order. No clarification on the subject appears to be necessary.

*Section 64 and pre-attachment agreements*

1. The question has been raised whether a transfer actually made after the attachment but in pursuance of an agreement made before the attachment is invalidated by section 64. One view is that the section does not apply in such cases<sup>7,8,9,10</sup>.

<sup>1</sup>26th Report (Insolvency Laws), App. I, clause 48 (1).

<sup>2</sup>*Megraj v. Corporation of Madras*, A.I.R. 1936 Mad. 797, 798.

<sup>3</sup>*Ramaswamy v. Krishnasa*, A.I.R. 1935 Mad. 988, 994.

<sup>4</sup>*Ram Chandra v. Digambar* I.L.R. 1960 Bom. 8 A.I.R. 1960 Bom. 230 F.B.

<sup>5</sup>A.I.R. 1946 All. 294.

<sup>6</sup>*Ahinath v. Nepal Chandra*, A.I.R. 1937 Cal. 55, 56.

<sup>7</sup>*Babala Venkata Reddy v. Mangadu Yellappa Chetty*, A.I.R. 1917 Mad. 4, 5 (Abdur Rahim and Srinivasa Ayyangar JJ.).

<sup>8</sup>*Ghusaram v. Parashram*, A.I.R. 1936 Nag. 163, 165 ; (Pollock J.). (Discusses specific performance).

<sup>9</sup>*Yeshwant v. Pyaraji*, A.I.R. 1943 Bom. 145 (Attachment after judgment).

<sup>10</sup>*Rango Ramchandra v. Gerlingappa*, A.I.R. 1941 Bom. 198, 200, 201 (Attachment before judgment).

A contrary view has been taken in other cases<sup>1,2,3,4,5,6</sup>.

2. In the draft Report which was circulated for comments, an exception was proposed to section 64 to the effect that "Nothing in this section applies to any private transfer or delivery of the property attached or of any interest therein, made in execution of any contract for such transfer or delivery entered into before the attachment." But, after careful consideration, it has been decided not to make any such exception. A sweeping provision of this kind might be abused, and the practice of bringing into existence agreements which are really executed after attachment but are ante-dated to an earlier date, might be encouraged by such exception.

3. The decision as to how far such a transfer should be recognised as valid by the court, would seem often to depend on the equities of each case. Some of the decisions are based on the specific provisions of Order XXXVIII, rule 10; a few exhibit special features arising out of the passing of a decree for specific performance. So far as other situations are concerned, the equities of the case should, it is considered, be taken by the court into account.

#### Section 66

A suggestion to the effect that a "defence" based on benami should also be barred (just as a suit based on benami is barred) where the name of the Benamidar is entered in the sale certificate, has been considered. According to this suggestion, where the real owner is in possession, and the Benamidar whose name is entered in the sale certificate sues him for possession, the real owner should be barred from raising a defence that the plaintiff was only a nominal purchaser. It has, however, been decided not to extend section 66 to such cases.

#### Section 73

A question has been raised as to the meaning of the expression "same judgment-debtor" in this section. For example, where a decree is passed against A as partner and another decree is passed against A in his personal capacity, the question is whether the respective decree-holders can share by rateable distribution. The principle appears to be now well-established, namely, that it is not

<sup>1</sup>*Tarak Nath v. Sanat*, I.L.R. 57 Cal. 274 ; A.I.R. 1929 Cal. 494, 495 (D.B.), distinguishing *Madan Mohan v. Rebati Mohan*, 21 C.W.N. 158.

<sup>2</sup>*Buta Ram v. Sayyad Mohammad*, A.I.R. 1935 Lah. 71, 74.

<sup>3</sup>*Usha Rani v. Jagbandhu*, A.I.R. 1955 Tripura 30, 32.

<sup>4</sup>As to enforcement of specific performance, see A.I.R. 1945 Bom. 481.

<sup>5</sup>The case-law is reviewed in A.I.R. 1952 T.C. 467.

<sup>6</sup>In *Nur Muhammad v. Dinshaw*, A.I.R. 1922 P.C. 39, the point was not decided.

so much the personality of the judgment-debtor as the property against which relief is claimed, which is regarded as relevant<sup>1</sup>.

The point has arisen also as regards the execution of a decree obtained against a person in his life-time and execution of another decree obtained against his legal representative; there also the same principle should apply. As has been pointed out<sup>2</sup>, the emphasis is not on the personality but on the property<sup>3,4</sup>.

No change in the law is therefore necessary.

#### Section 75

One question to be considered is, whether it is necessary to expand the scope of section 75 so as to enable rules to be made for issue of commissions for any purpose not at present mentioned in the section. No such necessity has been felt, and therefore no amendment is proposed.

A suggestion has been made to amend section 75 so as to give power to the court to appoint Commissioners for making inventories of books of accounts and movables and for initialling the account books. It is stated, that the decision of the Supreme Court in *Padam v. State of U.P.*<sup>5</sup> contains observations which imply that such power does not exist under the Code. It is also pointed out, that the practice in some of the States is to appoint such Commissioners in suits for partition, etc. It is, however, considered unnecessary to make any such amendment, as the powers that exist under Order XXXIX, rule 7 and Order XXVI, are sufficient for all practical purposes.

#### Section 80

The recommendation in the Fourteenth Report<sup>6</sup> is to the effect that section 80 be replaced by a provision whereunder the Government, etc., would be entitled to costs if notice is not given. But it is considered, that the question

<sup>1</sup>*Pacific Bank v. Thakur Singh*, A.I.R. 1949 Cal. 396. (S.R. Das J.).

This view is to be preferred to that taken in A.I.R. 1943 Bom. 156 and in *Kritant Kumar v. Pulin Krishna*, A.I.R. 1938 Cal. 316, which hold that the judgment-debtors are the same even if one decree is against a person as partner and the other against him personally.

<sup>2</sup>*Hoti Lal v. Chatura Prasad*, A.I.R. 1941 All. 110 (F.B.).

<sup>3</sup>*Ramzan Khan v. Hiralal*, A.I.R. 1961 Raj. 118 (Case-law discussed).

<sup>4</sup>*Dundappa v. Annaji*, A.I.R. 1953 Bom. 65 (F.B.).

<sup>5</sup>*Padam v. State of U. P.*, (1961) 1 S.C.R. 884 ; A.I.R. 1961 S.C. 218.

<sup>6</sup>14th Report, Vol. I, page 476, last two paragraphs. (Shri Chari's dissent is in Vol. II, page 1229).

of costs need not be governed by a mandatory provision. As a result, the section is proposed to be omitted totally<sup>1</sup>.

#### *Section 82*

1. Section 82, as it stands at present, prescribes an elaborate procedure to be followed before execution of a decree can be ordered against the Government, etc. It contemplates the following stages:—

(i) A time has to be specified in the decree itself for its satisfaction;

(ii) If a decree remains unsatisfied for the time specified, a report has to be made by the court to the State Government;

(iii) After the report, the court must wait for a further period of 3 months, and can issue execution only if the decree remains unsatisfied for a further period of 3 months.

2. It is considered, that this elaborate procedure is not necessary and causes delay. The intermediate report to the Government by the court is a formality which should be removed. Further, the law itself should lay down the period of waiting, instead of requiring the court to fix the period in each case. Power should be given to the court to fix a period in a particular case. Necessary changes have been proposed.

3. A power to extend the period is also considered desirable, and has been provided for.

4. The words "such act as aforesaid" in section 82 refer to an act purporting to be done by a public officer in his official capacity. That has been made clear.

#### *Section 82 and Jammu and Kashmir*

The provisions of section 80 were applied to the Government of Jammu and Kashmir by the amendment of 1963. The provisions of section 82 have not, however, been applied to that Government. The attention of the Government is drawn in the matter, for such action, if any, as it may consider necessary.

#### *Section 86 and foreign Governments*

While section 86 provides for the filing of suit against Rulers of foreign States with the consent of the Central Government, there is no express provision as regards suits against foreign States. The position was considered in a recent case by the Calcutta High Court<sup>2</sup>, where the view

<sup>1</sup>See also the body of the Report.

<sup>2</sup>*United Arab Republic v. Mirza*, A.I.R. 1962 Cal. 387, (paragraphs 7 and 8), 396 (para. 27), 397 (para. 31), 400 (para. 42) and 401 (para. 49). (Lshiri C. J. and Bachawat J.).



was taken, that these sections do not apply to foreign States, which would therefore, be governed by the rules of customary international law under which they enjoy immunity. The judgments in the Calcutta case have pointed out the desirability of extending the provisions of these sections to suits against foreign States. As the matter is one of policy, the attention of Government is invited to the suggestion of the Calcutta High Court<sup>1</sup>.

### Section 87B

1. In a recent Supreme Court decision<sup>2</sup> while upholding the validity of the section the following observations were made:—

“Before we part with this matter, however, we would like to *invite the Central Government to consider* seriously whether it is necessary to allow section 87B to operate prospectively for all time. The agreements made with the Rulers of Indian States may, no doubt have to be accepted and the assurances given to them may have to be observed. But considered broadly in the light of the basic principle of the equality before law, it seems somewhat odd that section 87B should continue to operate for all time. For past dealings and transactions, protection may justifiably be given to Rulers of former Indian States but the Central Government may examine the question as to whether for transactions subsequent to the 26th of January 1950, this protection need or should be continued. If under the Constitution all citizens are equal, it may be desirable to confine the operation of section 87B to past transactions and not to perpetuate the anomaly of the distinction between the rest of the citizens and Rulers of former Indian States. With the passage of time, the validity of historical considerations on which section 87B is found will wear out and the continuance of the said section in the Code of Civil Procedure may later be open to serious challenge.”

2. Since a decision as to the action to be taken in view of these observations involves matter of policy also, it is felt that the action to be taken should be left to be considered by the Government.

3. The section was inserted by the Amendment Act (2 of 1951) by which the other sections (83 to 86) were also re-cast. Before the Act of 1951, sections 85 and 86 applied to suits against a “sovereign prince or Ruling

<sup>1</sup>The question was discussed particularly with reference to commercial transactions, at the Asian African Legal Consultative Committee. See proceedings of the second session (Cairo, Oct. 13, 1958), pages 17, 23, 29 to 31, and 3rd Session (Colombo, 1960) Proceedings, page 56 *et seq.*

<sup>2</sup>*Narotam Kishore Deb Varma v. Union of India and another*, A.I.R. 1964 S.C. 1590 (October, 1964).

chief". So long as the Indian States existed as separate entities, i.e. up to their merger (either into a Union of States or with the then existing Dominion of India or Provinces, etc.), there was no doubt that the Rulers of those States were in the category—"sovereign chief or Ruling prince"—and suits against them were barred except with the consent of the Central Government<sup>1-2</sup>. During the period between their merger and the passing of the Act 2 of 1951, the position was not very definite. It was held in one Bombay case<sup>3</sup> that after merger, the appellant in that case (the ex-Ruler) was no longer a "sovereign chief or Ruling prince". But there are cases to the contrary<sup>4</sup>.

In one Supreme Court case<sup>5</sup>, it has been observed that the protection under section 86, as it stood before the Constitution, "continued in view of article 372 of the Constitution (unless it was void under the Chapter on fundamental rights) till we come to the enactment of Act 2 of 1951".

4. As a matter of policy, Government decided to make this exemption available to Rulers of former Indian States, and accordingly, the Amendment Act of 1951 made the necessary provisions.

5. The following extract from the White Paper on Indian States explains the background of these provisions<sup>6</sup>:—

Discussion  
in White  
Paper.

"240. *Guarantees regarding rights and privileges.*— Guarantees have been given to the Rulers under the various Agreements and Covenants for the continuance of their rights, dignities and privileges. The rights enjoyed by the Rulers vary from State to State and are exercisable both within and without the States. They cover a variety of matters ranging from the use of red plates on cars to immunity from Civil and Criminal jurisdiction and exempted from customs duties, etc. Even in the past it was neither considered desirable nor practicable to draw up an exhaustive list of all these rights. During the negotiations following the introduction of the scheme embodied in the Government of India Act, 1935, the Crown Department had taken the position that no more could be done in respect of rights and privileges enjoyed by the Rulers

<sup>1</sup>*Gaekwar Rly. v. Hafiz*, A.I.R. 1938 P.C. 165.

<sup>2</sup>*Govind Ram v. Gondal State*, A.I.R. 1950 P.C. 99.

<sup>3</sup>The Bombay case was in respect of a suit filed in December, 1948 (case relating to the Ruler of lands in the former principality of Vajira merged in the Dominion of India). See *Thakore Sahib Khanji Kashari Khanji v. Gulam Rasul*, A.I.R. 1955 Bom. 449 (Bavdekar J.).

<sup>4</sup>*Kant Narain v. Chandra Bhal*, A.I.R. 1951 All. 603, holding, that in view of section 86 as it stood then, and of the merger agreement which guaranteed personal privileges, etc., the Ruler of Benares could not be sued.

<sup>5</sup>*Mohan Lal v. Sawai Man Singh Ji*, A.I.R. 1962 S.C. 73, 74, 75, para.

<sup>6</sup>White Paper on Indian States, page 125, para. 240.

than a general assurance of intention of the Government of India to continue them. Obviously it would have been a source of perpetual regret if all these matters had been treated as *justiciable*. Article 363 has, therefore, been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of Courts except in cases which may be referred to the Supreme Court by the President. At the same time, the Government of India considered it necessary that constitutional recognition should be given to the guarantees and assurances which the Government of India have given in respect of the rights and privileges of Rulers. This is contained in article 362, which provides that in the exercise of their legislative and executive authority, the legislative and executive organs of the Union and States will have due regard to the guarantees given to the Rulers with respect to their personal rights, privileges and dignities."

6. Another recent decision of the Supreme Court<sup>1</sup> holds, that where a person applies for consent under section 87B in respect of a certain property i.e. for filing a suit against a Ruler in respect of certain property, and the Government grants partial and conditional consent to the applicant after going through the merits of the applicant's claim, that introduces an infirmity in the sanction and such sanction is invalid, with the result that it is to be construed as extending to all the properties in respect of which the sanction was applied for. The judgment points out, that section 87B authorises the Government either to accord or to refuse to accord such consent. "It is not open to the Central Government to impose any conditions on such consent, or to accord consent only in part, or to refuse it in part, particularly in cases where the reliefs are claimed on one and the same cause of action."

7. It is considered unnecessary to alter the language of the section on this point.

#### *Section 92 and cypres*

1. In connection with section 92, it may be of some use to draw attention to the legislation regarding cypres recently undertaken in England and to the provisions in the Bombay Public Trusts Act, 1950 (Bombay Act 29 of 1950) which have been followed by certain other States also. Some difficulties were felt in England by virtue of the limited scope of the cypres doctrine, whereunder, the court had power to direct the application of the income to another purpose only where the *original object had failed*, etc. It had no power to *alter* the objects of the trust so

<sup>1</sup>*Maharaj Kumar Tokendra Bir Singh v. The Secretary to the Government of India, Ministry of Home Affairs, New Delhi. Writ Petition No. 123 of 1963 decided on 23rd March, 1964.*

long as they could be carried on literally. Now, there might be cases where it would be desirable to alter the very purpose of application as mentioned in the trust instrument, because the original objects have been adequately provided for by other means, or have ceased to provide a suitable method of using the property, or have become *obsolete* or useless or prejudicial to the *public welfare*, or are not substantially beneficial to the class of persons for whom the endowment was intended originally.

2. The Nathan Committee<sup>1</sup> went into great detail in this question. The Committee was satisfied that the most urgent need was to enable the Charity Commissioners to give timely assistance to those trustees who were administering trusts "no longer adapted to modern conditions". Since the alteration of the objects of charities (where the objects can still be executed) could only be done by a statutory power, the Committee recommended suitable legislation regarding cypres.

3. The Charities Act, 1960 (8 & 9 Eliz. 2 ch. 58) has carried out, to a large extent, the recommendations of the Nathan Committee. Briefly speaking, under section 13 of that Act the original purpose of a charitable gift can be altered to allow the property to be applied cypres, where the original purpose has been fulfilled or cannot be carried out according to the directions and the spirit of the gift, or provides the use for part only of the property, or where the property available by virtue of the gift and other property applicable for similar purposes can be used in conjunction, or where the purposes were laid down with reference to an area which has ceased to be a unit or a class of persons which has ceased to be suitable or where the original purposes have been adequately provided for by other means or ceased (as being useless or harmful to the community) to be in law charitable or ceased to provide a suitable and effective method of using the property available by virtue of the gift. Thus, a failure of the original purpose is not now the only ground for cypres.

4. Attention may also be drawn to section 56 read with section 55 of the Bombay Public Trusts Act, 1950, whereunder, on an application by the Charity Commissioner, etc., the court can sanction an alteration of the *original* object. It provides that, if the court is of opinion that "the carrying out of such intention or object is not wholly or partially expedient, practicable, desirable, necessary or proper in the public interest", the court may direct the property or income of the public trust or any portion thereof to be applied cypres to any other charitable or religious purpose. For this purpose, it is lawful for the court to alter any scheme already settled or to vary the terms of any decree, etc., or the instrument of trust.

<sup>1</sup>Report of the Committee on the Law, etc., relating to Charitable Trusts (1952) Cmd. 8710, paragraphs 299, 316, 319, 320, 329.

5. As to the application of section 92 to High Courts on the original side in relation to the local limits, see the decision cited below<sup>1</sup>.

6. The matter can be considered in detail<sup>2</sup> when the Law of public trusts is revised.

7. The doctrine of cypres can even now be applied<sup>3</sup> to suits under section 92. But its scope will, presumably, be limited by the rules of the English Law, as unmodified by statute.

#### Section 92 and costs

The Hindu Religious Endowments Commission<sup>4</sup> has drawn attention to the fact that litigation under section 92 often involves expense for members of the public who have to move the law, and has recommended that the defendant should in all such cases be made personally liable for costs if he is in the wrong and that he should not be entitled to spend the funds of the institution unless his contentions are found to be just and are upheld.

This is a point which can be appropriately considered when the law of public trusts is revised.

#### Section 92 and notice

Notice,

A suggestion has been received to the effect that a provision for giving notice to persons interested in the trust should be inserted in section 92. The analogy of Order I, rule 8 has been cited in this connection. The suggestion has not been accepted. A suit under section 92 can be instituted only by persons who have obtained the consent of the Advocate-General. It would be contrary to the scheme of the section to add as a party a person who has not obtained such a consent. It may be that a decree in a suit under section 92 binds all persons interested in the trust<sup>5-7-8</sup>. But that is not a point justifying the insertion of the provision suggested.

(Order I, rule 8 does not ordinarily apply to suits under section 92)<sup>9</sup>.

<sup>1</sup>*Fazlehussain v. Yusufally*, A.I.R. 1955 Bom. 55, 58, para. 4 (Shah J.).

<sup>2</sup>The Hindu Religious Endowments Commission (1960-62), Report, page 89, Chapter VI, para. 29 has also recommended adoption of sections 13-14, Charities Act, 1960.

<sup>3</sup>See *Muthukrishna v. Ramchandra*, A.I.R. 1919 Madras 659, 669 (Seshagiri Aiyar J.).

<sup>4</sup>Report of the Hindu Religious Endowments Commission (1960-62), page 127, Chapter XI, para. 20.

<sup>5</sup>*Anjuman Islama v. Latifat Ali*, A.I.R. 1950 All. 109, 118.

<sup>6</sup>*S. Veeraraghava v. Parthasarathi*, A.I.R. 1925 Madras 1070.

<sup>7</sup>*Sunni Central Board, etc. v. Sirajul Haq*, A.I.R. 1954 All. 88.

<sup>8</sup>*Khaja Hasanulla v. Royal Mosque Trust Board*, A.I.R. 1948 Madras 134.

<sup>9</sup>*Bapagowda v. Vinayak*, A.I.R. 1941 Bom. 317.

## Section 95

1. Arrest and attachment before judgment, etc., are provided for by Order 38. Where such arrest or attachment appears to have been applied for on insufficient grounds, or where the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same, the court has, under section 95(1), power to award reasonable compensation to the defendant "for the expense or injury" caused to the defendant. Now, the exact scope of the words "expense or injury" has been a matter of some controversy, and a conflict of decisions has arisen on the question whether damages may be awarded under this head for injury to reputation. One view is, that such damages can be awarded<sup>1,2</sup>. The matter was discussed fully in a recent Bombay case<sup>3</sup>, which held, that the word "injury" does not necessarily mean injury to property or person, and includes injury to reputation and mental pain. This is also the view of the Madras High Court<sup>4</sup>.

2. The Calcutta view, however, is, that damage to prestige or a feeling of humiliation is not "injury" within the meaning of section 95<sup>1,2,5</sup>.

3. The General principles under Law of Torts<sup>6</sup> do not seem to rule out damages for humiliation, etc. In the case of *arrest*, particularly, damage to reputation has a very strong ground for recognition.

4. The position needs to be clarified. Sub-section (2) of section 95 bars a separate suit, once the application under section 95 is "determined". In view of this, it would be desirable to adopt the wider view. Necessary change is proposed.

## Section 97

The words "passed after the commencement of the Code" have become unnecessary with the passage of time. Hardly any case of preliminary decree passed before the commencement of the Code, and open to challenge in appeal, can now be in existence. Hence the amendment.

<sup>1</sup> *Srinivasa Ragavan v. Sundarajan*, A.I.R. 1955 Mad. 552.

<sup>2</sup> As to general damages, see *Arumugam Pillai v. A. Kadir*, A.I.R. 1926 Bom. 962.

<sup>3</sup> *Parikh Jivanlal v. Shah Chhitalal*, I.L.R. 1959 Bcm. 1686 ; A.I.R. 1960 Bom. 326, 328, paras. 7 to 9 (Datar and Tarkunde JJ.).

<sup>4</sup> The Madras case would be found reviewed in *Subrayan v. Kochuvarky*, I.L.R. 1958 Ker. 819 ; A.I.R. 1959 Kerala, 18,21.

<sup>5</sup> *Chandulal v. Purnachandra*, (1935) 39 C.W.N. 915.

<sup>6</sup> *Joharmlal v. Iswardas*, I.L.R. 59 Cal. 1082 ; A.I.R. 1932 Cal. 695 (D.B.).

<sup>7</sup> See also *Seenappa v. Suryanarayana*, A.I.R. 1958 Mysore 136.

<sup>8</sup> *Ratanlal*, Law of Torts (1960), page 222 ; *Iyer*, Law of Torts (1957, pages 333 to 336, paras. 14 and 15.

## Section 98

1. Existing section 98 is not comprehensive enough, because it does not cover one case, namely, where a Bench of *more than two Judges* is equally divided, and a reference to another Judge is practicable. Contract clause 36 of the Letters Patent of Bombay, etc., High Courts, which is, in this respect, wider than the Civil Procedure Code. It is considered that such a case should also be covered. The matter is dealt with in clause 36 (latter half) of the Letters Patent of the High Courts of Bombay, Madras and Calcutta<sup>1</sup>, clause 28, Patna, clause 27, Allahabad<sup>2</sup>, and clause 26, Nagpur.

2. On the other hand, two cases which are already covered by section 98 and which are not covered in the Letters Patent, namely, the cases where the reference to a third Judge is not possible, or where there is no majority which concurs in varying the decree, will continue to be covered. These are impliedly covered by section 98(2), main paragraph, because, where the proviso does not apply, the main paragraph, will apply.

3. Further, as recommended<sup>3</sup> in the Fourteenth Report, the provision relating to reference to another Judge should be extended to cover points other than points of *law*. (At present in such a case the decree must be confirmed)<sup>4</sup>.

4. Necessary changes have been proposed.

5. See also the working of section 66A(1), proviso, Indian Income-tax Act, 1922, now section 259(2) of the 1961 Act. Contrast section 429, Criminal Procedure Code, whereunder the opinion of the *third Judge* is the conclusive decision.

## Section 99

A question has been raised as to whether "non-joinder" should be added in the section, as in Order I, rule 9. It is considered unnecessary to do so as—

(a) non-joinder of an essential party should be regarded as a fatal defect, and

(b) non-joinder of a proper party would not, even now, entail variation, etc., of a decree.

<sup>1</sup>See *Abdul Latif v. Abdul Samad*, A.I.R. 1950 Assam 80.

<sup>2</sup>See *Ashtabhujia v. Board of Revenue*, A.I.R. 1954 All. 521.

<sup>3</sup>14th Report, Vol. I, page 406, para. 48, second sub-para.

<sup>4</sup>*Muhammad Ibrahim v. Sundar*, A.I.R. 1937 Nag. 88.

## Section 100

1. The legislature of the erstwhile State of Travancore-Cochin has inserted<sup>1</sup> an additional clause (d), which is as follows:—

(d) “the finding of the lower appellate court on any question of fact material to the right decision of the case on the merits being in conflict with the finding of the Court of first instance on such question.”.

(See now Kerala Act 13 of 1957 to the same effect).

This runs counter to the accepted scope of second appeal, and as observed in the Fourteenth Report<sup>2</sup> of the Law Commission, it should be repealed by a suitable measure to be enacted separately.

2. A recommendation has been made in the Fourteenth Report<sup>3</sup> for resolving the conflict of decisions on the point as to whether an appeal can be admitted on certain questions only. It is felt, that the power of the appellate Court should not be so confined. Hence no amendment is suggested.

## Section 102

This carries out, in part the recommendation made in the Fourteenth Report<sup>4</sup>. The object is to restrict the right of second appeal in certain cases. The proposed draft, however, differs from the recommendation in the Fourteenth Report, on the following points:—

(i) the amount has been increased to Rs. 3,000 (The Fourteenth Report suggested Rs. 2,000).

(ii) The restriction against second appeals in suits below the specified amount will apply, as at present, only to suits of a small cause nature. (The Fourteenth Report recommended its application to all suits except suits involving rights over or in respect of immovable property. It is not however considered desirable to widen the section in that manner)<sup>5</sup>.

## Section 125

The words “made after the commencement of this Code” are being omitted as obsolete today, after the lapse of fifty years from the enactment of the Code.

<sup>1</sup>Vide Travancore-Cochin Act 17 of 1951.

<sup>2</sup>14th Report, Vol. I, pages 377-378, paragraphs 25-26.

<sup>3</sup>Cf. 14th Report, Vol. I, page 392, paragraph 16, last sub-paragraph, and *Eswariah v. Rameswarayya*, A.I.R. 1940 Madras 483 and *Rekha v. Ramanathan*, A.I.R. 1936 Pat. 7.

<sup>4</sup>14th Report, Vol. I, page 377, paragraphs 23-24.

<sup>5</sup>See also the body of the Report.



### Section 115

This carries out the recommendation made in the Fourteenth Report<sup>1</sup>. The object is to clarify the position regarding revisions from interlocutory orders<sup>2</sup>.

There is a conflict of decisions as to revision in cases where an appeal lies to some *court other than* the High Court<sup>3-4</sup>. The position has been clarified.

### Section 133

In the Report of the Hindu Religious Endowments Commission<sup>5</sup>, an observation has been made that it is a matter for consideration whether "accredited and recognised heads of mutts of accepted sanctity and authority" should not enjoy exemption from personal appearance in courts. No change is suggested on this point, as it may not be possible to enumerate *in the statute* these various mutts.

### Section 135A

It is considered desirable to increase the period from 14 to 40 days in conformity with the position obtaining in England in relation to members of the House of Commons,—see articles 105 and 194 of the Constitution also. It is also considered, that this amendment should apply to Members of State Legislatures also. The view that the subject-matter (so far as concerns such Members) falls within the competence of State Legislatures, under article 194(3) of the Constitution, has not been accepted. It is felt, that the matter falls within entry 13, Concurrent List—"Civil Procedure including all matters dealt with in the Code of Civil Procedure at the commencement of this Constitution".

### Section 138

1. Certain changes in the provisions relating to taking down of evidence, have been suggested in the Fourteenth Report<sup>6</sup>, but section 138 is not expressly referred to therein. The changes have not been carried out under Order XVIII, for reasons given separately<sup>7</sup>. Accordingly, section 138 is also left as it is.

<sup>1</sup>See 14th Report, Vol. I, pages 422, 423, para. 19(1)(2)(3) and page 420, para. 13. Regarding the point raised at page 420, no specific recommendation has been made in the 14th Report, and hence no change has been suggested.

<sup>2</sup>See the body of this Report.

<sup>3</sup>*Vasu v. Narayanan*, A.I.R. 1962 Kerala 261 (Revision lies).

<sup>4</sup>*Custodian of Evacuee Property v. Nasiruddin* A.I.R. 1962 Punjab 218 (F.B.) (Revision does not lie).

<sup>5</sup>Report of the Hindu Religious Endowments Commission, (1960-62), page 37, Chapter IV, para. 10 bottom.

<sup>6</sup>See 14th Report, Vol. I, page 345, para. 80.

<sup>7</sup>See discussion regarding Order 18, rule 5.

2. For this reason, the Assam Amendment<sup>1</sup>, authorising dictation, has not been adopted.

#### Section 139

“Notaries” have powers to administer oath under section 8(1) (e) of the Notaries Act, 1952.

The question of adding “notaries” in section 139 has been considered in detail with reference to the suggestions received through the Ministry of Law to that effect. These suggestions state that in the absence of a provision, the courts refuse to accept the affidavits sworn before notaries. It is, however, considered that the matter should be left to be dealt with by High Courts under section 139(b) or otherwise.

#### Section 144

1. The object of the proposed amendment is to deal with the power of a court to order restitution when a decree is set aside or modified *otherwise than on appeal*, etc.—that is, in a separate suit. There is a conflict of decisions as to whether section 144 applies in such a case. One view is that it does<sup>2-3-4</sup>. Another view is that it does not<sup>5-6-7</sup>. The U.P. Amendment on the subject may be seen.

2. The words “court of first instance” are not literally applicable to such a case. Hence a somewhat elaborate provision in relation to such setting aside, etc., is added.

The question as to whether proceedings under section 144 are execution proceedings or independent and collateral proceedings is one on which there is a conflict of decisions<sup>8-9</sup>. In many of the decisions, however, on the subject, the point seems to have arisen with reference to the question whether an application for restitution falls under the article in the Limitation Act relating to execution or under the residuary

<sup>1</sup>See Assam Act 2 of 1941, section 2(2), amending section 138.

<sup>2</sup>*Subrayudu v. Seshasami*, I.L.R. 40 Mad. 299 ; A.I.R. 1917 Mad. 293.

<sup>3</sup>*Jagendra v. Hira*, I.L.R. 1948 All. 62 ; A.I.R. 1948 All. 252 (F.B.).

<sup>4</sup>I.L.R. 27 Pat. 873 ; A.I.R. 1949 Pat. 133 (F.B.).

<sup>5</sup>*Ashutosh v. Kundal Kamini*, I.L.R. 57 Cal. 226 ; A.I.R. 1929 Cal. 814.

<sup>6</sup>*Gopal v. Swarna*, A.I.R. 1931 Cal. 42, 43.

<sup>7</sup>*Alfred v. Sirajuddin*, A.I.R. 1944 Lahore 165, 167.

<sup>8</sup>Case law is reviewed in A.I.R. 1958 Punjab 134 (F.B.).

<sup>9</sup>See also *Bhamath v. Kedarnath*, I.L.R. 13 Pat. 411 ; A.I.R. 1934 Pat. 246.

article<sup>1-2</sup>. It is not, therefore, considered necessary to amend the section in the Civil Procedure Code<sup>3</sup>.

#### Section 145

The present position as to enforcement of decrees, etc., against a surety who has furnished security of his property, would be found discussed in the undermentioned decisions<sup>4-5</sup>, which collect the case-law on the subject. As to the proper course to be followed when the security is in favour of the court, see the Privy Council decisions quoted below<sup>6</sup>.

It is considered that an express provision should be inserted to deal with the power of the court to sell property where the property has been furnished as security. An amendment<sup>7</sup> on the subject has been made in the U.P. by the Amendment Act 24 of 1954. (In the U.P., an *Explanation* has also been added to deal with the case of a person to whom attached property has been entrusted for safe custody.) That aspect is dealt with separately<sup>8</sup>. Necessary amendment is proposed.

#### Section 145 and persons to whom attached property is entrusted

This is dealt with separately<sup>9</sup>.

#### Section 152

It has been suggested that the section should be amended so as to provide that the Court should not exercise the power under this section where rights of third party have intervened. This would be the ordinary practice<sup>10</sup>. It is, however, considered, that no such express provision is necessary.

<sup>1</sup>See *C. S. Ratanchand v. Multammul*, A.I.R. 1964 Mysore 117; 121, 122 (reviews case-law).

<sup>2</sup>See also *Vasudevan v. Choikutty*, I.L.R. (1964), 2 Kerala 597 (Dec. 1964).

<sup>3</sup>See now *M. M. Barot v. P. M. Gokalbhai* (1964) S. C. N. 362, which sums to resolve the conflict.

<sup>4</sup>*Babu Lal v. Hyderabad Municipal Corpn.*, A.I.R. 1961 Andhra Pradesh 413, 418.

<sup>5</sup>*Jagannatha v. Ramchandra*, A.I.R. 1936 Madras 589.

<sup>6</sup>*Raghubar v. Jai*, I.L.R. 42 All. 158 ; A.I.R. 1919 P.C. 56, 59 ; *Rohani v. Har*, A.I.R. 1943 P.C. 189.

<sup>7</sup>Compare discussion in the Report of the U. P. Committee on Judicial Reforms (1950-51), Vol. I, page 36.

<sup>8</sup>See Order 21, rule 43A (as proposed).

<sup>9</sup>See Order 21, rule 43A (proposed).

<sup>10</sup>See I.L.R. 47, All. 44 ; I.L.R. 54, Mad. 184 ; *Hatton v. Harris* (1892) A. C. 547, and discussion in *Bela Devi v. Bon Behary Roy*, A.I.R. 1952 Cal. 86, 90.

## Order I, rule 1

The proposed amendment splits up the rule into paragraphs, so as to show separately each condition to be satisfied before the rule applies<sup>1</sup>.

## Order I, rule 3

The proposed amendment is intended to split up the conditions and state them in separate paragraphs<sup>1</sup>. For the history of this provision, see the under-mentioned decisions<sup>2-3</sup>, which discuss the difference between the Indian rule and R.S.C. (1883) Order 16, rule 4.

## Order I, rule 3A (New)

This is new. At present, there is no rule empowering the court to order separate trials where a joinder of *defendants* is likely to cause embarrassment or delay. The desirability of such a rule is obvious<sup>4</sup>.

## Order I, rule 8

The following changes have been made:—

(a) A provision has been inserted to the effect that—

(i) the decree under this rule shall bind the parties on whose behalf the suit is instituted or defended<sup>5</sup>;

(ii) the decree, however, shall not be executed against such persons without leave of the court<sup>6</sup>. As to both these points, see the R.S.C.<sup>7</sup>.

(b) It has been provided, that in granting leave as above the court may consider facts, etc., particular to the person seeking exemption from liability in respect of execution<sup>8</sup>.

(c) A procedure for obtaining such leave has been briefly dealt with<sup>9</sup>.

(d) A provision has been added to the effect that the court can *direct* two or more persons to sue, etc., under this rule on behalf of others. This follows local

<sup>1</sup>Cf. Order 15, rule 4(1), Revised R.S.C. (1962).

<sup>2</sup>*Harendra v. Purna*, I.L.R. 55 Cal. 164 ; A.I.R. 1928 Cal. 199.

<sup>3</sup>*Bhagvan v. Balku*, A.I.R. 1932 Bom. 1, 3.

<sup>4</sup>Cf. Order 15, rule 5(1), Revised R.S.C. (1962).

<sup>5</sup>For the present position, see :—

(i) *Kodia v. Velandi*, I.L.R. 1955 Mad. 339 ; A.I.R. 1955 Mad. 281 (F.B.).

(ii) *Moolchandra v. Jagadish*, A.I.R. 1955 All. 385.

<sup>6</sup>For the present law, see *Kodia v. Velandi*, I.L.R. 1955 Mad. 339, A.I.R. 1955 Mad. 28 (F.B.).

<sup>7</sup>R.S.C. (Revision) 1962, Order 15, rule 12(3).

<sup>8</sup>Cf. R.S.C. Revision (1962), Order 12, rule 12(4).

<sup>9</sup>Cf. R.S.C. Revision (1962), Order 15, rule 12(4).

Amendments<sup>1</sup>. The direction can be given to one or more persons (as in the Calcutta Amendment) and is not confined to two or more persons, (as in the Bombay Amendment).

(e) A provision has been added to the effect that before a suit under this rule is withdrawn or compromised or the claim abandoned, notice shall be given to the persons interested in the suit. At present, there is no express provision on the subject. But that seems to be the practice of most courts. The under-mentioned decisions discuss the subject<sup>2,3,4,5</sup>.

As to withdrawal also that seems to be the practice<sup>6,7</sup>.

(f) Further, a provision has been added to deal with cases where the persons suing, etc., do not proceed with due diligence<sup>8</sup>.

#### Order I, rule 10(2)

The following changes have been proposed, to make the rule comprehensive:

(a) A power to strike off the name of any person who has for any reason ceased to be a proper or necessary party, has been added, on the lines of the R.S.C.<sup>9</sup>.

(b) A power to remove any person who has been unnecessarily joined, has been added<sup>9</sup>.

#### Order I, rule 10(5)

Reference to the section of the new Limitation Act (36 of 1963) has been substituted.

#### Order I, rule 11

Instead of the words "the suit" the words "a suit" have been substituted, as in the R.S.C.<sup>10</sup>.

<sup>1</sup>Cf. the Bombay and Calcutta Amendments.

<sup>2</sup>*Muthu Karuppa v. Appava*, A.I.R. 1943 Mad. 161, 164.

<sup>3</sup>*Chintaharan v. Gujabdeb*, A.I.R. 1951 Cal. 456.

<sup>4</sup>*Biram Parkash v. Narendra Das*, A.I.R. 1961 All. 266, 275.

<sup>5</sup>*Chander Bhan v. Des Raj*, A.I.R. 1952 Pun. 43.

<sup>6</sup>*Asian Assurance Co. v. Madholal*, A.I.R. 1950 Bom. 378.

<sup>7</sup>*Kunju Kombi v. Ammi*, A.I.R. 1932 Mad. 31.

<sup>8</sup>Cf. section 92, Presidency-towns Insolvency Act, 1909.

<sup>9</sup>Cf. R.S.C. Revision (1962) Order 15, rule 6 (2)(a).

<sup>10</sup>See R.S.C. Revision (1962), Order 15, rule 18.

## Order II, rule 2 and partition suits

The applicability of the principle embodied in Order 2, rule 2 to partition suits presents some problems. But that is because such suits form a peculiar category. The two main questions are—

(i) Where a claim for partition of a particular property is omitted by *mistake, inadvertence* or *ignorance* in the earlier suit, can it be included in a later suit;

(ii) Where, in the earlier suit, a claim for partition of a certain property was *intentionally* not made, can it be made in a later suit?

On the first point, there does not appear to be much uncertainty, as courts have allowed the later suit<sup>1-2-3-4</sup>. There are general observations in a Madras case<sup>5</sup> that all properties of which existence is *known* should be included; but these were made to over-rule the contention that property outside the jurisdiction need not be included. They do not rule out the case of inadvertence.

On the second point, there seems to be some amount of uncertainty. One view is, that even where a claim for partition of certain properties is omitted intentionally, a second suit will lie (if no objection is taken in first suit)<sup>6</sup>. It is also stated that the cause of action in a partition suit is a recurring one<sup>7</sup>. Another view is, that where the exclusion of the property in the first suit was *intentional*, a subsequent suit is barred<sup>8</sup>.

It is, however, unnecessary to enact any proposition for such particular kinds of suits. No change in the language is, therefore, recommended on this point.

## Order II, rule 6

The scope of this rule has been widened, so as to give the court power to order separate trial of causes of action whose joinder may cause embarrassment<sup>9</sup> or delay. Cf. the R.S.C.<sup>10</sup>.

<sup>1</sup>*Subramniam v. Lakshminarasamma*, A.I.R. 1927 Mad. 213 (Devadoss J.). (No "omission" to sue where ignorance).

<sup>2</sup>*Gapulal v. Gajasa*, A.I.R. 1932 Nag. 92 (Inadvertence).

<sup>3</sup>*Jogendra Nath v. Baldev Das*, I.L.R. 35 Cal. 961 (Mistake of Commissioner in first suit).

<sup>4</sup>*Sasi Mohan v. Hari Nath*, A.I.R. 1928 Cal. 459 (reviews case-law).

<sup>5</sup>*Biswanagudla v. Doddiliagappa*, A.I.R. 1923 Mad. 584, Right.

<sup>6</sup>See *Sasi Mohan v. Hari Nath*, A.I.R. 1928 Cal. 459, 460 (Suhrawardy and Graham JJ.).

<sup>7</sup>*Monsharam v. Ganesh*, 17 C.W.N. 521, cited in Mitra, Law of Co-ownership, etc., (1963), page 213.

<sup>8</sup>*Jasoda Kumari v. Sartyabhama*, A.I.R. 1960 Pat. 76.

<sup>9</sup>As to embarrassment, see *Ramaswamy v. Marinuthu*, A.I.R. 1928 Mad. 764.

<sup>10</sup>See R.S.C. (Revision) 1962, Order 15, rule 5 (1), latter half.

*Order II, rule 8 (Local Amendments) and separate trial in case of misjoinder*

1. The rules regarding joinder of causes of action are contained in Order II, rules 3, 4 and 5. Where there is a breach of these rules resulting in a misjoinder of causes of action, an objection can be raised on that ground, provided it is taken at the earliest opportunity. When such an objection is taken, the question arises—what course the court should adopt.

2. Usually, the court would not dismiss the suit, but should give the plaintiff an opportunity to amend the plaint and proceed with the claim in respect of one of the causes of action<sup>1-2-3-4</sup>.

3. Some High Courts have inserted a specific rule on the subject<sup>5</sup> as Order II, rule 8—to the effect that where an objection on the ground of misjoinder, duly taken, is allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall amend the plaint by striking out the remaining causes of action:

Where the plaintiff has so selected the cause of action, the Court shall pass an order giving him time within which to submit the amended plaint (and for making up court-fees where necessary).

If he does not comply with the order, the Court is to proceed as provided in Order VI, rule 18, and the Court-fees Act.

4. The question whether such a provision should be inserted in the Civil Procedure Code has been considered. It is felt that there is no need for it.

5. In cases where the joinder, though proper under Order II, rules 3, 4 and 5, is inconvenient, the Court can, under Order II, rule 8, order a separate trial. That rule would not, of course, apply to misjoinder<sup>6-7</sup>.

*Order III, rule 1*

A suggestion has been made that a recognized agent should not be allowed to appear or apply, and that he should not be treated at par with pleaders. No such change

<sup>1</sup>*Govindanathan v. Anjaneya*, A.I.R. 1950 Mad. 760, 761 (Meek J.).

<sup>2</sup>*Satya Narayan Banerjee v. Radhe Nath Das*, I.L.R. (1942) 1 Cal. 235 ; A.I.R. 1942 Cal. 69, 70, right middle.

<sup>3</sup>*Bhundu v. Raj Singh*, A.I.R. 1948 All. 60, 62.

<sup>4</sup>*Aldridge v. Barrow*, I.L.R. 34 Cal. 662.

<sup>5</sup>See Order 2, rule 8, inserted in Punjab, Kerala and Rajasthan.

<sup>6</sup>*Corporation v. Radha*, A.I.R. 1952 Cal. 222.

<sup>7</sup>*Muthappa v. Muthu*, I.L.R. 27 Mad. 80, 84.

is considered necessary. Even at present, the right to "audience" is not, according to the better view, available to recognised agents.<sup>1-2</sup> See also now the Advocates Act, 1961.

### *Order III, rule 2 and the Bombay Amendment*

1. The High Court of Bombay has made an extensive and elaborate amendment under Order III, rule 2, whereunder, persons who can be appointed as recognised agents must be persons holding on behalf of the party either—

(i) a general power-of-attorney, or

(ii) in the case of proceedings in the High Court of Bombay an attorney of such High Court or an Advocate, and in the case of proceedings in any district, any such attorney or an Advocate or a pleader to whom a *sanad* for that district has been issued, holding the requisite special power of attorney from parties not resident within the local limits of the jurisdiction of the court.

2. Stated briefly, the effect of this amendment is, that a recognised agent should either have a general power of attorney, or he must be an *Advocate*, etc., authorised by a special power executed by a party residing elsewhere. Thus, a person who is not an *Advocate*, etc., can act only under a general power. The Bombay Amendment, as it stood in 1930, recognised only holders of general powers.<sup>4</sup> Cases arose where non-residents had authorised Attorneys of the High Courts, etc., by special powers—a situation which was not then covered. The holders of special powers were therefore added later.<sup>5</sup>

3. It is considered unnecessary to make such a rigid provision.

### *Order III, rule 4*

Several points have been considered under Order III, rule 4 which deal with the mode of appointment of pleaders, powers and the form of the appointment. These are as follows:—

(a) *Sub-rule (1)*.—According to the Madras Amendment, where a person appoints a pleader, the document

<sup>1</sup>*Aswin v. National Rayon, etc., Co.*, A.I.R. 1955 Bom. 262.

<sup>2</sup>*Harchand v. B. N. Rly.*, A.I.R. 1916 Cal. 181 (1).

<sup>3</sup>As to the distinction between general and special powers, see *Vardaji v. Chandrappa*, A.I.R. 1916 Bom. 155, 156.

<sup>4</sup>*Ephrayim v. Turner Morrison & Co.*, A.I.R. 1930 Bom. 511, 512.

<sup>5</sup>As to meaning of the word "person" in Bombay Amendment, see *Performing Rights Society Co. v. Indian Morning Post Restaurant*, I.L.R. 1939 Bom. 295; A.I.R. 1939 Bom. 347, 348.



must be "subscribed with his signature in his own hand". This does not appear to be necessary.

(b) *Sub-rule (2)*.—The question whether the appointment should be accepted by the pleader *in writing* has been considered. Such a requirement was contained in the old rule 2, and was removed by the Amendment Act 22 of 1926.<sup>1</sup> No change is considered necessary on this point.

(c) *Sub-rule (3)* provides that certain applications and proceedings, mainly applications for review, appeal, and applications for copies or refund, etc., are deemed to be "proceedings in the suit", so that the provision in sub-rule (2) providing that the appointment of pleader continues until the "proceedings in the suit" are ended, is attracted. Now, one suggestion which has been made is that a pleader should not be allowed to act, etc., in the High Court (in appeal, etc.), on the basis of the authority filed by him in the lower court, and that he should file a fresh appointment in the High Court. It has been stated, that until the records of the lower court are called for, it becomes difficult to check up whether the pleader appearing in the High Court had in fact filed his authority in the lower court. The Patna High Court has added a rule on the subject<sup>2</sup>, whereunder, a pleader shall not act for any person in the High Court unless his appointment has been filed in the High Court. It is, however, considered that no such change is necessary. Counsel's statement in the High Court that he has filed his authority in the lower court can ordinarily be relied upon.

While "appeals" are mentioned in the sub-rule, *applications* relating to appeals are not mentioned. It is accordingly considered desirable to mention these specifically.<sup>3</sup>

There is some conflict of decisions on the point whether an authority filed by a pleader in the suit continues to be valid for the purposes of *revision*. One view is that the power to file an appeal includes the power to file a petition or revision.<sup>4</sup> But a contrary view has also been taken.<sup>5</sup> It is therefore considered desirable to add revisions also.

Another question that has arisen under sub-rule (3) is, whether applications under Order IX, rule 9 or under Order IX, rule 13 are proceedings in the suit. As regards applications for restoration of suit after dismissal for de-

<sup>1</sup>The present position is discussed in *Abdul Rauf v. Nami Bai*, A.I.R. 1955, Nag. 276.

<sup>2</sup>Order 3, rule 5B, Patna Amendment.

<sup>3</sup>Compare the Bombay Amendment to Order 3, rule 4(3).

<sup>4</sup>*P. Ojha v. R. R.*, A.I.R. 1962 All. 485.

<sup>5</sup>*Mool Chand v. Ram Babu*, A.I.R. 1961 M.P. 323.

fault (Order IX, rule 9), one view is that they are proceedings in the suit.<sup>1-2</sup>

But a contrary view has also been taken.<sup>3-4</sup>

Regarding applications for setting aside *ex parte* decrees (Order IX, rule 13) one view is that a fresh authority is not necessary.<sup>5</sup> But some doubt is thrown by one decision.<sup>6</sup>

It is considered unnecessary to insert any express provision in this behalf. (An amendment on the subject has been made by the Kerala High Court.<sup>7</sup>)

(d) *Sub-rule (6)*.—(Local Amendments)—

Sub-rule (6) has been inserted by several High Courts<sup>8</sup>, to provide, in effect, that a Government pleader appearing on behalf of the Government or on behalf of any public servant sued in his official capacity shall not be required to present any document empowering him to act, but that such pleader shall file a memorandum of appearance signed by himself and stating the names of the parties, the name of the party for whom he appears and name of the person by whom he is authorised to appear. After some consideration, it is felt that no such provision is necessary.

It may be noted that three kinds of documents are provided for in respect of various situations by Order III, rule 4:—

(i) A pleader who is appointed by the party to act in court, has to file a document in writing signed by the party, etc., under sub-rule (1)<sup>9</sup>, and pay necessary court-fees<sup>10</sup>.

(ii) A pleader who has been engaged for the purpose of pleading only has to file a memorandum for appearance signed by himself and stating the specified particulars under sub-rule (5). He need not file a power of attorney<sup>11</sup>.

<sup>1</sup>*Panna Lal v. Balla Ram*, A.I.R. 1957 Raj. 391 (Reviews the case-law).

<sup>2</sup>*Abdul Aziz v. Punjab National Bank Ltd.*, A.I.R. 1929 Lah. 96 (Jai Lal. J.).

<sup>3</sup>*Hyderabad Import and Export Corpn. v. United Trading Co.*, A.I.R. 1958 Andhra Pradesh 652.

<sup>4</sup>See also *Pavoo Rayil v. Kunhiman*, (1955) 2 M.L.J. 124, 125.

<sup>5</sup>*Jwala v. Bhrigu* A.I.R. 1944 All. 238.

<sup>6</sup>*Krishna v. Ranganathan*, A.I.R. 1951 Mad. 686 (2).

<sup>7</sup>See Kerala Amendment to Order 3, rule 4 (3).

<sup>8</sup>See Madras, Kerala and Rajasthan Amendments, Order 3, rule 4(6).

<sup>9</sup>*Braja Behari v. Arun Coomar*, I.L.R. (1953) 2 Cal. 309, 315.

<sup>10</sup>*Jhamman Lal v. Parma Nand*, A.I.R. 1951 All. 451.

<sup>11</sup>*Ramzan v. Gopal Das*, A.I.R. 1936 Lah. 199.

(iii) A pleader who has been engaged for pleading only, by any other pleader (who himself has been duly appointed to act on behalf of the party concerned) need not, under the proviso to sub-rule (5), file the memorandum of appearance.

*Order III, rule 5*

This follows local amendments.<sup>1,2</sup> The object is to make it clear that where service of a process is effected on a pleader, the pleader should have been appointed to act for the party.

*Order III, rule 6*

Under the Bombay Amendment, a party may be required by the Court to appoint an agent within the jurisdiction of the Court for accepting service of process, etc. This appears to be a useful provision, and has been adopted.

*Order IV, rule 2*

Order IV, rule 2 provides for the particulars to be entered in the Register of Civil Suits. The Calcutta Amendment makes an exception in respect of some suits triable by a Court of Small Causes. This seems to be a matter which can be best dealt with by local Amendments, and need not be adopted for the whole of India.

*Order V, rule 2*

Order V, rule 2 provides that every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. Some High Courts<sup>3</sup> have by local Amendments, omitted the reference to concise statements. It is, however, considered desirable to retain it. These concise statements are filed under another rule—Order VII, rule 9.

*Order V, rule 4A (Local Amendments)*

Certain High Courts have, by Local Amendments<sup>4</sup>, inserted Order V, rule 4A, empowering the Court to dispense with service in proceedings for interlocutory relief and in proceedings held after the decree, in respect of defendants against whom the main case has proceeded *ex parte*. It is not considered necessary to adopt such a provision for the whole of India.

<sup>1</sup>See the amendments made by High Courts of Andhra Pradesh, Bombay, Gujrat, Madhya Pradesh, Madras and Rajasthan.

<sup>2</sup>See also Civil Justice Committee (1924-25), Report, page 172, Chapter 10, para. 23.

<sup>3</sup>See Allahabad, Kerala and Rajasthan Amendments to Order 5, rule 2.

<sup>4</sup>See Local Amendments by Allahabad and Orissa.

*Order V, rule 5*

1. The question whether the words "for appearing and answering the claim" should be added, to emphasise the defendant's duty to file the written statement<sup>1</sup>, has been considered. It is felt that no such change is necessary, as the existing rule is adequate.

2. The Madras Amendment to this rule contains elaborate provisions as to the kinds of summonses that may issue against the defendant. Briefly speaking, the summons may (under that Amendment) be issued—

(i) for settlement of issues; or

(ii) for appearing and stating whether the defendant wishes to contest the suit and (if so) for receiving directions as to date for filing the written statement, date of trial and other matters, and (if he does not contest) for final disposal; or

(iii) for final disposal.

(As to the second category of summons—summons for receiving directions as to further proceedings, etc.—the addition of such a category was recommended by the Civil Justice Committee<sup>2</sup>).

The question whether a provision on the lines of this Amendment should be incorporated in the Code, has been considered. It is felt that such a change is not needed<sup>3</sup>.

*Order V, rule 15*

1. Order V, rule 15 provides that where in any suit the defendant "cannot be found" and has no agent empowered to accept service, service may be made on any adult male member of his family residing with him. Many High Courts have made local Amendments whereunder, instead of the words "defendant cannot be found", the words "defendant is absent" or "defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time"<sup>4</sup> have been substituted. The last mentioned form is the most elaborate and has been employed in the Calcutta Amendment. It seems to be worth incorporating, and has therefore been adopted.

2. The genesis of these local Amendments may be explained. There had been decisions by several High Courts

<sup>1</sup>*Cf.* 14th Report, Vol. I, page 302, para. 11.

<sup>2</sup>Civil Justice Committee (1924-25) Report, page 6, Chapter I, para. 15.

<sup>3</sup>See also 14th Report, Vol. I, page 302, para. 9.

<sup>4</sup>See the local Amendments made by High Courts of Allahabad, Andhra Pradesh, Assam, Calcutta, Madhya Pradesh, Madras, Punjab and Rajasthan.

to the effect that service under this rule upon an adult male member would not be proper service unless it was proved to the complete satisfaction of the court that attempts were made to find the defendant, that the defendant could not be found and that he was deliberately keeping himself out of the way to avoid service. The Civil Justice Committee<sup>1</sup> noted this position and observed that the decisions "imposed an unnecessary restriction on the application of this rule which is not contemplated either by the letter or spirit of the rule". It observed that there was no reason to suppose that the knowledge of the service effected on the adult male member would be withheld from the defendant and recommended the substitution of the words "where the defendant is absent".

3. A suggestion has been received to the effect that the word "male" in this rule should be omitted. Though the word has been omitted by local Amendment in one State<sup>2</sup>, it does not appear to be a change which can be safely adopted for the whole of the country.

#### *Order V, rule 17*

In view of the change proposed to Order V, rule 15<sup>3</sup>, it is proposed to substitute in rule 17 also for the words "or where the serving officer cannot.....find the defendant", the words "or where the defendant is absent, etc." The Calcutta Amendment on the subject, which is on the same lines, may be seen. The effect of that amendment has now been settled by several decisions relating to Order V, rule 15, and Order V, rule 17<sup>4,5</sup>.

#### *Order V, rule 19*

By a local Amendment, the Calcutta High Court has substituted "declaration" for "affidavit" in Order V, rule 19. It is unnecessary to adopt this change.

#### *Order V, rule 19 (proposed)*

1. This carries out the recommendation in the Fourteenth Report<sup>6</sup>. The object is to provide for simultaneous issue of summons for—

- (i) service in the ordinary manner, and
- (ii) service by post.

<sup>1</sup>Civil Justice Committee Report (1924-25), pages 168-169, Chapter 10, para. 20.

<sup>2</sup>See Kerala Amendment.

<sup>3</sup>See amendment proposed to Order 5, rule 15.

<sup>4</sup>*Tripura M. Bank v. Bansen & Co.*, A.I.R. 1952 Cal. 781.

<sup>5</sup>*Ganesh Mal v. Keshoram*, A.I.R. 1952 Cal. 10.

<sup>6</sup>14th Report, Vol. I, page 310, para. 24, last sub-para.

2. The suggested alternative that in the beginning, the summons should be sent by registered post, and if the defendant does not appear, the case should not proceed *ex parte* but the summons should be issued again for service in the ordinary way, has been examined. The question whether processes in connection with injunctions, contempts and proclamations for sale should be excluded totally from service by post, has also been considered. It is felt, that from the practical point of view, the course suggested in the Fourteenth Report, which has been adopted, is the simplest and is worth giving a trial. The amendments made to Order V, rule 9 by certain High Courts<sup>1</sup> and to Order V, rule 10 by other High Courts<sup>2</sup>, and Order V, rule 21A inserted by some High Courts<sup>3</sup>, give a *discretion* to the court to send the summons for service by registered post. It is unnecessary to consider the details of these amendments, but the effect of most of these amendments is that where summons is sent by registered post, an acknowledgment purporting to be signed by the defendant shall be deemed to be *prima facie* proof of service. Case-law on these amendments explains their meaning<sup>4-5-6-7-8-9</sup>. What is now proposed is, that the summons (by post)<sup>10</sup> should be simultaneously issued. The court may act on whichever summons is proved to have been served.

3. A saving, preserving the power of the Court to direct service in another manner, has been provided for. (It may be useful in cases, for example, where the defendant resides very near the headquarters of the Court, or the Court proposes to send a special messenger).

#### Order V, rule 20

1. The Fourteenth Report contains a recommendation<sup>11</sup> to empower the court to order substituted service where a summons sent for personal service has been returned *unserved twice*.

<sup>1</sup>See amendments to Order 5, rule 9 by High Courts of Allahabad, Andhra Pradesh, Kerala and Madras.

<sup>2</sup>See amendments to Order 5, rule 10 by High Courts of Orissa, Patna Punjab and Rajasthan.

<sup>3</sup>Bombay, Gujarat and Madhya Pradesh Amendments inserting Order 5, rule 20A.

<sup>4</sup>*S. M. R. C. Church v. Lakshmana*, A.I.R. 1959 Ker. 297.

<sup>5</sup>*Sri Krishna Rice Mills v. Rajagopal*, A.I.R. 1958 Mad. 528.

<sup>6</sup>*Bai Shanta v. Khalas*, A.I.R. 1956 Bom. 144.

<sup>7</sup>*Mohan v. Sunder*, A.I.R. 1949 Pun. 295.

<sup>8</sup>*Dua v. Balli*, A.I.R. 1959 Pun. 467.

<sup>9</sup>*K. A. Desai v. Vijoy Singh*, A.I.R. 1954 Sau. 84 (existing position).

<sup>10</sup>As to post, see sections 16 and 114, Evidence Act, and section 27, General Clauses Act.

<sup>11</sup>14th Report, Vol. I, page 311, para. 25.

It is, however, considered unnecessary to insert any such rigid provision of this nature.

2. It is considered, that where substituted service by advertisement in newspapers is ordered, the newspapers should be those circulating in the neighbourhood. Necessary change has been proposed.

*Order V, rule 20A*

This is consequential.<sup>1</sup> See also Fourteenth Report<sup>2</sup>.

*Order V, rule 26*

Order V, rule 26 contains two types of provisions for service of a summons intended for a defendant residing outside the territories to which the Code extends. Under the first type, it can be sent for service to a Political Agent appointed by the Central Government in exercise of foreign jurisdiction or to a court established or continued in the exercise of such jurisdiction. Under the second, where the State Government has, in respect of any court situate in any such territory, and not established or continued in the exercise of such jurisdiction, declared that service by such court of a summons issued under this Code, shall be deemed to be valid service, a summons can be sent to such court.

It is considered that in the second case, the notification should be issued by the Central Government, and not by the State Government. Since external affairs are exclusively in the charge of the Central Government, and since the corresponding section for summonses received from countries outside India—section 29—now leaves the power to issue notification under the section to the Central Government, it is proper that the power under Order 5, rule 26 should also be vested in the Central Government.<sup>3-4</sup>

Secondly, it would appear that the intention of Government is, that a provision should be made for the transmission of summonses under this rule (in both cases) through diplomatic channels<sup>5</sup>.

Necessary change has been proposed.

<sup>1</sup>See Order 5, rule 19A (proposed).

<sup>2</sup>14th Report, Vol. I, page 310, para. 24, last sub-para.

In Order 5, rule 26 as enacted in 1908, the power was with the Governor-General in Council. In the adaptation made in 1937, the power was transferred to the State Government, on the ground that the matter fell within the topic of "administration of justice".

<sup>3</sup>This is also the suggestion received from the Government; see Ministry of Law, Legal Affairs Deptt. File No. 12(3)-62, J.

<sup>4</sup>See correspondence in Ministry of Law, Legal Affairs Department, File No. 12(3)/62, J., which was forwarded to the Law Commission for its consideration.

*Order V, rule 26A (New)*

1. This rule is new, and inserts an additional provision dealing with service of summonses meant for defendants residing outside India. There are two rules which exist at present on the subject, namely, Order V, rule 25, under which the summons can be sent by *registered post direct* to the defendant (subject to the proviso relating to Pakistan), and Order V, rule 26, under which, in certain cases, the summonses can be sent to a Political Agent or court specified in the rule or in the notification issued thereunder. These provisions do not, however, provide for cases where it is intended that the summons should be served through diplomatic channels and sent to an officer of the foreign country. A provision authorising such a course has been suggested by the Government<sup>1</sup>. The provision, as drafted, is intended to implement this suggestion. Reference may be made in this connection to the local Amendments made in Order V, rule 26 by the High Courts of Madras and Kerala, though they are not so comprehensive as the proposed provision.

2. Certain points of detail<sup>2</sup> may be discussed.

(a) The proposed new rule will not alter the existing practice of sending summonses to the Political Agent or courts (Order V, rule 26).

(b) The transmission of documents under the new rule, will be either through the External Affairs Ministry or in such other manner as the Central Government may notify.

(c) It is expected that the documents will be sent in a language with which the authorities in the foreign countries will be familiar, but it is considered unnecessary to make such a provision in the Code of Civil Procedure<sup>3</sup>.

3. One point of importance may be noted. Order V, rule 26 authorises a presumption of service when the endorsement by the court, etc., is to the effect that the summons has been served on the defendant "in manner hereinbefore directed". This seems to contemplate service in accordance with the provisions of the Civil Procedure Code. But, in respect of the proposed new rule, it is considered sufficient to provide that a certificate of service by the officer of the foreign country concerned shall be evidence of service. It would not be convenient to adopt the provision in rule 26 in such cases.

<sup>1</sup>Suggestion in Ministry of Law, Department of Legal Affairs, Judicia Section, File No. F. 12(3)/62, J., which is in substitution of the previous suggestion under Order 5, rule 25, contained in File No. F. 17(5)/58, J.

<sup>2</sup>Those points arise from Ministry of Law, Legal Affairs Department, File No. F. 12(3)/62, J.—noting as well as correspondence.

<sup>3</sup>This can be conveniently dealt with by rules made by the High Courts for civil courts.



4. Order V, rule 26, as originally enacted in 1908, is quoted below:—

Service in foreign territory through Political Agent or Court.

“26. Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the *Governor-General in Council* has, by notification in the Gazette of India, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid,

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.”

5. The Adaptation of Indian Laws Order, 1937 substituted “Provincial Government” in clause (b)—now State Government.

6. The provisions corresponding to Order V, rule 26 in the earlier Acts are quoted below:—

*Code of Civil Procedure (10 of 1877) (Sections 90 and 92) (now Order V, rule 26)*

Service through British Resident or Agent of Government.

“90. If there be a British Resident or Agent of Government in or for the territory in which the defendant resides, the summons may be sent to such Resident or Agent, by post or otherwise, for the purpose of being served upon the defendant; and if the Resident or Agent returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be conclusive evidence of the service.

Mode of sending such letter.

92. When a letter is so substituted for a summons, it may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; unless the defendant has an agent empowered to accept service of summons, in which case the letter may be delivered or sent to such agent.”

Section 90 of Act 14 of 1882 (now Order V, rule 26)

"90. If there be a British Resident or Agent of Government in or for the territory in which the defendant resides, the summons may be sent to such Resident or Agent, by post or otherwise for the purpose of being served upon the defendant; and if the Resident or Agent returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be conclusive evidence of the service.

Service  
through  
British  
Resident  
or Agent of  
Government.

Section 90 of Act 14 of 1882 as amended by section 12 of Act 7 of 1888 (now Order V, rule 26)

"90. If there is a British Resident or Agent, or a Superintendent appointed by the British Government, or a Court established or continued by the authority of the Governor General in Council, in or for the territory in which the defendant resides, the summons may be sent to such Resident, Agent, Superintendent or Court, by post or otherwise for the purpose of being served upon the defendant; and if the Resident, Agent or Superintendent or the Judge of the Court returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be evidence of the service."

Service in  
foreign terri-  
tory through  
British Resi-  
dent or  
Court.

7. The reason for the 1888 Amendment (Act 7 of 1888) appears from the following remarks of the Select Committee, namely:—

"The section will admit of summonses being sent for service to Superintendents of foreign States, and to Courts established or continued by the authority of the Governor General in Council in foreign territory, as well as to British Residents and Agents."

The 1882 Act was revised and in the draft prepared in 1900 (which became the present Order V, rule 26), emphasis was laid on one ingredient, namely, that the officers and courts must be those who possess powers to serve a summons in the foreign territories, and that the summons should not be sent for service to an officer who had no such power.

8. As to service by the *ordinary mode*, Order V, rule 18 requires the serving officer to make a return as to service and the person identifying (if any).<sup>1</sup>

<sup>1</sup>As to Order 5, rule 18, see *Nagendra v. Sambu*, A.I.R. 1923 Pat. 114 (D.B.).

Without examining the peon, or proving his report, the report would not be evidence.<sup>1</sup> An affidavit of the process-server would be evidence, but where a defendant denies that he was absent from the house (service having been effected by affixture), the process-server should, it has been held, be put in the witness box for cross-examination.<sup>2</sup>

*Order VI, rule 2*

The rule has been slightly re-drafted, to provide that each allegation should be contained in a separate paragraph in the pleadings.<sup>3</sup>

*Order VI, rule 14A (New)*

1. This mainly carries out the recommendation made in the Fourteenth Report,<sup>4,5</sup> and requires a party to file an address for service ("registered address") at which service may be effected on him. Some local Amendments provide that such service should not be effected when a pleader has been engaged (unless the court otherwise directs)<sup>6</sup>, or make an exception in respect of notices under Order XXI, rule 22<sup>7</sup>. It is considered unnecessary to adopt them.

2. The draft mainly follows the Calcutta Amendment<sup>8</sup>, but amendments made by other High Courts have also been considered in detail<sup>9</sup> and a few useful points added.

The desirability of such a provision was stressed by the Civil Justice Committee also.<sup>10</sup>

<sup>1</sup>*Sarad Prosad v. Krishna Dome*, A.I.R. 1926 Cal. 539,540 (Cuming and Chakravarti JJ.). (Case of service of notice under Order 21, rule 22.)

<sup>2</sup>*Basappa v. Hansaji*, A.I.R. 1936 Mad. 660, 661 (Wadsworth J.).

<sup>3</sup>*Cf.* Order 18, rule 6 (2), R.S.C. Revision (1962).

<sup>4</sup>14th Report, Vol. I, page 304, para. 14.

<sup>5</sup>See also Civil Justice Committee (1924-25) Report, page 62, para. 3 and page 173, para. 24.

<sup>6</sup>Contrast Order 7, rule 23 (Bombay).

<sup>7</sup>Contrast Order 7, rule 26 (Bombay).

<sup>8</sup>Order 6, rule 14A (Calcutta).

<sup>9</sup>Orissa Order 6, rule 14A.

Allahabad Order 7, rules 19—25.

Bombay Order 7, rules 19—26.

Punjab Order 7, rules 19—25.

Madhya Pradesh Order 7, rules 19—25.

Allahabad Order 8, rules 11-12.

Bombay Order 8, rules 11-12.

Allahabad Order 41, rule 38.

Bombay Order 41, rule 38.

<sup>10</sup>Civil Justice Committee (1924-25) Report, page 62, para. 3 ; page 173, para. 24.

3. It is considered that an express provision imposing the penalty for failure to file such address is unnecessary<sup>1</sup>. But where the address filed is not genuine, the suit should be stayed (until the correct address is filed) or the defence struck off, as the case may be. Necessary provision is proposed.

*Order VI, rule 15*

There is a recommendation in the Fourteenth Report<sup>2</sup> to provide for verification of a pleading on oath. (The detailed provisions as to the person before whom the oath should be taken are contained in local Amendments)<sup>3</sup>.

It is considered unnecessary to make such a provision, as it may not prove very useful in practice.

*Order VI, rule 16*

Power to strike off matter which is "frivolous or vexatious" or "an abuse of the process of the Court" has been added, as in the Revised R.S.C.<sup>4</sup>.

*Order VI, rule 17 and amendment beyond jurisdiction*

1. The question whether a court can grant leave to amend a plaint if the effect of the amendment would be to take away the suit from the jurisdiction of the court does not seem to admit of a definite answer. One view is, that the court has such a power, and that if after the amendment the court has no jurisdiction to try the suit on the basis of the amended plaint, the plaint could be returned to the plaintiff for presentation to the proper court.<sup>5-6,7</sup>

2. A contrary view, however, has been taken in certain cases,<sup>8-9</sup> holding that the court cannot allow the amendment.

3. A third possible view is that taken in a Nagpur case,<sup>10</sup> where the position is discussed in great detail. It was

<sup>1</sup>Contrast Order 7, rule 21 (Bombay, Allahabad, Madhya Pradesh, etc.), and Order 8, rule 11 (Bombay and Allahabad.)

<sup>2</sup>14th Report, Vol. I, page 299, para. 6 ; page 303, para. 12 and page 330, para. 53.

<sup>3</sup>See Bombay Amendment to Order 6, rule 15.

<sup>4</sup>See R.S.C. Revision (1962), Order 18, rule 19.

<sup>5</sup>*Nandula Bhavani v. Saladi Mangamma*, A.I.R. 1949 Mad. 208 (earlier decision of Madras High Court not cited).

<sup>6</sup>*Kundanmal v. Thikana Siryari*, A.I.R. 1959 Raj. 146.

<sup>7</sup>*Goverdhan v. Union of India*, A.I.R. 1953 Hyderabad 212, 215, para. 16.

<sup>8</sup>*Singapore v. Govin'aswamy*, A.I.R. 1928 Mad. 400.

<sup>9</sup>*E.R.R.M.H.S. Committee v. P. Atchayya*, A.I.R. 1957 A.P. 10.

<sup>10</sup>*Lalji v. Naroutam*, A.I.R. 1953 Nag. 273 (*Hidayatullah and Kaushalendra Rao JJ.*). (Case of pecuniary jurisdiction.)

observed there, that "something fundamental" was involved. If the court disallows the amendment simply on the ground that it had no jurisdiction to entertain it, it might be shutting out a claim which was otherwise good, and then the plaintiff would have no remedy in respect of the claim which he sought to add. He would not ask for the plaint to be returned merely because he wanted to make an amendment. Again, the jurisdiction of a court was determined by the nature of the plaint and once jurisdiction is found, it inheres in the court until something supervenes which ousts it. As against this, the court observed, by allowing an amendment which, taken together with the original claim, exceeded the court's pecuniary jurisdiction, the court was in effect trying a suit beyond its jurisdiction. By adding the new relief, the court in effect amended the plaint as presented, because all amendments relate back to the presentation of the plaint. The court is thereby rendered incompetent to entertain the claim for amendment at all.

Thus, (i) the plaintiff cannot ask for return of the plaint, (ii) the court cannot allow the amendment, and therefore (iii) "the logical procedure to follow would be to return the plaint together with the application for amendment for consideration of that Court which has jurisdiction to consider the original claim and the claim sought by the amendment not taken separate but together".

4. A clarification on the subject appears to be desirable. Necessary amendment is proposed, wherunder the *amendment* will be dealt with by the court, but it will then return the plaint for presentation to proper court.

#### *Order VI, rule 17 and Bombay amendment*

The Bombay Amendment to Order VI, rule 17 provides that (i) where the amendment of a plaint applied for is a material one, the Court shall give notice to a defendant who has not appeared, and (ii) where in the *absence of the defendant* the Court grants any amendment in a form materially different from that applied for, a copy of the amended plaint shall be served on the defendant.

It is considered that no such provision need be adopted.

#### *Order VII, rule 1*

The Madras Amendment to Order VII, rule 1, to the effect that the plaint should state the *age* of the minor, has been considered. Such an amendment would not be of much practical use for ordinary cases and has not therefore been adopted.<sup>1</sup>

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<sup>1</sup>As to minor plaintiffs, see Order 32, rule 2.

## Order VII, rule 2

Under the Punjab Amendment, where the suit is for movables in the possession of the defendants or for debts whose value cannot be estimated, the plaint shall state approximately the amount or value.

It is considered unnecessary to adopt such a provision.

## Order VII, rule 6

1. Where the ground of exemption from limitation is not stated in the plaint, the question is whether it can be raised later (without amendment). The Madras view<sup>1,2,3</sup> is that it cannot. But that High Court has also held, that the ground of exemption need not be stated before the occasion for claiming exemption arises<sup>4</sup>.

2. Another question is whether, when one ground is stated, plaintiff can take another and consistent ground<sup>5</sup>.

One view is that when one acknowledgment is pleaded, another cannot be set up<sup>6</sup>. This was the Calcutta view, but in later cases of the same High Court, a liberal view has been taken<sup>7</sup>. But the Madras view is, that a new ground can be urged only after amendment.<sup>8,9,10</sup>

The Bombay view is that another and consistent ground can be set up<sup>11</sup>.

But can an inconsistent ground be pleaded? A clerical error in a Bombay judgment seems to have misled some courts into thinking that even an inconsistent plea can be taken for claiming exemption from limitation<sup>12</sup>.

<sup>1</sup>*Ramaswami v. Anaiya*, A.I.R. 1936 Mad. 545.

<sup>2</sup>*Palani v. Sevugan*, A.I.R. 1933 Mad. 395 (Cornis J.) (reviews the case-law).

<sup>3</sup>*Mahadeva v. Marulai*, A.I.R. 1933 Mad. 674 (Walsh J.).

<sup>4</sup>*Gopalaswami v. Narayanswami*, I.L.R. 1944 Mad. 572 ; A.I.R. 1944 Mad. 65, 67 dissenting from *Gulam Hossan v. Mohamed Ali*, (1910) I.L.R. 34 Bom. 540.

<sup>5</sup>See *Parmeshri v. Fakiria*, I.L.R. 2 Lah. 13 ; A.I.R. 1922 Lah. 230.

<sup>6</sup>*Jogeshwar v. Raj Narain* (1904), I.L.R. 31 Cal. 195, 201, (Maclean C. J., Hill and Stevens JJ.) (Under old section 50).

<sup>7</sup>See the Calcutta cases discussed in A.I.R. 1922 Lah. 230. Also see *Gangadhar v. Khaja Abdul*, (1909) 14 C.W.N. 128

<sup>8</sup>A.I.R. 1933 Mad. 874.

<sup>9</sup>A.I.R. 1936 Mad. 545.

<sup>10</sup>In *Bojjana v. Kristappa*, A.I.R. 1947 Mad. 268, 271, para. 9 (Wadsworth O.C.J. and Govindarajachari J.) ; this principle was applied to an application to set aside an execution sale.

<sup>11</sup>*Percy F. Fisher v. Ardeshir Hormasji*, 37 Bom. L.R. 165.

<sup>12</sup>See *Rustomji, Limitation* (1958), page 25, foot-notes (d) and (e).

3. A specific claim to exemption is, of course, unnecessary if the facts pleaded show the exemption<sup>1</sup>.

4. Further, if the facts justifying exemption are patent on the face of the record, they need not be pleaded<sup>2</sup>.

5. The general rule is that the exemption must be pleaded<sup>3</sup>.

6. To summarise the position,—

(i) the strict provision embodied in Order VII, rule 6 has been administered liberally by most High Courts (excepting, it would seem, the Madras High Court);

(ii) there is some confusion about whether the extra grounds to be set up may be “consistent”, or may even be “inconsistent”.

7. The adoption of the following proviso at the end of the rule to clarify the position has been considered—

“Provided that the court may permit the plaintiff to rely on any ground of exemption from such law, not shown in the plaint, being a ground which is not inconsistent with the allegations in the plaint.”

(The burden of proof regarding limitation is on the plaintiff)<sup>4</sup>.

It is, however, felt that no change is necessary in view of the decisions of the majority of the High Courts.

#### Order VII, rule 9

1. Under Order VII, rule 9, as it stands at present, copies of the plaint are to be filed on the admission of the plaint. The Madras and Andhra Pradesh Amendments provide that they should be filed along with the plaint. The Calcutta Amendment, Order VII, rule 9(1A) provides that the copies should be filed with the plaint, but the Calcutta Amendment to Order VII, rule 11 gives power to the court to grant further time. It is considered, that the copies should be filed within such time as the court may fix or extend.

2. It is also proposed to make it clear, that the plaintiff should pay the court-fees and charges for the service of the summons within the time allowed by the court. Cf. the Calcutta Amendment to Order VII, rule 9, on this point. Necessary amendment has been proposed.

<sup>1</sup>See *Raghunath v. Syed Samad*, (1908), 12 C.W.N. 617, followed in A.I.R. 1959 Kerala 243.

<sup>2</sup>See *Rustomji, Limitation* (1958), page 25, bottom.

<sup>3</sup>*Kalyan Mal v. Ahmad Uddin*, A.I.R. 1934 P.C. 208, 210.

<sup>4</sup>*Sri Krishna Roy v. Tinkari*, A.I.R. 1951 Cal. 198, 199.

*Order VII, rule 11*

1. Order VII, rule 11(c) provides that the plaint shall be rejected where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper *within a time to be fixed by the court*, fails to do so. Some controversy seems to exist on the question whether granting of time under this rule is mandatory. One view is, that the matter falls outside section 149 and is entirely governed by Order VII, rule 11, which is a special provision and, therefore, the party is *entitled* to demand some time for making good the deficiency<sup>1-2-3</sup>. In a Bombay case<sup>4</sup>, both the provisions were considered but the right to demand time was assumed<sup>5</sup>. Another view is, that the grant of time is discretionary<sup>6</sup>, on the ground that the authority to grant time is in section 149 and not in Order VII, rule 11, which is a disabling provision.

2. In a recent case<sup>7</sup>, a single Judge of the Bombay High Court, though stating there was much to be said in favour of the latter view, had to take a different view because of the High Court's own earlier decision.

3. The Madras High Court has made an express amendment to this rule which, in substance, provides that the granting of the time is a matter of discretion. The question whether the Madras amendment should be adopted has been considered, but it is felt unnecessary to insert any such provision.

*Order VIII—Heading*

This is consequential<sup>8</sup>.

*Order VIII, rule 1 and obligatory written statement*

A recommendation has been made in the Fourteenth Report<sup>9</sup> to the effect that the filing of a written statement must be made obligatory in all cases. After some consi-

<sup>1</sup>*Radha Kanta v. Debendra Narayan*, I.L.R. 49 Cal. 880 ; A.I.R. 1922 Cal. 506, 508. (Mookerjee and Cuming JJ.).

<sup>2</sup>*Subba Reddy v. Venkatanarasimha Reddi*, A.I.R. 1937 Mad. 266.

<sup>3</sup>*Venkanna v. Achutaramanna*, A.I.R. 1938 Mad. 542, 543, right hand (Venkatasubba Rao J.).

<sup>4</sup>*Achut Ramchandra v. Nagappa*, A.I.R. 1914 Bom. 249, 250. (Batchelor and Shah JJ.) (traces history of the rule).

<sup>5</sup>*Bajjnath v. Umeshwar* A.I.R. 1937 Pat. 550 (F.B.).

<sup>6</sup>*Shiv Charan v. Behari Lal*, A.I.R. 1941 Oudh 30.

<sup>7</sup>*Ram Kishan v. Nathu*, A.I.R. 1959 Bom. 86. (Mudholkar J.) (Reviews case-law).

<sup>8</sup>See Order 8, rules 6A-6G (counter-claim).

<sup>9</sup>14th Report, Vol. I, page 302, para. 11.



deration, it has been felt that such a rigid provision need not be inserted, as it may work hardship on ignorant or illiterate people residing in villages.

*Order VIII, rule 1*

1. A provision regarding filing of a list of documents by the defendant with the written statement has been added. This carries out the recommendation made in the Fourteenth Report<sup>1</sup>, with an important modification, namely, no provision has been proposed for production of documents by the defendant with the written statement.

2. Such a provision was recommended by the Civil Justice Committee also<sup>2</sup>. Local Amendments on the subject<sup>3</sup> may be seen. Where the list is not filed with the written statement, some time should be allowed by the court for filing. The exact time will be left to the court under the proposed rule<sup>4</sup>.

*Order VIII, rule 1 and failure to file written statement*

1. In one decision<sup>5</sup>, the Madras High Court has pointed out one defect in relation to Order VIII, rule 1, namely, that while a person who fails to comply with an order under Order VIII, rule 9 suffers penalty under rule 10, the same penalty is not provided for on default under Order VIII, rule 1. The High Court observed, that this was a defect which should be set right, if necessary, by appropriate amendment.

2. Certain other points have also arisen as to effect of failure to file a written statement. It would therefore be convenient briefly to enumerate all those points:—

(i) If a person fails to file a written statement, when called upon to do so by the court under rule 1, does the provision in rule 10 of Order VIII apply? The Madras view<sup>6</sup> is, that rule 10 does not apply, because the words "so required" in rule 10, refer back only to rule 9 and not to rule 1. On this view, the court has no jurisdiction to pronounce judgment against a defendant who has failed to file a written statement under rule 1. The contrary seems to have been assumed by the Allahabad High Court<sup>7</sup>.

(ii) Another question is, whether, if the defendant has not put in any written statement, does Order VIII,

<sup>1</sup>14th Report, Vol. I, page 316, para. 32, first sub-para.

<sup>2</sup>Civil Justice Committee (1924-25) Report, page 39.

<sup>3</sup>See Allahabad, Punjab, Madhya Pradesh, Orissa and Kerala Amendments to Order 8, rule 1.

<sup>4</sup>The Punjab Amendment fixes 10 days.

<sup>5</sup>*Nagaratnam v. Kamalathammal*, I.L.R. 194 Mad. 866 ; A.I.R. 1945 Mad. 299, 300 (King and Bell JJ.).

<sup>6</sup>*Gopi Charan v. Ram Prasad*, A.I.R. 195 All. 283, 284.

rule 5 apply? The Calcutta view is, that Order VIII, rule 5 does not apply where the defendant has not put in any written statement at all, and further, that the verification of the plaint is not evidence on which a suit should be decreed whether the defendant did or did not appear<sup>1</sup>. According to the Calcutta view, rule 5 is merely "a rule of construction of the defendant's pleading". (Woodroffe J.). This is also the Lahore view.<sup>2</sup>

The Patna High Court has also held.<sup>3</sup> that a mere omission to file a written statement does not amount to admission of the facts stated in the plaint.

But the Bombay High Court has expressed emphatic dissent from the Calcutta view, and held<sup>4</sup> that Order VIII, rule 5 which is similar in substance to R.S.C., Order XIX, rule 13 covers also a case where the defendant files no pleading. If there is no pleading of the defendant, the court observed, obviously "it could not contain any denial or non-admission.

The Bombay High Court<sup>5</sup> has also held, that failure to file a written statement means that the defendant admits the allegations in the plaint, but he is entitled to appear and submit any argument open to him on the plaint, for instance that the plaint discloses no cause of action or that the claim is time-barred.

(iii) Another question that has arisen is whether, in case of failure to file a written statement, the court can proceed *ex parte*. One view is that it can<sup>6</sup>, while the Bombay view is that an order that the suit should proceed *ex parte* is not justified<sup>7</sup>.

The Fourteenth Report<sup>8</sup> contemplates that if the written statement is not filed by the date fixed for the settlement of issues, the matter may be dealt with *ex parte*.

3. Since most High Courts have held that failure to file a written statement does not amount to admission of facts

<sup>1</sup>*J. B. Ross and Co. v. C. R. Scrioen* (1916) I.L.R. 43 Cal. 1001, 1010 ; A.I.R. 1917 Cal. 269 (Sanderson C. J., Woodroffe and Mookerjee JJ.).

<sup>2</sup>*Narendra Singh v. C. M. King*, A.I.R. 1928 Lah. 769.

<sup>3</sup>*Sonavati v. Kirtyanand*, A.I.R. 1935 Pat. 306, 331, right-hand (Fazl Ali and Saunders JJ.).

<sup>4</sup>*Shriram v. Shriram*, I.L.R. 60 Bom. 788 ; A.I.R. 1936 Bom. 285 (Beaumont C. J. and Rangnekar J.) explained in A.I.R. 1943 Bom. 387.

<sup>5</sup>*Vinayak v. Chintaman*, A.I.R. 1938 Bom. 470, 471 (Beaumont C. J. and Wassodew J.).

<sup>6</sup>This seems to have been assumed in A.I.R. 1957 All. 283.

<sup>7</sup>*Vinayak v. Chintaman*, A.I.R. 1938 Bom. 470.

<sup>8</sup>14th Report, Vol. I, page 302, para. 11, last sentence.

stated in the plaint, the choice is between two courses, namely, either the court may be permitted to proceed *ex parte* as suggested in the Fourteenth Report, or it may be empowered to proceed under rule 10—"the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit". The latter course has been adopted, as logical<sup>1</sup>.

*Order VIII, rule 2, and joint promisors*

A recommendation has been made in an earlier report of the Law Commission<sup>2</sup> to the effect that the question whether a joint promisor can, when sued for contribution by his co-promisor, resist the suit, on the ground that in the creditor's suit the co-promisor suing for contribution did not (negligently or otherwise) set up defences which could have been legitimately raised to defeat the claim, has been considered. This, it is felt, is a matter of substantive law, and need not be dealt with in a Code dealing with procedure.

*Order VIII, rule 5*

Order VIII, rule 5 provides (roughly) that an allegation of fact in the plaint, if not denied, etc., or stated to be not admitted in the pleading of the defendant, is to be taken as admitted. Whether this rule applies in a case where the defendant has not filed a pleading at all, is a question that has arisen<sup>3</sup>. No amendment to the rule is, however, proposed, as it is felt that on the language of the rule, it should not apply to such cases.

*Order VIII, rules 6A to 6G*

These are new. The object is to provide for counter-claim by the defendant<sup>4</sup>.

The rules have been drafted mainly on the lines of rules 137 to 146 of the Rules of the Bombay High Court (Original Side), 1957, pages 38-39. Those rules embody many points which have been clarified by case-law on the corresponding rules in the R.S.C. See also Order VIII, rules 13 to 22 inserted for Bombay City Civil Court.

The provision that even after judgment in the suit is given, the counter-claim can be proceeded with, has been taken from the Revised R.S.C.<sup>5</sup>.

Counter-claim against a person who is not a party to the suit, has been excluded, to avoid complications.

<sup>1</sup>See the amendment proposed to Order 8, rule 10.

<sup>2</sup>13th Report (Contract Act), page 33, para. 70.

<sup>3</sup>See notes under Order 8, rule 1.

<sup>4</sup>See also the body of the Report.

<sup>5</sup>R.S.C. (Revision) 1962, Order 15, rule 2(3).

It is considered unnecessary to say anything about "same character". Rule 6A(3) has been inserted for comprehensiveness, and will enable the court to apply the rules regarding court-fees (Order VII, rule 11), etc.

*Order VIII, rule 7*

This is consequential<sup>1</sup>.

*Order VIII, rule 8*

This is consequential<sup>1</sup>.

*Order VIII, rule 9*

This is consequential<sup>1</sup>.

*Order VIII, rule 10*

Order VIII, rule 10 deals with the procedure to be followed when a party fails to present a written statement called for by the court, and begins thus:—

"Where any party from whom a written statement is so required, fails to present the same..." Now, the word "so" has been construed as limiting the operation of the rule to failure to file a written statement that was *demande*d under Order VIII, rule 9, and not as covering the more frequent case of a written statement demanded under Order VIII, rule 1. This is a lacuna<sup>2</sup>. The object of the proposed amendment is to remove this lacuna.

*Order IX, rule 2*

Where the plaintiff fails to file the copies of the plaint, etc., as required by Order VII, rule 9, the question arises what should be the consequences of such failure. Under the Calcutta Amendment to Order VII, rule 11 read with Order VII, rule 9(1A) (inserted by the Calcutta Amendment), the plaint shall be *rejected* in such cases. Under the Allahabad Admendment to Order IX, rule 2, the court has the power to *dismiss* the suit in such a case. In both the cases, a fresh suit is not barred (Order VII, rule 13 and Order IX, rule 4); but, in the case of a dismissal, the suit can be *restored* under Order IX, rule 4. An order for ejection is *appealable* as a decree. It is considered, that a provision for dismissal would be proper and should be adopted. Compare the existing provision for failure to pay fees, etc.

<sup>1</sup>See Order 8, rule 6A—6G (counter-claim).

<sup>2</sup>See notes to Order 8, rule 1.

## Order IX, rule 4

This is consequential<sup>1</sup>.

## Order IX, rule 5(1)

Order IX, rule 5(1) provides that where a plaintiff fails to apply for a fresh summons (after the summons on the defendant is returned unserved), the Court shall dismiss the suit (except in certain cases). The period prescribed for the application for a fresh summons is three months, at present. The original period was for one year, but it was changed to three months by the Code of Civil Procedure Amendment Act (24 of 1920). The period has been changed into two months by local Amendments by the High Courts of Bombay and Gujarat, and one month in Kerala. The proposed amendment reduces it to two months<sup>2</sup>.

## Order IX, rule 6

The question whether the court should have power to give a decree, if it thinks fit, on the basis of a pleading without formal evidence, where the case proceeds *ex parte*, has been considered. As pleadings are not required to be on oath<sup>3</sup>, it has been considered unnecessary to make such a change.

It has been held by the Supreme Court<sup>4</sup>, that even when the defendant against whom a case has proceeded *ex parte* does not assign good cause for his previous non-appearance, he has a right to participate from the stage at which he appears. The decision of Wallace J. in the Madras case<sup>5</sup> was approved. The under-mentioned decisions<sup>6</sup> may be seen as an illustration of the application of the rule enunciated by the Supreme Court. It is considered unnecessary to make any provision codifying the proposition laid down by the Supreme Court.

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<sup>1</sup>See Order 9, rule 2 as proposed, and Order 7, rule 9 as proposed.

<sup>2</sup>The history of this rule and its scope are discussed in *Shaw & Co. v. B. Shamaldas and Co.*, A.I.R. 1954 Cal. 369, 371.

<sup>3</sup>See the discussion relating to Order 6, rule 15.

<sup>4</sup>*Sangram Singh v. Election Tribunal, Kotah* (1955) 2 S.C.R. 1 ; A.I.R. 1955 S.C. 425, 431, para. 28.

<sup>5</sup>*Venkatasubbiah v. Lakshmi*, A.I.R. 1925 Mad. 1274.

<sup>6</sup>*Binju Prasad v. United Bank*, A.I.R. 1959 Pat. 152 ; *Mahant Ramji Das v. Bhupinder Singh*, A.I.R. 1962 Pun. 443 ; *Kumara v. Thomas*, A.I.R. 1961 Ker. 287.

## Order IX, rule 9

By a local Amendment in the Punjab the suits for redemption are excluded from the operation of Order IX, rule 9. This would be the position even apart from the amendment<sup>1</sup>. It is considered unnecessary to adopt this amendment.

Under the Calcutta Amendment copies of the application under this rule have to be filed along with the application. This is a matter for the Civil rule and need not be adopted.

## Order IX, rule 13 and "duly served"

1. Under Order IX, rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the *ex parte* decree should be set aside. The two branches of the rule are distinctive and the defendant, whatever his position may be in respect of one branch, is entitled to the benefit of the other branch if he satisfies the court that he has made good his contention in respect of the other branch<sup>2</sup>.

2. Now, cases may arise where there has been a technical breach of the requirements of "due service", though the defendant was aware of the institution of the suit. It may well be, that the defendant had knowledge of the suit in due time before the date fixed for hearing, and yet, apparently he would succeed if there is a technical flaw<sup>3</sup>. This situation can arise, e.g., where the acknowledgment on the duplicate of the summons has not been signed. There may be small defects in relation to affixation,<sup>4</sup> etc., under Order V, rule 15. At present, the requirements of the rules regarding service must be *strictly* complied with, and actual knowledge (of the defendant) is immaterial<sup>5</sup>. (There are not many decisions which hold that even where there has not been due service, yet the decree can be maintained, if the defendant knew the date of hearing.)<sup>6</sup>

<sup>1</sup>*Subbu Rao v. Raju*, 1949 F.C.R. 485 ; A.I.R. 1950 F.C. 1 reversing A.I.R. 1945 Mad. 225; *Shridhar v. Ganu*, I.L.R. 52 Bom. 111 ; A.I.R. 1928 Bom. 67.

<sup>2</sup>*Baldeodas v. Subkarandas*, A.I.R. 1925 Cal. 627, 628, left (Page J.) (Reviews case-law as to affixation also).

<sup>3</sup>*Cf.* Civil Justice Committee Report, (1924-25), page 169, mid para.

<sup>4</sup>*Cf.* elaborate discussion in Civil Justice Committee Report, pages 168 to 171.

<sup>5</sup>*Ebrahim Saleji v. Johurmull*, A.I.R. 1916 Cal. 181 (2) (Sanderson C.J., Woodroffe and Mookerjee JJ.).

<sup>6</sup>One decision taking such view is *Nathu Ram v. Salim Abdul Karim*, A.I.R. 1933 All. 165 (Iqbal Ahmad J.).

3. Where a literal conformity with the C.P.C. is wanting, the second part of column third of article 164, Indian Limitation Act, 1908 (now article 123, Limitation Act, 1963) applies<sup>1-2</sup>. As to substituted service, see discussion in under-mentioned decision<sup>3</sup>.

4. The matter was considered exhaustively by the Civil Justice Committee<sup>4</sup>, which recommended a provision that a decree should not be set aside for mere irregularity. Local Amendments made by several High Courts (including Allahabad, Kerala, Madhya Pradesh, Madras and Orissa) have made a provision on the subject, though there are slight variations in the language adopted by each. Such a provision appears to be useful one, and has been adopted on the lines of the Madras Amendment<sup>5</sup>.

5. When the defendant cannot be found, and the summons is served on an adult male member of the family under Order V, rule 15, the question may arise whether the service is sufficient in law, if the male member has an interest in the litigation which is adverse to that of the defendant. The matter was considered by the Civil Justice Committee<sup>6</sup>, which recommended that though such service should remain "due service" for the purposes of the Civil Procedure Code, yet Order V, rule 15 should be amended to provide that in such a case the service shall not be regarded as coming within the words "duly served" in article 164 of the Limitation Act, 1908 (now article 123 of the Limitation Act, 1963).

The Calcutta High Court has amended Order V, rule 15 by adding a proviso to the effect that where the adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of article 164 not to have been duly served. The Orissa High Court has made an amendment to Order IX, rule 13 to the effect that in such a case the summons shall not be deemed to have been duly served within the meaning of the rule (Order IX, rule 13). The question whether any provision on the subject is needed has been considered, and it is felt that no change need be made on this point.

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<sup>1</sup>*Sri Krishna Rice Mills v. Rajagopaul*, A.I.R. 1958 Mad. 522.

<sup>2</sup>Rustomji, Limitation Act (1958), pages 957 and 958.

<sup>3</sup>*Bashyam v. Parthasarathi*, A.I.R. 1954 Mad. 195.

<sup>4</sup>Civil Justice Committee (1924-25) Report, page 172.

<sup>5</sup>The Madras Amendment was construed in A.I.R. 1953 Mad. 528.

<sup>6</sup>Civil Justice Committee Report (1925), page 170, para. 20.

## Order IX, rule 13, proviso

1. The proviso to Order IX, rule 13 runs as follows:—

“Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.”

The proviso thus empowers the Court to set aside an *ex parte* decree in relation to a defendant who has not actually applied for such setting aside. The proviso was inserted in 1908, because, under section 108 of the 1882 Code, there was a conflict of decisions<sup>1</sup> as to whether the decree could be set aside only against the defendant who made the application, or whether it could be set aside as a whole<sup>2</sup>.

2. One question that has arisen under the proviso is, whether it authorises the setting aside of a decree when the decree *dismisses* the suit in relation to a particular defendant. A narrower view based on the word “against” is, that such setting aside is not allowed<sup>3</sup>. But a wider view seems to have been taken in some decisions<sup>4-5</sup>.

3. Another point on which there is some doubt is, whether in relation to those defendants against whom the proceedings were not *ex parte*, the proviso applies. A query on this point was raised by Mudholkar J. in one Nagpur case<sup>6</sup>, and though he thought it possible to decide the case on some other ground, he observed, that he would have been inclined to hold that the proviso should be confined to the “*ex parte*” decree to which alone the substantive provision expressly relates. But in a Patna case<sup>7</sup> a different view seems to have been expressed. (Under the old Code sections 106 and 108, it had been held<sup>8</sup> that the case could not be re-opened with respect to a defendant against whom a decree not *ex parte* was passed.)

4. It is considered unnecessary to encumber the rule with any amendment on these points.

<sup>1</sup>The case-law under the old section will be found reviewed in *Khagesh Chandra v. Chandra Kanta*, A.I.R. 1954 Assam 183, 186 (F.B.).

<sup>2</sup>*Vasant v. Tukaram*, A.I.R. 1960 Bom. 485 contains a good general discussion of the proviso.

<sup>3</sup>*Khagesh Chandra v. Chandra Kanta*, A.I.R. 1954 Assam 183 (F.B.) (Sarju Prasad, C.J. and Ram Labhaya J., Deka J. dissenting)

<sup>4</sup>*Ram Baran v. Bodh Ram*, A.I.R. 1934 All. 1051 (Kendall J.).

<sup>5</sup>*Buramal v. Har Kishan*, (1902) I.L.R. 24 All. 383.

<sup>6</sup>*Bhim Rao v. Girdhari Lal*, A.I.R. 1954 Nag. 125, 126 (Mudholkar J.).

<sup>7</sup>*Raghubar v. Ramasray*, A.I.R. 1924 Pat. 771, 772.

<sup>8</sup>*Manoku v. Sitaram* (1894), I.L.R. 18, Bom. 142.



*Order X, rule 2*

1. It is considered, that at the first hearing, it should be obligatory on the court to examine such party or his pleader, etc., who is present for elucidating the matters in controversy, as the court may think fit.

2. Necessary changes have been proposed<sup>1</sup>.

*Order XI, rule 6*

It is considered that objections on the ground of privilege should be specifically included in this rule and should not be left to the residuary words "any other ground"<sup>2</sup>. Necessary change in the wording has been proposed<sup>3</sup>.

*Order XI, rule 14*

1. Order XI, rule 14 provides that it shall be lawful for the court "at any time during the pendency of any suit" to order the production by any party, upon oath, of all documents in his possession, etc. One question that has arisen is, whether an order under this rule can be passed before an application for discovery is made under Order XI, rule 12. The majority view is, that it can be so ordered. This is based on the words "at any time"<sup>4,5,6</sup>. But a contrary view also seems to have been taken<sup>7</sup> in one case. The language does not seem to require any change, in view of the majority opinion.

2. The question whether an express provision excluding production of documents regarding matters of State should be inserted, has been considered, and the relevant provision in the R.S.C. Revision<sup>8</sup> has been noted. It is unnecessary to insert any such provision, there being no controversy on the subject under this rule. The privilege as to inspection can be claimed even after production<sup>9</sup>.

*Order XI, rule 15*

1. Order XI, rule 15 entitles a party to give notice for inspection, etc., of documents "to which a reference has

<sup>1</sup>See also the body of the Report.

<sup>2</sup>Cf. R.S.C. (Revision) 1962, Order 26, rule 4.

<sup>3</sup>As to disallowing incriminating questions, see *Meenakshi Sundaram v. Radhakrishna*, A.I.R. 1960 Madras 184.

<sup>4</sup>*Ram Hari v. Niranjana*, 50 C.W.N. 845.

<sup>5</sup>*Srinivas v. Election Tribunal, Lucknow*, A.I.R. 1955 All. 251.

<sup>6</sup>*P. Varalakshamma v. P. Bala*, A.I.R. 1958 Andhra Pradesh 157.

<sup>7</sup>*Baidyanath v. Bholanath Roy*, A.I.R. 1923 Pat. 337, 338, left (Das & Kulwant Sahai JJ.).

<sup>8</sup>R.S.C. Revision (1962), Order 24, rules 13 to 15.

<sup>9</sup>*K. V. Ramachari v. Krishnamachari*, A.I.R. 1924 Mad. 486. Generally as to privilege claimed with reference to production, see *Nagammai v. Alamelu*, A.I.R. 1957 Mad. 401.

been made" in the pleadings or affidavit of the opposite party. Now, the question has arisen whether documents which are merely entered in the list annexed to the plaint are covered by this rule. One view is, that rule 15 does not apply to such documents, as they are not documents to which a "reference" is made in the pleadings<sup>1,2,3,4</sup>.

2. But a contrary view has been taken in other cases. According to this view, the list is a part of the plaint for the purposes of this rule. This view has been taken by Bombay, Madras and Lahore High Courts<sup>5,6,7,8</sup>.

In fact, in the Madras case there is an observation, that probably one of the reasons for requiring the plaintiff to furnish a list with the plaint was to enable the defendant to apply for inspection.

A clarification on the subject is proposed.

*Order XI, rule 19(2)*

1. This rule, which confers power on the court to inspect any document for which privilege is claimed, is to be read as subject to the provisions of section 162, Evidence Act, as has been held by the Supreme Court<sup>9,10,11,12</sup>.

2. The contrary view<sup>13</sup> is no longer good law, in view of the Supreme Court's decision.

3. As to English law, see (a) section 28, Crown Proceedings Act, 1947; (b) old R.S.C., Order 31, rule 19A;

<sup>1</sup>*Chandmull v. Dhanraj*, A.I.R. 1920 Cal. 416 (Greaves J.).

<sup>2</sup>*Gopal v. Syed*, A.I.R. 1944 Pat. 177.

<sup>3</sup>*Nagpur Glass Works Ltd. v. Onama Glass Works, Ltd.*, A.I.R. 1938 Nag. 239 (Vivian Bose J.).

<sup>4</sup>*Braj Beshari v. Arun Coomar*, I.L.R. (1953) 2 Cal. 309 (Das and Guha Ray JJ.).

<sup>5</sup>*Ramdayal v. Nurhury* (1894) I.L.R. 18 Bom. 368.

<sup>6</sup>*Khetsidas v. Narotamdas* (1908) I.L.R. 32 Bom. 152.

<sup>7</sup>*Ramrathan v. Annamalai*, I.L.R. 55 Mad. 421 ; A.I.R. 1931 Mad. 825, 826 (Curgenvven J.).

<sup>8</sup>*Janki Das v. Krishalya Devi*, A.I.R. 1943 Lah. 207, 208 (Beckett J.) (obiter).

<sup>9</sup>*State of Punjab v. Sodhi Sukhdev Singh* (1961) 2 S.C.R. 371 ; A.I.R. 1961 S.C. 493, 513, para. 48.

<sup>10</sup>See also *Governor-General-in-Council v. Peer Mohd.* A.I.R. 1950 E.P. 228, 234 (F.E.).

<sup>11</sup>See also *Brijnath Kedarnath v. State* (1957) Criminal Law Journal 134 (Madhya Bharat).

<sup>12</sup>See also A.I.R. 1944 Lah. 209, 212.

<sup>13</sup>*Ijjatali Talukdar v. Emp.*, A.I.R. 1943 Cal. 539.

(c) Revised R.S.C., Order XXIV, rule 15 and Revised Order LXXVII 12, and the under-mentioned case<sup>1</sup>.

(There is vast literature in England on Crown privilege, but it is unnecessary to go into it for the present purpose.)

4. The rule is also subject to section 123, Indian Evidence Act<sup>2</sup>. As to the meaning of the words "affairs of State" in section 123, see the observations of the Supreme Court<sup>3</sup>, that they are identical with the words "matters of State".

5. It is considered, that the position on the subject, as it has emerged from the decision of the Supreme Court, should be codified. It will suffice if a proposition is inserted to the effect that the rule does not apply to documents relating to affairs of State.

6. Reference may be made to the express provision in section 94(3), Criminal Procedure Code, on the subject.

7. Generally, as to procedure to be followed when the Crown claims privilege, the under-mentioned cases may be seen<sup>4,5</sup>.

#### Order XII, rule 2

A recommendation has been made in the Fourteenth Report<sup>6</sup>, to empower the court to award penal costs against a party unreasonably neglecting or refusing to admit documents. (Such costs will be in addition to the costs awarded at present under this rule.)

After some consideration, it has been decided not to make this change, as it is felt that the existing provision is adequate.

#### Order XII, rule 6

1. Certain local Amendments change this rule on two points—

(i) They empower the court to pass a judgment (on admission) of *its own motion also*<sup>7</sup>, and

(ii) they provide that on such judgment, etc., a decree shall be drawn up.

<sup>1</sup>*In re Grosvenor Hotel, London* (No. 2) (1964) 3 W.L.R. 992.

<sup>2</sup>*Lakhu Ram v. Union of India*, A.I.R. 1960 Pat. 192, 193 makes it clear that it is subject to section 123, Evidence Act.

<sup>3</sup>A.I.R. 1961 S.C. 493, 503.

<sup>4</sup>*Ditai v. Dominion of India*, A.I.R. 1951 Bom. 72 (Chagla C. J.).

<sup>5</sup>(*Miss*) *Rajul Raojibhai v. Provincial Government*, I.L.R. 1950 Nag. 690; A.I.R. 1951 Nag. 212.

<sup>6</sup>14th Report, Vol. I, pages 316-317, para. 32.

<sup>7</sup>Under the existing law, this cannot be done. *Abinash v. Surjya*, I.L.R. (1948) 1 Cal. 141, 145.

See, particularly, the Madras Amendment made in pursuance of the recommendation of the Civil Justice Committee<sup>1</sup>.

2. It is considered that these changes are unnecessary. Hence no amendment is proposed.

*Order XIII, rule 2*

A provision has been added to exclude documents produced for cross-examination, etc., Cf. Order VII, rule 18(2).

*Order XIII, rule 5*

The Bombay Amendment to Order XIII, rule 5 and Order VII, rule 17 provides for filing of translation of entries in other languages. See also Madhya Pradesh and Punjab Amendments to Order VII, rule 17; the latter provides for transliteration also.

This is a matter for Civil Rules, and need not be incorporated in the Code of Civil Procedure.

*Order XIII, rule 7*

The Madras Amendment prohibiting return of a document, etc., which has become void, has been noted. It is considered that the provision in Order XIII, rule 9(1), second proviso, should suffice for normal cases.

*Order XIII, rule 9*

1. Under Order XIII, rule 9(1), where a person who has produced a document wants its return (before the suit is disposed of), the court may allow such return under the proviso, if he delivers to the proper officer a certified copy, etc. Now, when the document was produced by a witness, this rule creates difficulty, as he has also to deliver a certified copy (and there is no provision as to re-imbursing him for its expenses). The Civil Justice Committee<sup>2</sup> suggested that the party exhibiting the document should be required to pay the cost of preparing the copy, etc.

2. The problem has been tackled in different ways by local Amendments. The Madras Amendment empowers the court to require the party concerned to substitute a certified copy within a certain time, failing which the document is to be returned to the applicant. The Punjab Amendment provides, that the cost shall be recoverable

<sup>1</sup>Civil Justice Committee (1924-25), Report, page 563, para. 16, bottom.

<sup>2</sup>Cf. Civil Justice Committee (1924-25) Report, pages 564-565, para. 16.

from the party concerned. The Madhya Pradesh Amendment provides, that the court shall order the party concerned to pay the cost.

3. It is considered, that the best course would be to allow the witness himself the facility of putting in a simple copy; the copy can be compared, etc., and then the original returned.<sup>1</sup> Necessary change has been proposed.

*Order XIV, rule 1(5)*

1. The examination of the parties which is referred to in Order XIV, rule 1(5), appears to be the examination under Order X, rule 2. It is considered that this should be made clear. Necessary change has been proposed.

2. The framing of issues, it is felt, should take place after hearing the parties or pleaders. A provision to that effect has been added.

*Order XV, rule 2*

Local Amendments made by Madras, Andhra Pradesh and Kerala provide that *whenever* a judgment is pronounced under Order XV, rule 2, a decree shall follow.

It appears to be unnecessary to insert such an express provision, in view of section 33.

*Order XVI, rule 1*

1. This carries out the recommendation made in the Fourteenth Report<sup>2</sup>. The recommendation in the Fourteenth Report is confined to witnesses summoned *through* court, but, in view of existing Order XVI, rule 1A, the provision proposed can be applied to all witnesses. The object is to lay down a procedure for filing a list of witnesses by the parties, and to provide that a person not mentioned in the list shall not be produced as a witness without the permission of the Court.

2. In sub-rule (2), the positive form has been considered preferable to the negative form—"No person shall be permitted", etc.

3. The Fourteenth Report recommended a period of 30 days, but it is considered that a period of 10 days should suffice.

*Order XVI, rule 1 and credibility*

A recommendation has been made in the Fourteenth Report<sup>3</sup> to the effect that the credibility of a witness should

<sup>1</sup>Cf. Order 13, rule 5(3), as to account books.

<sup>2</sup>14th Report, Vol. I, page 325, para. 45 and page 328, para. 50.

<sup>3</sup>14th Report, Vol. I, pages 327-328, para. 49.

not be attacked on the ground that he has not been summoned through the court. It is felt that it is unnecessary to insert such a provision. A rule as to the value of evidence need not be inserted in the Civil Procedure Code.

*Order XVI, rule 1A*

Since the provision regarding list of witnesses has been transferred<sup>1</sup>, consequential changes are proposed in this rule.

*Order XVI, rule 2*

Where a summons is served by a party, the expenses of the witness should be paid to the witness by the party or his agent, and need not be deposited in the court. The change proposed is intended to make that clear. Cf. the Calcutta Amendment to Order XVI, rules 2 and 8 and the Madras Amendment, Order XVI, rule 2(4).

*Order XVI, rule 7A (New)*

This rule is new, and has been inserted to facilitate the service of summons by a party. It carries out the recommendation made on the subject in the Fourteenth Report<sup>2</sup>, to the effect, that the Calcutta Amendment (under which parties are in the first instance responsible for bringing witnesses) may be adopted subject to the safeguard that the impartiality of a witness so brought should not be suspected. Except in one respect, the proposed rule follows the provisions of Order XVI, rule 7A, inserted by the Calcutta Amendment. One important departure from the Calcutta Amendment may, however, be noted. Under the Calcutta Amendment, under rule 7A(1), the court "shall make over" the summons to the party applying therefor, except where it appears to the court that the summons should be served by the court. Under the Bombay and Gujarat Amendments, Order XVI, rule 1B, the court may, on the application of any party, permit the service of summons by that party. The discretion of the court has been put more clearly in the Bombay Amendment, which has been followed in the draft rule on this point. See also the amendments made to Order XVI, rule 8 by the High Courts of Allahabad, Andhra Pradesh, Kerala, Orissa, Madras, Patna and Rajasthan.

*Order XVI, rule 8*

This is consequential, and is intended to exclude a summons handed over to parties for service<sup>3</sup>, from the operation of the rule. Compare Order XVI, rule 8(1), as amended by the Calcutta High Court.

<sup>1</sup>See Order 16, rule 1 (proposed).

<sup>2</sup>14th Report, Vol. I, page 326, para. 48 and page 328, top, para. 49, middle.

<sup>3</sup>See Order 16, rule 7-A proposed.

*Order XVI, rule 10*

1. Where a summons is served by a party,<sup>1</sup> the person effecting service should, it is felt, always be examined by the court under Order XVI, rule 10. That has been provided for in the proposed amendment.

2. It is considered, that ordinarily process fee should not be charged for the issue of a proclamation, warrant or attachment under rule 10. These processes are necessitated by reason of the disobedience of a witness to a lawful order of the court, and should be issued without charging fees.

Necessary change has been proposed.

*Order XVI, rule 12*

1. Order XVI, rule 12 empowers the court to impose a fine upon a witness who has disobeyed a summons for attendance in court. The wording used is, "The Court may, where such person does not appear, etc.". Now, the question has arisen whether, before the power under this rule can be exercised, it is essential that the Court should have issued a proclamation under Order XVI, rule 10(2) or a warrant under Order XVI, rule 10(3) or an order of attachment of property under Order XVI, rule 10(3), latter half. Conflicting opinions have been expressed on this point, as follows:—

(i) One view is that, the fine under rule 12 cannot be imposed unless the property of the witness has been attached<sup>2-3</sup>. According to this view, rules 11 and 12 have to be read together, and rule 12 deals with the alternative situation to that dealt with in rule 11. Since rule 11 applies only where there is an attachment, rule 12 will also apply only where there is attachment. A contrary view has, however, been expressed in an observation of the Lahore High Court<sup>4</sup>.

(ii) Another view is, that no fine can be imposed unless and until there has been a *proclamation* which has been disobeyed<sup>5</sup>. According to this view the words "such person" in rule 12 refer to that person who is described during the whole of rules 10 and 11. If a proclamation is issued and the witness fails to obey it and fails to show that he did not receive notice, the fine may be imposed. This view seems to assume that the words 'does not appear, or appears but fails,

<sup>1</sup>See Order 16, rule 7A (proposed).

<sup>2</sup>*Sib Kumari v. Secretary of State*, A.I.R. 1920 Cal. 46.

<sup>3</sup>*Ashutosh v. Secretary of State*, A.I.R. 1920 Cal. 655 (1).

<sup>4</sup>*Bantwari Lal V. Emp.*, A.I.R. 1928 Lah. 979, 980, right-hand (Shadi Lal C.J.).

<sup>5</sup>*Amir Chand v. Jotwaha Singh*, A.I.R. 1928 Lah. 473 (Harrison J.).

etc.", in rule 12 refer to appearance on the date mentioned in the proclamation.

(iii) According to the third view<sup>1</sup>, either a proclamation under sub-rule (2) of rule 10 or a warrant or an attachment of property under sub-rule (3) of rule 10 should have been ordered before the fine can be imposed under rule 10. According to this view, the words "such person" in rule 12 refer to sub-rules (2) and (3) of rule 10.

(iv) Another view is, that neither attachment nor proclamation mentioned in rule 10(2) or (3) is necessary, and that the words "such person" in rule 12 refer to the person mentioned in rule 10(1), who has been referred to in all the subsequent provisions as "such person"<sup>2,3</sup>.

2. On the language of the existing rule, there is much to be said for each of these views. But there is no reason why a provision in the amplest terms should not be made so as to apply rule 12 in all cases where the witness fails to comply with a summons. It may be noted, that the object of the various processes in rules 10, 11 and 12 is to compel the attendance of the witness. (See section 32 opening lines.) The basis of the jurisdiction is the disobedience to the summons by the witness. The word "may" in sub-rules (2) and (3) of rule 10 shows that the issue of a proclamation, etc., is discretionary.

3. It is, therefore, considered desirable to make the position clear. At the same time, it is proposed that where none of the three processes has been issued, notice to show cause should be given to the person concerned, before a fine can be imposed.

#### Order XVI, rule 16

Under the Punjab Amendment, where a presiding officer is absent, the next date of hearing can be intimated by another Judge or by a court-official nominated for the purpose. The previous Punjab view was, that if the Judge is absent, the Reader cannot fix the date<sup>4-5,6</sup>. (Where the Judge has authorised the Reader under the Local Civil Courts Act, it can be done, according to the Madras High Court.)<sup>7</sup>

<sup>1</sup>*Hirdey Narain v. Emp.*, A.I.R. 1929 All. 850.

<sup>2</sup>*In re Narasayya*, I.L.R. 48 Mad. 541 ; A.I.R. 1925 Mad. 147 (D.B.).

<sup>3</sup>*Ramdeo Prasad v. State*, A.I.R. 1951 All. 415 (D.B.).

<sup>4</sup>See *Hukam Chand v. Mani Shibrat Das*, A.I.R. 1934 Lah. 934 (Hilton J.).

<sup>5</sup>See also *Gulam Haidar v. Divan Iqbal Nath*, A.I.R. 1936 Lah. 1000.

<sup>6</sup>See also *Lalla Prasad v. Nand*, I.L.R. 22 All. 56 (F.B.).

<sup>7</sup>See *S. M. Raja Goundar v. Sabapathi*, A.I.R. 1952 Mad. 798.



It is considered unnecessary to adopt the Punjab Amendment, the matter being one of minute detail.

*Order XVI, rule 21*

1. Order XVI, rule 21 provides that where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable. The first point that has arisen under this rule is as to the mal-practice of one party calling the other party as a witness. This practice has been condemned more than once by the Privy Council<sup>1-2</sup>. Notwithstanding such condemnation, the practice appears to persist<sup>3</sup>.

2. Another point is that this rule applies only where a party is summoned at the instance of the *other party*<sup>4</sup> to give evidence, etc.

3. The third point is the question of expenses incurred by a party who appears as his own witness. Several High Courts<sup>5</sup> have inserted a provision to the effect, that when a party to the suit gives evidence (on his own behalf), the court may in its discretion permit him to include in the costs of the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses of similar standing. Without such a provision, the rule does not seem to permit the award of travelling expenses incurred by a party giving evidence on his own behalf<sup>6</sup>.

4. All these points have been considered, but it is felt that an express provision thereon is not necessary.

(So far as the question of costs of party is concerned, there is an elaborate discussion in the Report of the Civil Justice Committee)<sup>7</sup>.

*Order XVII, rule 2 and disposal on merits*

1. Order XVII, rule 2 says that if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by

<sup>1</sup>*Lal Kunwar v. Chiranjit*, I.L.R. 32 All. 104 (P.C.).

<sup>2</sup>*Kishori Lal v. Chimni Lal*, I.L.R. 31 All. 116, 122 (P.C.).

<sup>3</sup>See *Pir Gouda v. Vishtwanath*, A.I.R. 1956 Bom. 251 (Gajendragadkar J.).

<sup>4</sup>*Kamiah Chetty and Co. v. Subba Rao*, A.I.R. 1935 Mad. 244 (Beasley C.J.).

<sup>5</sup>See Calcutta, Madras and Kerala Amendments to Order 16, rule 21.

<sup>6</sup>*Kamiah Chetty and Co., v. Subba Rao*, A.I.R. 1935 Mad. 244.

<sup>7</sup>Report of the Civil Justice Committee (1924-25), paras. 518, 519, Chapter 44, para. 1, middle, and subsequent paragraphs.

Order IX or make such other order as it thinks fit. Thus, the court may—

- (i) act under Order IX, (but it is not bound to do so, as has been stressed by the Supreme Court)<sup>1</sup>;
- (ii) grant further adjournment; or
- (iii) make such other order as it thinks fit.

2. The words "such other order" have been interpreted in a number of decisions, but there still remains some uncertainty about their exact scope. Ordinarily, the court would not, in the absence of a party, proceed to dispose of the suit "on merits" under this rule. But there are observations to the effect that the words "such other order" do not rule out disposal on the merits where sufficient material is available<sup>2-3-4</sup>. On the other hand, there are rulings to the contrary<sup>5</sup>.

3. The matter has some practical importance as regards the remedy available to the plaintiff or defendant affected by the actual order passed under Order XVII, rule 2.

4. There is a decision in an earlier Madras case<sup>6</sup> to the effect that when a plaintiff has closed his case and there is evidence which, if unrebutted, would prove his case, it could hardly be deemed to be a judicial exercise of discretion to dismiss the suit for default; the defence evidence should, it was held, have been recorded in plaintiff's absence, and the case disposed of on the merits. This case does not seem to have been expressly over-ruled in any of the later Madras cases. It follows a Bombay decision<sup>7</sup>. This decision was, however, referred to in the Full Bench case of *Pichamma*<sup>8</sup> and would seem to have been impliedly over-ruled by that case, as the judgment of Kumaraswami Sastri J. which was concurred in by Sadasiva Aiyar J. in *Pichamma's case*, holds that if the matter is treated as falling outside Order IX, there would be hardship to the parties because the remedies under Order IX would not be available. (The actual facts in *Pichamma's case* were of the defendant's absence and of a

<sup>1</sup>Cf. A.I.R. 1955 S.C. 425, 433.

<sup>2</sup>*Basalingappa v. Shidramappa*, A.I.R. 1943 Bom. 321, 324, right (F.B.).

<sup>3</sup>*Rukam Shah v. Shankargouda*, A.I.R. 1941 Bom. 83, 84, right (Beaumont C.J. and Wassoodew J.).

<sup>4</sup>*Tulsiram v. Sitaram*, A.I.R. 1959 Cal. 389.

<sup>5</sup>*Ram Adhin v. Ram Bharose*, A.I.R. 1925 All. 182 (Mukherji and Dalal JJ.).

<sup>6</sup>*Subramania v. Munusamiya*, A.I.R. 1916 Mad. 890, 897 (right) (Phillips J.).

<sup>7</sup>*Ningappa v. Gowdappa*, (1905) 7 Bom. Law Reporter 261.

<sup>8</sup>*Pichamma v. Sreeramulu*, (1918) I.L.R. 41 Mad. 286 ; A.I.R. 1918 Mad. 143 (F.B.).

judgment being delivered in favour of the plaintiff; and the actual decision was that rules 2 and 3 are mutually exclusive and independent, so that if the party fails to appear, rule 2 applies and the stringent provisions of rule 3 should not apply.) Rule 3, it was held, should be treated as applying only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reasons for having not done what they had directed to do. Since the consideration of hardship to the parties was stressed there, it would appear that a decision on the "merits" so as to exclude the application of Order IX at least in cases where the absence was of the *defendant*, is ruled out by *Pichamma's case*. If the default consists in non-appearance, it is rule 2 dealing with such a case specifically that in terms applies; this is the view reinforced by later decisions<sup>1,2</sup>. That the suit should not necessarily be dismissed for the plaintiff's absence and that the court has got a discretion to grant an adjournment was stressed in a Lahore case also<sup>3</sup>. Where the plaintiff had at an earlier hearing made a definite case, which if rebutted, would entitle him to a decree, it is not the only course open to the court to dismiss the case for default of appearance; rather the court should exercise a discretion and adjourn hearing as stressed by Fazil Ali J.<sup>4</sup>

In fact, as was observed by Kumaraswami Sastri J. in the *Pichamma's case*, "no Judge with any sense of justice would dismiss a just claim which he considers proved simply because a party fails to appear on an adjourned date".

5. Perhaps an approach to the matter would be clear, if two situations are kept apart, namely, plaintiff's absence and defendant's absence. In the former case, a misunderstanding of the law to the effect that the court is *bound* to dismiss the suit causes hardship. In such a case, the position is that—

- (i) an adjournment can be granted;
- (ii) a decision on the merits *in the plaintiff's* favour could cause no grievance to any party. Question of hardship will arise only if a decision on merits is given against the plaintiff.

In the case of the defendant's absence,—

- (a) an adjournment can be granted, or
- (b) a decision subject to the setting aside procedure under Order IX, rule 13 would cause no grievance. A decision strictly on the merits, in the sense that the

<sup>1</sup>*Ellammal v. Karuppan*, A.I.R. 1936 Mad. 625.

<sup>2</sup>*Gurusanthayya v. Verayya*, A.I.R. 1952 Mad. 825.

<sup>3</sup>*Langar Khan v. Zakar*, A.I.R. 1934 Lah. 56 (Jai Lal J.).

<sup>4</sup>*Chamak Lal v. Mauji*, A.I.R. 1929, Pat. 248 (Fazl Ali J.).

remedy under Order IX, rule 13 is to be excluded, would cause hardship to defendant.

6. So far as the inter-relationship of rules 2 and 3 is concerned, the matter can be dealt with separately<sup>1-2</sup>. The question now is of the exact scope and application of rule 2.

7. Even in the case of the absence of the plaintiff, where the suit is decreed, he would have no grievance. It is only where the suit is dismissed on the merits that he may have a grievance because, as stressed by the Madras High Court, the remedy under Order IX, rule 9 would be lost. (To this extent, the Allahabad Amendment to rule 2 is stringent as compared with the Madras view. On the other hand, in cases where the Allahabad Amendment results in a decree in favour of the plaintiff, it would be beneficial and acceptable even according to the Madras view.)

8. In view of the obscurity of the present position, a clarification is considered desirable.

While a provision authorising the Court in every case to dispose of the suit as if the parties had appeared may be abused, there is no harm, it is felt, if a limited power to do where the evidence of the defaulting party is substantially over be inserted, as in the Allahabad Amendment.

Necessary change is proposed.

*Order XVII, rule 2 and Allahabad Amendment*

Under the Allahabad Amendment to Order XVII, rule 2—

(i) where a substantial portion of the evidence is concluded, the court may (even if a party is absent) dispose of the suit on merits. This was construed as confined to cases where *the party failing to appear has finished his evidence*<sup>3</sup>;

(ii) if a pleader is present, then even if he is engaged only for making an application, the party is deemed to be present<sup>4</sup>;

The first point has already been dealt with. As regards the second, it has been observed by the Bombay

See amendment proposed to Order 17, rule 3.

<sup>2</sup>See also *Jhanda Singh v. Saddiq*, A.I.R. 1924 Lahore 545.

<sup>3</sup>*Mst. Jaggo v. Kanhaiya*, A.I.R. 1957 Al. 344. See also A.I.R. 1957 All. 238 and A.I.R. 1962 All. 515.

<sup>4</sup>As to the effect of Allahabad Amendment, see—

(i) *Baldeo Singh v. Chhaja Singh*, A.I.R. 1931 All. 703 ;  
 (ii) *Jhandoo Mal v. Khalsa Singh*, A.I.R. 1940 All. 305 ;  
 (iii) *Filak Singh v. Pradyumna Singh*, A.I.R. 1937 All. 347.

High Court<sup>1</sup>, that the Allahabad Explanation to Order XVII, rule 2 regarding pleaders may be said to have changed the provisions of Order V, rule 1, in their application to Order XVII, rule 2. In the absence of the Explanation regarding pleaders, where a pleader is appearing only for applying for adjournment, and withdraws after the adjournment is refused, the case is one of the court proceeding *ex parte*<sup>2</sup>.

*Order XVII, rule 3*

1. This is intended to define clearly the scope of rule 3, so as to state the action to be taken by the Court when—

- (i) the parties are present, and
- (ii) the parties are absent.

Compare, *Pichamma v. Sreeramulu*<sup>3</sup>, which contains a useful discussion on the subject.

2. The following discussion of the views of various High Courts will show that at present opinion on the point is not uniform:—

**MADRAS.**—The Court should, in a case where the plaintiff is absent, proceed under rule 2 and dismiss the suit for default, so that the plaintiff may have an opportunity to apply under Order IX, rule 9 to set aside the dismissal<sup>4</sup>.

**BOMBAY.**—The Court should proceed under rule 2 and dismiss the suit for default<sup>5</sup>, but if the evidence has been closed it should proceed under rule 3 and deal with the suit on the merits<sup>6-7</sup>.

**LAHORE.**—Makes a distinction between cases where there are no sufficient materials on the record and cases where there are such materials. In the former case, the Court should proceed under rule 2<sup>8</sup>, but in the latter case it may proceed to decide the suit under this rule<sup>9</sup>.

<sup>1</sup>*Basalingappa v. Shidrammappa* A.I.R. 1943 Bom. 321, 324.

<sup>2</sup>*Habib Baksh v. Johri Mal*, A.I.R. 1928 All. 760.

<sup>3</sup>*Pichamma v. Sreeramulu* (1918) I.L.R. 41 Mad. 286 ; A.I.R. 1918 Mad. 143 (F.B.).

<sup>4</sup>*Chandramathi v. Narayanswami*, (1910) I.L.R. 33 Mad. 241  
*Pichamma v. Sreeramulu*, (1918) I.L.R. 41 Mad. 286 ; A.I.R. 1918 Mad. 143, 147 (F.B.) ; *Elammal v. Karuppan Chetti*, A.I.R. 1936 Mad. 625 ; *Guru Santhayya v. Veerayya*, A.I.R. 1952 Mad. 825.

<sup>5</sup>*Basayya v. Alayya*, A.I.R. 1925 Bom. 328 ; *Shrimant v. Smith* (1890) I.L.R. 20 Bom. 736.

<sup>6</sup>*Irappa v. Sidava*, A.I.R. 1931 Bom. 111.

<sup>7</sup>See also discussion in *Basalingappa v. Shidrammappa*, A.I.R. 1943 Bom. 33 (F.B.).

<sup>8</sup>*Hargopal v. Harish Chander* (1919) Punj. Rec. No. 48, p. 120, 47 I.C. 596 ; *Sher Ali v. Mangu*, (1919) Punj. Rec. No. 150, p. 395, 52 I.C. 292 ; both cited in Mulla, Code of Civil Procedure, (12th edition), pages 714-715.

<sup>9</sup>*Jhanda Singh v. Sadiq*, (1924) I.L.R. 5 Lah. 218 ; A.I.R. 1924 Lahore 545.

**ALLAHABAD.**—The Court should proceed under rule 2 and not under this rule<sup>1</sup>. But, by an amendment of rules 2 and 3 made by the Allahabad High Court, the Court has power to proceed to decide the suit on the merits<sup>2</sup> in certain cases under rule 2 also.

**PATNA.**—This rule does not apply unless the hearing has commenced<sup>3</sup>.

**CALCUTTA.**—In order to apply the procedure of rule 3, two elements must be present, *viz.* (1) the adjournment must have been at the instance of the party, and (2) there must be materials on the record for the Court to deal with the suit; the presence of one element without the other does not justify<sup>4</sup> the application of rule 3.

*Order XVII, rules 2 and 3 compared*

1. The points of difference between Order XVII, rules 2 and 3 may be analysed as follows:—

Rule 2	Rule 3
(a) Applies <i>generally</i> to all cases where hearing is adjourned.	(a) Applies only where adjournment is granted— (i) <i>at the instance of a party</i> ; and (ii) by way of granting time for a particular purpose.
(b) Is confined to cases where the parties or any of them fail to <i>appear</i> .	(b) Not confined to non-appearance (as the language stands at present), and applies where there is failure to do the act for which time was granted.
(c) Court can— (i) proceed to <i>dispose</i> of the <i>suit</i> in one of the modes directed by Order IX, or (ii) make such other order as it thinks fit.	(c) Court may proceed to <i>decide</i> the suit <i>forthwith</i> .
(d) Object is to state the consequences of non-appearance. Emphasis is on <i>discretion</i> of Court.	(d) Emphasis is on the court's power to proceed, so that non-performance of the act in question need not interrupt the progress of the suit.

<sup>1</sup>*Ganish Lal v. Debi Das*, (1925) I.L.R. 47 All. 140, 146; A.I.R. 1925 All. 267; *Ram Adhin v. Ram Bharose*, (1925) I.L.R. 47 All. 181, 185; A.I.R. 1925 All. 182. *But see Badam v. Nathu*, (1903) I.L.R. 25 All. 194; *Gaura Bibi v. Ghasita*, (1912) I.L.R. 34 All. 123.

<sup>2</sup>*Ram Dulari v. Bholi*, A.I.R. 1935 All. 398.

<sup>3</sup>*Mahabir Prasad v. Sheodayal*, (1928) I.L.R. 7 Pat. 236; A.I.R. 1928 Pat. 167.

<sup>4</sup>*Brojendra v. Promatha*, A.I.R. 1933 Cal. 412.

2. Cases when the two rules overlap are those where an adjournment is granted (rule 2) at the instance of a party—(rule 3), and there is non-appearance as well as non performance of the act for which adjournment was sought, so that both the rules are satisfied.

It is these situations which have presented difficulties and raised questions, leading to three different approaches, in cases of non-appearance of the parties or either of them. The three different approaches are (i) only rule 2 should be applied; (ii) rule 3 can be applied; (iii) if there are materials on record, rule 3 may apply, otherwise rule 2 applies.

The proposed rule<sup>1</sup> clarifies the position.

*Order XVIII, rule 2*

This follows local amendments<sup>2-3</sup>. The object is to empower the court to direct or permit a party to examine any witness at any stage. A similar recommendation was made by the Civil Justice Committee also<sup>4</sup>.

*Order XVIII, rule 3*

The Allahabad Amendment to Order XVIII, rule 3, which inserts elaborate provisions regarding "statement of case", etc., has been considered. It is felt that no such change is necessary.

*Order XVIII, rule 3 and examination of party*

The Fourteenth Report<sup>5</sup> has recommended that, ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. It is, however, considered unnecessary to make any such statutory provision. This should be the ordinary rule<sup>6</sup>; but a rigid provision on the subject does not seem to be desirable.

*Order XVIII, rule 5*

The Fourteenth Report<sup>7</sup> has recommended that a provision empowering the Judge to dictate the *verbatim* record of evidence should be inserted, and that the rules on the subject should be brought into line with the more elaborate provisions contained in section 356 of the Code of Criminal Procedure.

<sup>1</sup>Order XVII, rule 3 (proposed).

<sup>2</sup>See Calcutta Amendment, Order 18, rule 2A and Andhra Pradesh, Madras, Punjab, etc. Amendments to Order 18, rule 2.

<sup>3</sup>The provision in the Madhya Pradesh Amendment (Order 18, rule 2) is expressed in the widest terms.

<sup>4</sup>Civil Justice Committee (1924-25) Report, page 564, middle.

<sup>5</sup>14th Report, Vol. I, page 340, para. 71, last sub-para.

<sup>6</sup>Cf. *Gurdial Kaur v. Pyara Singh*, A.I.R. 1962 Pun. 180, 181.

<sup>7</sup>14th Report, Vol. I, page 345, para. 80.

After some consideration, it is felt that the existing provisions are adequate. It is thought, that the existing wording "under the personal direction....." should cover dictation. The memorandum under Order XVIII, rule 8 should, of course, continue to be made<sup>1</sup>.

*Order XX, rule 1*

1. This is in implementation of the Fourteenth Report<sup>2</sup> The main object is to provide that the Judge need not read out the full judgment, and that it would suffice if the findings and the final order are pronounced.

2. Certain local Amendments<sup>3</sup> to rule 1 provide for dictation of the judgment<sup>4</sup>, but it is considered, that no express provision is necessary on the subject.

*Order XX, rule 2*

1. Order XX, rule 2 provides that a Judge *may* pronounce a judgment written but not pronounced by his predecessor. Though the word used is "may", one view is, that the rule casts a duty on the succeeding Judge, and it is mandatory upon the succeeding Judge to pronounce the judgment written by his predecessor, and he cannot re-open the whole matter<sup>5</sup>. But a contrary view has been taken in some cases. The former view supports itself on the ground, that the Legislature did not intend to leave an uncontrolled and unregulated discretion to the succeeding Judge, and that a duty is cast on the Judge to pronounce a judgment in the interests of the public and to save time.

2. The section seems to confer a power, but also contemplates that the power should *ordinarily* be exercised. It is, however, considered unnecessary to insert any rigid rule. No change is, therefore, suggested.

*Order XX, rule 6 and registered address*

The question whether a provision should be inserted to the effect that the decree should mention the address for service (consequential on the proposed addition of a rule<sup>6</sup> requiring a pleading to be accompanied by the

<sup>1</sup>*Cf. Pramoda v. Harish*, I.L.R. 55 Cal. 1084 ; A.I.R. 1929 Cal. ; 78 (Page I.).

<sup>2</sup>14th Report, Vol. I, page 348, para. 87.

<sup>3</sup>*e.g.* Madras Amendment.

<sup>4</sup>*Cf.* Code of Criminal Procedure, 1898, section 367 (1).

<sup>5</sup>*N. Venkatesu v. N. Suryanarayana*, A.I.R. 1959 Andhra Pradesh 16 (D.B.). *Hargulal v. Abdul Gany*, I.L.R. 14 Rangoon, 136 ; A.I.R. 1936 Rangoon 147, 149 (F.B.) ; *Lachman Prasad v. Ram Kishan*, I.L.R. 33 All. 236 (Knox and Karamat Hussain JJ.).

<sup>6</sup>See Order 6, rule 14A (proposed).



address for service) has been considered. (Compare the amendment made by the High Courts of Madras and Lahore).

It is felt, that no such provision is necessary.

*Order XX, rule 11*

Certain local Amendments<sup>1</sup> provide, that where the court proposes to pass an order for payment by instalments, the decree-holder shall be given an opportunity of being heard, but his consent should not be required. One result of this would be, that the court has to exercise a judicial discretion, and the order would be appealable under section 47, as has been held in cases under the similar Madras Amendment<sup>2</sup>.

It is considered that such a change need not be made. The present provision is a good and just one.

*Order XX, rule 12*

1. This rule is new, and is intended to provide that a decree for specific performance of contracts for the sale or lease of immovable property should specify the period within which the purchase money or other amount is to be paid.

2. An elaborate provision regarding decrees for specific performance of such contracts was suggested in an earlier report of the Law Commission<sup>3</sup>. The recommendation there was to the effect, that complete relief (such as possession, etc., rescission, refund of earnest money, etc.), in such a suit should be available by application in the *suit itself* (instead of in execution as at present), and that appropriate provision should be made in the Civil Procedure Code enabling such applications to be made and orders thereon and also for appeals.

3. It is considered, that so far as a provision authorising the making of an *application* and orders thereon is concerned, section 28 of the Specific Relief Act, 1963 (read with section 22) would be adequate. So far as appeals from such orders are concerned, the orders, it is considered, would fall within the definition of "decree" given in section 2(2) of the Civil Procedure Code. It is thought, that the only specific provision which is required is to the effect that the decree should specify the period for payment of the purchase-money or other amount due under the decree.

Necessary amendment is proposed.

<sup>1</sup>See Madras and Nagpur Amendments.

<sup>2</sup>See case-law reviewed in *Muthuswami v. Ramu*, A.I.R. 1958 Mad. 460.

<sup>3</sup>9th Report (Specific Relief Act), pages 40-41, para. 18 read with pages 6-17, para. 35.

*Order XX, rule 19*

This is consequential<sup>1</sup>.

It is considered unnecessary to amend Order XX, rule 19(3).

*Order XXA, rule 1*

This is in implementation of the Fourteenth Report<sup>2</sup>. The object is to make specific provisions regarding the power of the court to award costs in respect of certain items of expenditure, including notice expenses, typing charges, expenses of witness and of obtaining copies, etc.

*Order XXA, rule 2*

This rule proposes that before the fees of counsel can be taxed, a certificate of the counsel about payment of the fees should be filed. The object is to avoid false claims in these matters.

*Order XXA and cost of hearing*

The question whether the court should have power to record, after a particular hearing, its opinion, as to whether the costs of the hearing have been increased by undue length, has been considered. It is felt that no such provision is necessary.

(Such a provision exists in Order LXV, rule 8 of the Supreme Court Rules of South Australia quoted below:—

"8. (1) On the hearing of a cause or matter the Court or Judge before whom it is heard shall if requested so to do by any party entitled to attend on such hearing, and may, without any request, certify to what time has been reasonably occupied on such hearing, and such certificate shall be final.

(2) If on such certificate being given it shall appear that the hearing has been unduly prolonged the Court or Judge may order that the party in default pay to any other party the costs occasioned by the undue prolongation.)".

<sup>1</sup>See Order 8, rule 6A (proposed).

<sup>2</sup>Cf. 14th Report, Vol. I, following paragraphs:—

(a) and (b)—page 480, para. 11, 3rd and 4th sub-paras.

(c) and (e)—page 482, paras. 15 and 17.

(d) pages 483-484, para. 20.

(f) page 484, para. 23, second sub-para.

Other recommendations regarding costs contained at page 483, para. 18, 3rd sub-para., page 483, para. 19, last sentence, and page 484, para. 24 have been left for implementation by the High Courts.

## Order XXI, rule 1

1. This is in implementation of the Fourteenth Report<sup>1</sup>, and also follows (in part) local Amendments. The object is—

(i) to enable parties to remit money to court by money order or through bank (see Fourteenth Report);

(ii) to provide that payment to the decree-holder outside court should be by money-order or through bank or other mode of payment evidenced in writing (see Fourteenth Report and Allahabad Amendment);

(iii) to make it clear, that on an amount paid into court or in accordance with the orders of the court, interest shall cease to run from the date of the service of notice. (See Bombay and Patna Amendments.)

2. A provision for notification of the payment has been added. It is considered, that even a payment under rule 1(1) (c) should be notified.

3. A special form of money order has been referred to in the *Explanation* added by the Lahore High Court, and the word "special" has also been used by the Patna High Court, but this appears to be unnecessary.

Money  
Orders.

4. The question whether the introduction of payment by money order would increase the work of the courts and create opportunities for fraud has been considered. It is thought, that the experiment is worth trying, as has been done by several High Courts. (See Local Amendments made by the High Courts of Allahabad, Calcutta, Madhya Pradesh, Patna, Orissa and Punjab). It is presumed, that no serious practical difficulties would arise.

Interest.

5. As to sub-rule (4) dealing with interest, compare local Amendments made by the High Courts of Bombay and Patna and also Order XXIV, rule 3 and under-mentioned decisions<sup>2,3,4</sup>.

6. The question whether the decree-holder, to whom notice of payment made by the judgment-debtor is given, should be allowed some time for coming into the Court and receiving payment of the amount, has been considered with reference to the point whether interest should be allowed to run until such time expires. No such provision is, however, considered necessary.

## Order XXI, rule 2(1)

Under the Madras Amendment, any party to the suit can certify and get recorded a payment or adjustment. Further a person who has become a surety as well as the

<sup>1</sup>14th Report, Vol. I, pages 443-444, paras. 25-28.

<sup>2</sup>*Special L. A. Officer v. Ambalal*, A.I.R. 1951 Bom. 394.

<sup>3</sup>*Vinayak v. Srikishan*, A.I.R. 1955 M.B. 126.

<sup>4</sup>*Alleppy, etc. v. Ponnur*, A.I.R. 1957 T. 241.

legal representatives of the judgment-debtor are also brought under this rule by the Madras Amendment. These amendments have been considered, but it is felt that it is unnecessary to adopt them. So far as sureties are concerned, even now they fall under the rule<sup>1</sup>. So far as legal representatives are concerned, section 146 is adequate.

No change is therefore proposed, on these points.

*Order XXI, rule 2(1)—which decree:*

1. A question which has arisen under rule 2(1) is—do the words “decree of any kind” apply to all decrees, or only to decrees under which *money* is payable? Some High Courts hold that they apply to all decrees<sup>2-3-4</sup>.

2. But the High Courts of Madras and Andhra Pradesh hold that they are confined to decrees under which money is payable<sup>5-6-7</sup>.

For the history of the provision, see the under-mentioned cases<sup>8-9</sup>.

3. It is considered that the provision should apply to all decrees. Necessary clarification is proposed.

*Order XXI, rule 2(2) New*

The big question under Order XXI, rule 2, is whether the provision prohibiting the recognition of an unrecorded payment or adjustment requires to be made more liberal or more rigid.

The various possible approaches may be considered.

(1) The first is, that the mandatory provision has worked hardship and should be removed. This has been done in the Punjab by removing sub-rule (3); see the Punjab

<sup>1</sup>*Tambi v. Devi*, I.L.R. 49 Mad. 325 ; *Onkarmal v. Nritya*, A.I.R. 1923 Cal. 313.

<sup>2</sup>*Shaik Niamat v. Shaikh Jalil*, A.I.R. 1928 Cal. 715 ; *Ellis v. Kitter*, I.L.R. 46 Bom. 226 ; A.I.R. 1922 Bom. 380 (2) (McLeod C.J. and Shah J.).

<sup>3</sup>*Shadi v. Ram Ditta*, A.I.R. 1936 Lah. 842 ; *Devidas v. Bala Saheb*, I.L.R. 1948 Nag. 486, A.I.R. 1948 Nag. 374.

<sup>4</sup>The point is discussed in Mulla, C.P.C. (1953) at page 754.

<sup>5</sup>See *Chawa Seetharamayya v. Kadiyala*, A.I.R. 1951 Mad. 853.

<sup>6</sup>*Narayanaswami v. Rangaswami*, I.L.R. 49 Mad. 716 ; A.I.R. 1926 Mad. 749.

<sup>7</sup>*Anjaneyulu v. Rangacharyulu*, A.I.R. 1958 Andhra Pradesh 705 (reviews case-law).

<sup>8</sup>A.I.R. 1928 Cal. 715.

<sup>9</sup>A.I.R. 1926 Mad. 749.

Relief of Indebtedness Act (7 of 1934), section 36<sup>1-2</sup>. It has been expressly excluded in respect of proceedings under the Bombay Agriculturist Debtors Relief Act (28 of 1947), which takes the place of section 71, Dekhan Agriculturists Relief Act<sup>3</sup>. It has also been held to be inapplicable to an inquiry under section 3 of the Madras Agriculturists Relief Act, 1938, since the court scaling down a debt under that Act is not a "court executing a decree"<sup>4</sup>.

(2) The other approach is that hinted at by Shah J. in a Bombay case<sup>5</sup>. He observed, that the wording of sub-rule (3) is quite clear and admits no escape therefrom "on such general considerations as have been referred to by Heaton J. in *Trimback v. Hari*<sup>6</sup> and accepted in *Hansa v. Bhawa*"<sup>7</sup>. He observed further—

"Such considerations may afford a sufficient ground to modify the provision of sub-rule (3) or to repeal article 1748, of the Indian Limitation Act so as to make it permissible to the judgment-debtor to apply at any time to have the payment recorded. But they cannot afford any sufficient ground for refusing to give effect to the plain and unambiguous words of the sub-rule in words of the sub-rule in question."

(3) The Fourteenth Report considered the matter in detail<sup>8</sup>, and took the view that a payment not made through bank or by postal money order or evidenced in writing, and an adjustment not made in writing, should not be recognised by any court executing the decree. It referred to the Allahabad Amendment in this context, and recommended its adoption<sup>10</sup>.

(4) In the draft Report on Civil Procedure Code which had been circulated, while requiring the payments to be made in the manner suggested in the Fourteenth Report, scope had been deliberately left for the recognition of *other* payments if they were certified and recorded as at present.

<sup>1</sup>*Daru Mal v. Todar*, A.I.R. 1938 Lah. 602.

<sup>2</sup>*Murli Dhar v. Firm Bashesar Lal*, I.L.R. 1938 Lah. 264, A.I.R. 1938 Lah. 126, applying the Punjab Amendment to an original side decree of the Calcutta High Court sent to Punjab.

<sup>3</sup>*Chhaganlal v. Farasram*, A.I.R. 1921 Bom. 142, 143.

<sup>4</sup>*K. Raju v. C. Mahalakshman*, I.L.R. 1943 Mad. 138 ; A.I.R. 1942 Mad. 597, 598.

<sup>5</sup>*Mehbunissa v. Mehbunissa*, I.L.R. 49 Bom. 548 ; A.I.R. 1925 Bom. 309, 310(B.F.)

<sup>6</sup>(1910) I.L.R. 34 Bom. 575.

<sup>7</sup>(1916) I.L.R. 40 Bom. 333.

<sup>8</sup>Article 174 of the old Limitation Act.

<sup>9</sup>14th Report, Vol. I, pages 443-444, paras. 25—28.

<sup>10</sup>As to genesis of Allahabad Amendment, see U. P. Judicial Reform Committee (1950-51) Report, Vol. I, pages 41-42.

The matter has since been considered in detail, and it is felt that the time has come to make the provisions of the law more stringent by recognising only payments made in the manner suggested in the Fourteenth Report (summarised above) or adjustments proved by documentary evidence. Even such payments and adjustments should, it is felt, be got recorded, and further, payments not recorded should continue to be unrecognised as at present. Broadly speaking, the effect of the proposed amendment will be, (i) that oral payments and adjustments will have no claim for recognition in execution and will be incapable of being got recorded; (ii) payments evidenced in writing or adjustments proved by documentary evidence, can be recognised, but that too *only if they* are recorded. The condition of recording is considered necessary even in the case of such payments, etc., for the reason that otherwise there may be room for fraud and forgery.

*Order XXI, rule 2 and limitation*

The period of limitation for an application for certification of payment or adjustment is 30 days under the (New) Limitation Act, 1963, article 125. Since the provision in the Civil Procedure Code regarding certification is now proposed to be made more stringent than at present (by requiring that the payment should be in the manner provided in Order XXI, rule 1 as proposed to be amended or that the adjustment should be proved by documentary evidence), it is considered that a longer period should be allowed. It is, accordingly, recommended that the period should be increased to 90 days<sup>1</sup>. The Fourteenth Report<sup>2</sup> recommended that the period should be deleted, but it is not considered necessary to go so far.

*Order XXI, rule 2 and pre-decree agreements*

1. How far a court executing a decree is precluded from looking at agreements entered into before the decree, is a matter on which there is some uncertainty. The majority of the High Courts have taken the view that such an agreement cannot be pleaded in bar of execution. But the Bombay High Court has held in one case<sup>3</sup>, that the executing court can look into a pre-decree agreement to the effect that the prospective judgment-debtor will within 15 days, pay something less than the amount for which the decree was to be passed, and the decree-holder will give up the balance if such payment was made within 15 days. It was held, that, the court was bound by its previous decision<sup>4</sup> on this point, though "it had not met with universal approval

<sup>1</sup>Cf. (Old) Limitation Act, 1908, article 174.

<sup>2</sup>14th Report, Vol. I, page 444, para. 28.

<sup>3</sup>*Burjorji v. Madhavlal*, I.L.R. 58 Bom. 610 ; A.I.R. 1934 Bom. 370, 372 (Beaumont C.J., and Barlee J.).

<sup>4</sup>*Laldas v. Kishordas*, (1896) I.L.R. 22 Bom. 463 (F.B.).

in other courts". The Bombay view thus seems to be a settled one<sup>1</sup>.

2. There is some doubt with reference to the position in Madras also. In an earlier decision<sup>2-3</sup>, it was held that the executing court could have regard to an agreement which provided that execution shall not be issued for a certain time. But this was distinguished in later case<sup>4</sup>, holding that an executing court cannot inquire into a pre-decree agreement which had nothing to do with "execution". The allegation in this case was, that before the preliminary decree, the mortgage-debt had been paid and the parties had allowed the decree to be passed simply for convenience. It was held, that the executing court could not take notice of such agreements.

3. The Andhra Pradesh High Court seems to have allowed an agreement to the effect that one of the parties could not execute a decree to be obtained against the other<sup>5-6</sup>. Other High Courts take the view that the executing court cannot look into pre-decree agreements<sup>7-8</sup>.

4. As the matter does not really pertain to rule 2, and as the ordinary rule is that an executing court cannot go behind the decree, no express provision is considered necessary.

#### *Order XXI, rule 2 and counter-affidavits*

1. Under Order XXI, rule 2(2), the judgment-debtor may inform the court of the payment or adjustment of the decree and apply to the court to issue a notice to the decree-holder to show cause why the payment, etc., should not be recorded, etc. The form of notice is given in Appendix E, form No. 1. A question that has arisen in this connection is, whether a counter-affidavit by the judgment-debtor (within the period of limitation provided in old article 174, now article 125) informing the court about the adjustment, etc., is sufficient, when there is no *prayer for issue of notice*. Case-law on the subject is summarised below. In

<sup>1</sup>The point was raised in *Bilasram v. Durgadutt*, A.I.R. 1956 Bom. 526, 528, but not decided.

<sup>2</sup>*Chidambaram v. Krishna* I.L.R. 40 Mad. 243 ; A.I.R. 1918 Mad. 1174 (F.B.).

<sup>3</sup>Generally to agreements to give time, see Mulla (1953) page 750.

<sup>4</sup>*Gudimalla v. Taita*, A.I.R. 1950 Mad. 608.

<sup>5</sup>*Kuka Ranji v. Moutri Pragada*, A.I.R. 1957 A.P. 75.

<sup>6</sup>See also *Usman v. Mammooty*, A.I.R. 1961 Kcr. 179.

<sup>7</sup>See *Co-operative Bank v. Ram Sarup*, A.I.R. 1953 Pun. 267 ; *Krishna Trading Corpn. v. Ram Saran*, A.I.R. 1962 All. 374 ; *Hukam Chand v. Badhey Krishan*, A.I.R. 1915 Nag. 128, following *Chhoti Narain Singh v. Ramchwar Koer* (1902) 6 C.W.N. 796 ; *Robert Skinner v. R. M. Skinner*, A.I.R. 1937 Lah. 537.

<sup>8</sup>But injunction can be granted in a separate suit, *Harendra v. Gopal* A.I.R. 1935 Cal. 177.

an earlier case, the Madras High Court<sup>1</sup> pointed out that to treat an affidavit as an application was to ignore the language of rule 2(2) which required notice, etc. The case does not seem to have been referred to in a later case<sup>2</sup>, where an application under Order XXI, rule 90 was treated as sufficient compliance with rule 2.

2. The Calcutta High Court in one case<sup>3</sup> held, that the objection of the judgment-debtor could not be treated as an "application" under old section 258. A recent decision on the subject seems to have accepted this position<sup>4</sup>. The same strict view has been taken by a majority of the Judges in an Allahabad decision<sup>5</sup>. Desai J. in that case has given several reasons in support of this conclusion: first, that rule 2(2) requires not only information to the court but an application; secondly, that on an objection by the judgment-debtor to the execution of the decree on the ground of satisfaction, etc., the only possible reply which a decree-holder could give was that stated in Order XXI, rule 2(3) itself, which bars recognition of uncertified payment, etc.; and thirdly, even if the objection is filed within the limitation period, that is of no consequence. He further pointed out, that there was no reason why the judgment-debtor when the matter is in his own hands, should fail to make an application. If every objection to execution on the ground of payment were treated as an application under sub-rule (2), there would be no sense in sub-rule (3).

3. A liberal view has, however, been taken by the High Court of Bombay<sup>6</sup>, and by the Andhra Pradesh High Court<sup>7</sup>. This view attaches importance to the substance of the matter. The liberal view seems to be correct. The matter does not seem to be of sufficient importance to require an amendment of the rule.

#### Order XXI, rule 5

Under local Amendments<sup>8</sup>, in cases where the courts are situated within the same *State*, the decree can be sent for execution to the transferee court directly, instead of through the District Court. It is, however, considered that the District Judge would be in a position to know and

<sup>1</sup>*Ladd Govind Doss v. Ram Doss*, (1913) 24 M.L.J. 88.

<sup>2</sup>*Kandaswami v. Narasinha*, A.I.R. 1952 Mad. 582.

<sup>3</sup>*Bajrang Bahari v. Lachmi Narain*, (1912) 15 C.L.J. 88.

<sup>4</sup>*Bimla Bala v. Bata Krishna*, A.I.R. 1957 Cal. 308 (Guha J.).

<sup>5</sup>*Akbar Ali v. Dr. Ishwar Saran*, I.L.R. (1957) 2 All 1; A.I.R. 1957 All. 622 (Desai and Mukerjee JJ., Beg J. *contra*).

<sup>6</sup>*Kalyanji v. Dharamji*, A.I.R. 1935 Bom. 303 (Broomfield J.).

<sup>7</sup>*Chengayya v. Chenga*, A.I.R. 1959 Andhra Pradesh 632 (F.B.).

<sup>8</sup>See amendments made by Allahabad and Bombay High Courts.



check up whether the court to which the papers are sent through him, is the proper court. Hence no change is recommended.

*Order XXI, rule 11*

A recommendation has been made in the Fourteenth Report<sup>1-2</sup> to remove certain columns from the form of application for execution of decree. It is, however, considered that the particulars to be mentioned in such columns, even though many of them can be ascertained from other records, serve a useful purpose, inasmuch as they give all the relevant information at one place. Hence no change is suggested.

*Order XXI, rule 11(2) and Bombay Amendment*

Order XXI, rule 11(2) (j) (ii) provides for mentioning "attachment and sale" or "sale without attachment" in the application for execution. It does not expressly mention simple attachment. The local Amendment made by the Bombay High Court, adds the words "by the attachment of". Cases of simple attachment may arise when a decree or debt or money in custody of a public officer, etc., is to be attached.

It is, however, considered unnecessary to adopt this amendment, as the residuary clause in rule 11 would suffice.

Section 51 (b), it may be noted, covers attachment *simpliciter*<sup>3</sup>,

*Order XXI, rule 11A (New)*

This is new. Since section LI, proviso, now limits the grounds on which a judgment-debtor can be arrested (after the 1936 amendment), it is desirable to provide that the application under Order XXI, rule 11 should state 'the grounds on which arrest is sought for'. This will assist the court in taking action under Order XXI, rule 37 (notice to show cause), and also further proceedings under Order XXI, rule 40. It has been held<sup>4</sup>, that the existence of the circumstances mentioned in section 51, proviso (a) to (c) should be alleged either in the execution application or in an accompanying affidavit. Unless such a circumstance is alleged (it was pointed out), the court cannot think of the circumstances and, in its absence, the court cannot take action under Order XXI, rule 37.

<sup>1</sup>14th Report, Vol. I, page 445, para. 29.

<sup>2</sup>See also Civil Justice Committee (1925), Report, page 383, bottom.

<sup>3</sup>*Amulya v. Pashubati*, A.I.R. 1951 Cal. 48, 50, para. 7.

<sup>4</sup>*Harpal Singh v. Hira Lal*, A.I.R. 1955 All. 402, 403, para. 7 (*Raghubar Dayal and Chowdhry, JJ.*).

It may be added, that section 51 is mandatory and even when an order is passed *ex parte*, its provisions have to be complied with<sup>1-2</sup>.

*Order XXI, rule 16*

(1) The Calcutta Amendment which, while *not* dispensing with notice, allows the execution to proceed<sup>3</sup>, has been considered. It is unnecessary to adopt this in the Code<sup>4</sup>.

(2) The Bombay Amendment, providing that any payment, etc., not certified or recorded under Order XXI, rule 2 shall not be recognised by the court hearing an application under Order XXI, rule 16, appears to be unnecessary. That is the position even apart from such amendment<sup>5</sup>.

*Order XXI, rule 16 and transferee court*

As to whether the power under this rule can be exercised by a court to which the decree may be transferred for execution, the matter has been dealt with separately<sup>6</sup>.

*Order XXI, rule 17*

1. This carries out the recommendation made in the Fourteenth Report<sup>7-8</sup>. The object is to *require* the court to allow a defect in an application for execution to be remedied. (The existing rule leaves a discretion to the court to reject the application, the amendment takes away the discretion.) Detailed provisions have also been made for cases where there is a dispute about the correctness of the amount stated in the application.

2. In drafting the provision, assistance has been taken from the Calcutta Amendment. See also the amendments made by Madras, Allahabad, Patna, etc., High Courts.

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<sup>1</sup>*T. Kunhiraman v. Madhavan Nair*, A.I.R. 1957 Mad. 761. An earlier decision (A.I.R. 1948 Mad. 9) took a contrary view.

<sup>2</sup>*B. K. Puttaramaniah v. H. I. E. & Sons*, A.I.R. 1959 Mys. 94.

<sup>3</sup>*Sailendra v. Bank of Calcutta*, A.I.R. 1948 Cal. 131, 132, para. 10 (Chakravarti and Ellis JJ.).

<sup>4</sup>The Calcutta Amendment follows the Report of the Civil Justice Committee (1925), page 405, para. 11.

<sup>5</sup>See Mulla, C.P.C. (1953), pages 759-760.

<sup>6</sup>See amendment proposed to section 42.

<sup>7</sup>*Cf.* 14th Report, Vol. I, page 445, paras. 30-31.

<sup>8</sup>See also Civil Justice Committee (1924-25) Report, page 384, para. 12 and page 406, para. 12.

## Order XXI, rule 22

1. Two recommendations relevant to Order XXI, rule 22 were made in the Fourteenth Report<sup>1-2</sup>. At present, notice is necessary if one year has elapsed from the date of the decree. The Fourteenth Report recommended substitution of a period of *three years* in its place. Further, it recommended that the failure to issue the notice or to record reasons for non-issue, etc., should not render the proceedings void, unless substantial injury is caused.

2. A brief statement of the existing position on these points is given below:—

(i) Before 1914 there was a conflict of authority as to whether omission to issue notice under rule 22 rendered the sale void or voidable. After the Privy Council decision<sup>3</sup> holding that it is the notice which confers *jurisdiction*, all the High Courts (following that decision) held, that in the absence of the notice, the sale was void<sup>4-5,6,7</sup>. The Madras High Court in certain decisions regarded the sale as voidable and distinguished the Privy Council decision on the ground that that decision was given under the old Code, while in the present Code, sub-rule (2) showed that the rule could be relaxed<sup>8</sup>. But this view was rejected in later Madras cases<sup>9-10</sup>.

(ii) Amendments relaxing the rigour of this rule, have been made by some of the High Courts. *e.g.*—*Allahabad*; *Calcutta*—see the under-mentioned decisions<sup>11</sup>; *Andhra*—similar to Madras Amendment; *Assam*—similar to Calcutta Amendment; *Kerala*—similar to Madras Amendment; *Madras*—see the under-

<sup>1</sup>14th Report, Vol. I, page 447, para. 34, middle and last portion.

<sup>2</sup>See also Civil Justice Committee (1924-25) Report, page 387, para. 16.

<sup>3</sup>*Raghunath v. Sundar*, I.L.R. 42 Cal. 72 ; 41 I.A. 251 ; A.I.R. 1914 P.C. 129.

<sup>4</sup>*Shyam v. Satinath*, I.L.R. 44 Cal. 954.

<sup>5</sup>*Chandi v. Jumna* I.L.R. 49 All. 830.

<sup>6</sup>*Adkia v. Shankar*, A.I.R. 1921 Nag. 126.

<sup>7</sup>*Anil v. Ahmad*, A.I.R. 1940 Cal. 23.

<sup>8</sup>*Kasivisvanathan v. Somasundaram*, I.L.R. 45 Mad. 875.

<sup>9</sup>*Rajgopal v. Ramanuja*, I.L.R. 47 Mad. 288 ; A.I.R. 1924 Mad. 431 (F.B.).

<sup>10</sup>*Kanchamalai v. Shaheji*, I.L.R. 59 Mad. 461 ; A.I.R. 1936 Mad. 205

<sup>11</sup>*Dwarka v. Abdul*, 48 Cal. W. N. 346 ; *Mahadeo v. N. D. U. Tea Co.* 55 C.W.N. 408 ; see also A.I.R. 1961 Cal. 336.

<sup>12</sup>*Thomas v. Simon*, A.I.R. 1957 Travancore-Cochin 153 (construing an amendment similar to the Madras Amendment).

mentioned case<sup>12</sup>; Orissa—similar to Patna Amendment; Patna—see the under-mentioned decisions<sup>1</sup>; and Punjab. Most of these amendments are confined to failure to record reasons while the Calcutta Amendment seems to cover non-issue of the notice itself.

3. After some consideration it has been decided that it would not be proper to make an amendment relaxing the rigour of this rule. The provision for notice being of an essential character, the position laid down by the Privy Council need not be disturbed.

4. As regards increase of the period, it is considered sufficient to increase it to two years.

Necessary change is proposed.

#### *Order XXI. rule 22 and Insolvency*

1. The question whether the provisions of Order 21, rule 22 should be applied to the Official Assignee or Official Receiver in insolvency, where the judgment-debtor has become insolvent, has been considered. The present position is as follows:—

(i) It was held by the Privy Council<sup>2</sup> under the corresponding provision in the old Code, that the Official Assignee or Official Receiver under the Insolvency law was “a legal representative” within the meaning of section 248 of the old Code. In the old Code, however, there was no definition of the expression “legal representative”. In the present Code, there is a definition which does not seem to include the Official Assignee or Official Receiver in the insolvency<sup>3</sup>. In a Calcutta case<sup>4</sup>, it seems to have been assumed that Order XXI, rule 22 applies to the Official Receiver in insolvency. Corresponding English rule is Order XLII, rule 23(a), R.S.C., under which leave is necessary where any change has taken place “by death or otherwise in the parties entitled or liable to execution”.

<sup>1</sup>*Bal Mukand v. Pirthiraj*, A.I.R. 1951 Pat. 333; *Shyam v. Naurangi*, A.I.R. 1946 Pat. 270; *Ram Lal v. Ramia*, A.I.R. 1947 Pat. 454; *Raj Kishore v. Subah*, A.I.R. 1959 Pat. 89; see also A.I.R. 1961 Pat. 480, 508; *Sukhdeo v. Brahmdeo*, A.I.R. 1957 Pat. 431; *Ram Saran v. Deo Nandan*, A.I.R. 1957 Pat. 433; A.I.R. 1953 Orissa 295 (construing an amendment similar to Patna).

<sup>2</sup>*Raghmath Das v. Sunder Das*, 41 I.A. 251, 256; I.L.R. 42 Cal. 72, 82; A.I.R. 1914 P.C. 129.

<sup>3</sup>That the old Code did not contain this definition has been noticed by the Madras High Court in *Kanchamalai v. Shahaji* I.L.R. 59 Mad. 461; A.I.R. 1936 Mad. 205, 207 (F.B.).

<sup>4</sup>See *Dinesh Chandra v. Jahan Ali*, I.L.R. 62 Cal. 457; A.I.R. 1935 Cal. 503 505 (Guha and Charles Bartley, JJ.).

(ii) The Madras High Court has amended this rule so as to provide (*inter alia*) that when a party to the decree has been declared insolvent, notice shall be issued to the Official Assignee or Receiver in insolvency.

2. It seems advisable to adopt the Madras Amendment, which seem to be supported by the following reasons.

In the first place, upon an order of adjudication, the insolvent's property vests in the Official Assignee, and therefore it would be unrealistic to proceed with the execution without notice to him. In the second place, the order of adjudication may affect the very operation of the decree (in view of the doctrine of relation back and effect of insolvency on antecedent transactions, particularly fraudulent preferences). The issue of a notice would give the Official Assignee an opportunity to raise these objections. Thirdly, such an amendment is in conformity with the principle on which Order XXII, rule 10 is based, namely, the procedure to be followed on devolution of interest during pendency of the suit<sup>1</sup>.

In fact, all further proceedings (for example, appeal in execution), will have to be continued by the Official Assignee<sup>2</sup>.

Necessary amendment is proposed.

3. The proposed amendment will be in addition to any restrictions or formalities arising out of insolvency which may be necessary under the insolvency law<sup>3,4</sup>.

4. The Madras amendment was construed, in the under-mentioned case<sup>5</sup>.

*Order XXI, rule 22A (Patna)*

1. The Patna High Court has added rule 22A to the effect that where property is sold in execution, the sale shall not be set aside by reason only of death of the judgment-debtor between the date of issue of sale proclamation and date of sale, notwithstanding failure to substitute legal representatives. But, if the legal representative is prejudiced, the court may set aside the sale.

<sup>1</sup>See Mulla, Civil Procedure Code (1953), page 962, bottom, and Mulla, Law of Insolvency in India (1958), page 690, para. 700. See also *Ammanna v. Ramakrishna Rao*, I.L.R. 1949 Mad. 904 ; A.I.R. 1949 Mad. 886.

<sup>2</sup>*Cf. Muni Lal v. Bari Doab Bank Ltd.*, A.I.R. 1936 Lah. 368.

<sup>3</sup>See Mulla, Law of Insolvency in India (1958), pages 250—252, para. 255 and page 689, para. 698.

<sup>4</sup>See also section 51 (3) of the Provincial Insolvency Act and section 53 (3) of the Presidency Act.

<sup>5</sup>*Official Receiver, Nellore v. Venkiah*, A.I.R. 1941 Mad. 606.

2. On this point, see the under-mentioned case<sup>1,2,3,4</sup>. The ordinary rule is, that sale of a judgment-debtor's property does not bind his representatives, at whatever stage the judgment-debtor might have died<sup>5</sup>.

3. It is considered unnecessary to adopt the Patna Amendment.

*Order XXI, rule 24(3)*

Some High Courts have made local amendments, which require that the day on or before which the process should be returned should be specified<sup>6,7</sup>.

It is considered unnecessary to adopt this amendment, which is of a minor character.

*Order XXI, rule 26*

A recommendation has been made in the Fourteenth Report<sup>8</sup> to the effect that where a judgment-debtor applies for stay of execution under this rule, the court *shall* require him to furnish security or impose conditions under the rule, before granting stay. This recommendation was made in view of the feeling that the courts failed to discriminate between honest and dishonest judgment-debtors and thus failed to exercise properly the *discretion* left to them. It is, however, considered that the existing provision should continue, and that making it mandatory would cause hardship.

Hence no change is suggested.

*Order XXI, rule 29*

Order XXI, rule 29 C.P.C. runs as follows:—

“Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

<sup>1</sup>*Ajab v. Hari Charan*, A.I.R. 1945 Pat. 1 (F.B.)

<sup>2</sup>*Ramlal v. Ramia*, A.I.R. 1947 Pat. 454 (F.B.).

<sup>3</sup>*Kanchamalan v. Sahaji*, A.I.R. 1936 Mad. 205 (F.B.) (reviews case-law).

<sup>4</sup>*Marotirao v. Narayan*, A.I.R. 1948 Nag. 300.

<sup>5</sup>*Rajlakshmi v. Banamali*, A.I.R. 1955 Cal. 573.

<sup>6</sup>After the date fixed for return, execution is not valid. See *Gurdial v. Emp.*, I.L.R. 55 All. 119 ; A.I.R. 1933 All. 46 (Pullan J.).

<sup>7</sup>See also Civil Justice Committee Report (1925), page 406, para. 13 to same effect.

<sup>8</sup>14th Report, Vol. I, page 449, para. 40.

<sup>9</sup>See also Civil Justice Committee (1924-25) Report, page 406, para. 14.

1. The object of rule 29 is to—

(i) prevent the judgment-debtor from being compelled to satisfy the decree when it might be proved that on balance he owed less than the decretal amount (or even nothing at all<sup>1</sup>);

(ii) prevent multiplicity of proceedings<sup>2</sup>;

(iii) to provide for adjustment;<sup>3</sup>

(so that the successful plaintiff in a pending suit need not take out execution).

2. Therefore, the words "decree of such court" should be amplified to cover cases where the decree is of some other court, but is being executed by the court in which the suit is pending.

3. At present there is a conflict of decisions on this point. One view is, that a court to which the decree of *any other* court is transferred, can act under this rule<sup>4-5</sup>.

4. But another line of cases takes a narrower view<sup>6-7-8</sup>.

5. The wider view bases itself on the principle that the transferee court becomes the "court" which passed the decree, (section 37) and would, under section 42, become clothed with the same powers<sup>9</sup>. The narrower view justifies itself on the language of the section, which requires identity of the court passing the decree and the court in which the suit is pending.

To clarify the position, necessary change is proposed, adopting the wider view.

6. As to the converse question—whether the court in which a suit is pending, can act even if the decree is transferred to another court, Bombay High Court has held that it can<sup>10</sup>.

<sup>1</sup>*Mahesh v. Jyotsna*, A.I.R. 1928 Cal. 222, 224.

<sup>2</sup>*Mahesh v. Jyotsna*, A.I.R. 1928 Cal. 222, 224 (Page J.).

<sup>3</sup>*Kannammal v. Muthu Kumarswami*, A.I.R. 1936 Mad. 102, 103 (Beasley C.J.).

<sup>4</sup>*Kassamal v. Gopi* (1888) I.L.R. 10 All. 389, 393.

<sup>5</sup>*Sivaakripa v. Comilla Union Bank Ltd.*, A.I.R. 1934 Cal. 4 (Jack and Nag. JJ.).

<sup>6</sup>*Inayat v. Umrao*, A.I.R. 1930 All. 121 (Sulaiman Acting C. J. and Kendall J.).

<sup>7</sup>*M.s. Khemchand v. Rambabu*, A.I.R. 1958 M.P. 131, 132.

<sup>8</sup>*Ujagar Singh v. Puran Singh*, A.I.R. 1930 Lah. 961, 968, right-hand (Walker J.).

<sup>9</sup>As to the general position, see *Maharajah of Bobbili v. Narasa Raju*, A.I.R. 1916 P.C. 16.

<sup>10</sup>*Narsidas v. Manhar Singh*, A.I.R. 1931 Bom. 247, 249.

*Order XXI, rule 31*

1. This carries out the recommendation made in the Fourteenth Report<sup>1-3</sup>. In a decree for delivery of specific movable property, the award of compensation in lieu of delivery of property is, at present, permissible where the property of the judgment-debtor has been attached and the attachment has continued for at least six months. The amendment seeks to reduce this period to 3 months.

2. It is considered unnecessary to give power to the court to extend it to six months, as has been done in some local Amendments.

*Order XXI, rule 32*

This carries out the recommendation made in the Fourteenth Report<sup>3-4</sup>. In a decree for specific performance of contract, restitution of conjugal rights or injunction, the court can at present, levy execution by attachment of the property of the judgment-debtor. Where the attachment has continued for one year, the property may be sold and compensation awarded to the decree-holder. The amendment seeks to reduce this period from one year to six months.

*Order XXI, rule 32(5) and prohibitory injunctions*

1. Whether the word "injunction" in Order XXI, rule 32(5) is confined to mandatory injunctions is a matter on which there has been some controversy. The Calcutta view<sup>5</sup> at one time seems to have been that it covered prohibitory injunctions also; but in a latter case<sup>6</sup>, it seems to have taken a different view, relying upon the illustration.

2. The English rule, Order XLII, rule 30, B.S.C. 1883 (which continues in the 1962 revision) speaks of "mandatory order, injunction or judgment for the specific performance of any contract".

3. Other High Courts have held that this sub-rule is confined to mandatory injunctions<sup>7-8</sup>. A change in the language does not appear to be necessary in the present

<sup>1</sup>14th Report, Vol. I, page 455, para. 53.

<sup>2</sup>See also Civil Justice Committee (1924-25) Report, page 407, para.

15. <sup>3</sup>14th Report, Vol. I, page 455, para. 54.

<sup>4</sup>See also Report of the Civil Justice Committee (1925), page 407, para. 16.

<sup>5</sup>*Sachi Prasad v. Amar Nath Roy*, I.L.R. 46 Cal. 103; A.I.R. 1919 Cal. 674 (Richardson J. Bat Beachcroft J. withheld his concurrence in this point).

<sup>6</sup>See *Hem Chandra v. Narendra Nath*, I.L.R. 61 Cal. 146; A.I.R. 1934 Cal. 402, dissenting from *Sachi Prasad's* case.

<sup>7</sup>See case-law reviewed in *Joseph v. Makkaru*, A.I.R. 1960 Ker. 127.

<sup>8</sup>*Chinnabha Chetty v. Chengalroya*, A.I.R. 1950 Mad. 237.



position of the case-law. As has been observed the words of sub-rule (5) are "opposite only to mandatory injunctions and not to prohibitory injunctions".

*Order XXI, rule 37*

1. A recommendation has been made in the Fourteenth Report<sup>2</sup> to the effect, that the issue of notice to the judgment-debtor before his arrest should be made discretionary, as it was before the amendment of 1936. The Report observed, that execution by arrest and detention was a very effective and quick way of realisation of money, and that the application to issue a notice in the first instance defeated the very purpose of this mode of execution, by enabling the judgment-debtor to abscond before the issue of warrant. While it did not take the view that no notice was necessary, it expressed the opinion that it should be left to the *discretion* of the court whether to issue a notice or not, because, if execution by arrest had to continue and was to be of any value, it should not be compulsory for the court to issue notice in every case<sup>3</sup>.

2. It is, however, considered, that having regard to the fact that execution by way of arrest is a somewhat antiquated mode, it is not desirable to go back to the law before the 1936 amendment. The change recommended, therefore, *has not been carried out*.

*Order XXI, rule 39(5)*

1. Local Amendments made in implementation of the Report of the Civil Justice Committee<sup>4</sup> have omitted the words "in the civil prison" in sub-rule (5). Others—Bombay, Madras and M.P.—are more elaborate. The object in all cases is the same, namely, to provide that sub-rule (5) will cover the costs incurred by decree-holder for subsistence expenses and conveyance charges before the period of *actual* detention.

2. As execution by arrest is now rare, it is considered unnecessary to make any such change.

*Order XXI, rule 41*

Order XXI, rule 41, at present empowers the Court (in case of a money decree) to examine the judgment-debtor in order to find out whether any debts are owing to him and what other property or means of satisfying the decree he has.

<sup>1</sup>*Ramkrishna v. Board of Revenue*, A.I.R. 1954 Nag. 245, 248 (Sinha C.J.).

<sup>2</sup>14th Report, Vol. I, page 448, para. 36.

<sup>3</sup>*Cf. U. P. Judicial Reforms Committee (1950-51) Report*, page 43.

<sup>4</sup>Civil Justice Committee Report (1925), page 407, para. 18.

Similar provision is contained in Order XLII, rule 32—Rules of the Supreme Court. This rule was considered by the Evershed Committee<sup>1</sup>. It heard representations to the effect, that (even with the examination as to the means) the judgment-creditor had difficulty in ascertaining as to what the assets of judgment-debtor were, and that was the reason why the judgment-creditors resorted to the writ of "*fiery facias*" to force the judgment-debtor to realise his assets; the judgment-debtor knew what assets he had, while the judgment-creditor did not. The Committee recommended, that where a judgment-debt remained unpaid for 14 days, the judgment-creditor should be entitled to call upon the judgment-debtor to make an affidavit of his assets. The filing of such an affidavit was, in the opinion of the Committee, much more effective than the examination now in vogue, as the judgment-creditor (at present) attended the examination without any prior knowledge of the debtor's assets and liabilities.

It is considered, that the insertion of a provision on the lines suggested by the English Committee would be useful in India also. Necessary change has been proposed. The period, however, has been fixed at 30 days.

It is, however, considered unnecessary to make any specific provision as to penalty for failure to make the affidavit in such cases. (The English Committee suggested<sup>2</sup> that the notice should be endorsed with a "penalty notice" under Order XLI, rule 5, Rules of the Supreme Court. Neglect to make the affidavit would thus render the judgment-debtor liable to a process of execution for compelling him to obey it. This would attract the provisions of Order XLII, rule 7, R.S.C. providing for writ of "attachment" or committal)<sup>2</sup>. Penalty.

*Order XXI, rule 43A (New)*

1. The question has been raised how far a custodian of movable property whom property attached in execution is entrusted is liable if he does not look after the property or restore it when required. Since occasions for so entrusting property are frequent, it is considered desirable to lay down the rule on the subject.

2. The U.P. Legislature has in this connection amended section 145 by adding the following *Explanation*<sup>3</sup>:—

*"Explanation.—For the purposes of this section a person entrusted by a Court with custody of any property attached*

<sup>1</sup>Final Report of the Committee on Supreme Court Practice and Procedure (1953) Cmd. paper 8878, pages 145 and 146, paras. 453-454 and form of affidavit at page 376.

<sup>2</sup>See Final Report of the Evershed Committee, para. 454.

<sup>3</sup>*Cf.* Report of the U. P. Judicial Reforms Committee (1950-51), pages, 35-36.

in execution of any decree or order shall be deemed to have become liable as surety for the restitution of such property within the meaning of clause (b).”.

3. The Calcutta High Court has inserted a new order—Order XXIA, and rule 11 of that Order contemplates the enforcement of the “bond” against the custodian.

4. The High Courts of Madras, Andhra Pradesh, Kerala and Madhya Pradesh have achieved the object by providing for the taking of a bond, *vide* amendments made by those High Courts to rule 43 of Order XXI.

The High Court of Patna has inserted an elaborate provision—rule 43A—which deals at length with the subject.

The High Court of Punjab has added rules 43A to 43D in Order XXI.

5. It is considered that it would be better if provision is made making the custodian liable *without the formality of a bond*. Section 145, however, does not appear to be the proper place for this. As rule 43 of Order XXI deals with the subject of attachment and the mode of effecting it in the case of movable property, it would be more convenient if the amendment is placed in proximity with that rule.

6. An elaborate provision dealing with the liability of the custodian has been proposed, so as to—

(i) deal with the custodian's liability both to the decree-holder and to the judgment-debtor, and also to third parties who may be declared to be owners of the property;

(ii) make this liability enforceable in execution;

(iii) define the limits of this liability by making it dependent on his fault;

(iv) allow appeal in respect of orders determining liability in such proceedings.

#### *Order XXI, rule 42*

Local Amendments made by certain High Courts make provision for pre-payments of expenses of watching corps. This was also the recommendation made by the Civil Justice Committee<sup>1</sup>. It is considered unnecessary to adopt this minor amendment.

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<sup>1</sup>Civil Justice Committee (1924-25) Report, page 407, paragraph 19.

*Order XXI, rules 46A to 46I (New)*

1. These carry out the recommendation made in the Fourteenth Report<sup>1-2</sup>. The object is to make detailed provisions for procedure in garnishee cases. They mainly follow the Calcutta Amendments, Order XXI, rule 46A *et seq.* Cf. also Order 45, R.S.C. 1883, which seems to continue after the 1932 Revision.

2. Rule 46A(3) is intended to make the provision comprehensive

3. In rule 46F, it has been made clear that payment by the garnishee will protect him in both the situations, namely, where the order of the court in the *garnishee proceeding* is set aside, and where the *decree* under execution (on which the proceedings in garnishee were taken) is set aside. On this point, rule 46F of the Calcutta Amendment merely provides for setting aside, etc., of "such judgment", but the language of Order 45, rule 7, Rules of the Supreme Court, is more elaborate. The latter has been drawn upon.

*Order XXI, rule 48*

The amendment is intended to make the provisions of rule 48 applicable to persons who, though not servants of the Government, are employees of Corporations engaged in trade or industry and established by statute or Government companies. For the purposes of rule 48 (attachment of salaries) such persons should, it is considered, be treated on the same footing as Government servants.

In drafting the amendment, assistance has been taken from section 21 of the Indian Penal Code, as amended in 1958.

*Order XXI, rule 48A*

1. This is new, and is intended to lay down the procedure for attachment of private salaries. There is no express provision in the Code on the subject, and up to now, the attachment of private salaries was difficult, because they were regarded as not attachable until they actually became due at the end of the month. Since, the position is now being altered<sup>3</sup>, it is considered that a *specific provision* should be inserted on the subject, instead of leaving the attachment of such salaries to be dealt with under Order XXI, rule 46, which deals with attachment of debts and all movable property not in possession, etc.

<sup>1</sup>14th Report, Vol. I, page 451, para. 45.

<sup>2</sup>See also Civil Justice Committee (1924-25) Report, page 390, para. 22.

<sup>3</sup>See the amendment proposed to section 60.

2. In drafting this provision, the language of Order XXI, rule 48, dealing with salaries of Government servants, etc., has been drawn upon, with suitable changes, and, particularly, this important modification, that the disbursing officer of the employer should be *within the jurisdiction* of the court.

3. The present position would seem to be that such salaries are "debts"<sup>1</sup>.

4. Whether the limitation as to the jurisdiction of the court (namely, that the disbursing officer should be within its local limits) should be removed has been considered. While no such limit exists in the case of salaries of public employees, it is felt that it should be there in the case of private employees. The position of public employees is different, because their scales of pay are laid down precisely by a centralised authority, and the authority for drawing pay is also in many cases issued from one source, so that the likelihood of dispute or doubt is not great. In the case of private employees, there is no such centralisation, and it may be inconvenient if the employer (of a private employee) whose office is situated in one place, is required to deal with a distant court under an attachment effected by it.

#### *Order XXI, rule 50(1)*

The change in sub-rule (1) is purely verbal, being intended to substitute the correct reference (section 30 of the Partnership Act) instead of the old section (section 247, Contract Act).

#### *Order XXI, rule 50(2)*

1. The expression "such liability is disputed" in Order XXI, rule 50(2) had caused some controversy. But the narrower view, namely, that the person concerned could only dispute the fact of his being a partner, was generally preferred<sup>2-3</sup>.

2. In a recent Supreme Court case<sup>4</sup>, it has now been held that under this sub-rule, the person can only prove that he was not a partner, and (in a proper case) that the decree is the result of collusion, fraud or the like. He cannot re-open the whole question of the liability of the firm.

3. Hence no clarification is now needed.

<sup>1</sup>See case-law cited in *V. V. Subba Rao v. Mohd. Hussain Khan*, A.I.R. 1964, A.P. 395 (September).

<sup>2</sup>See also discussion under Order 30, rule 8.

<sup>3</sup>See A.I.R. 1956 Bom. 513, 515 and A.I.R. 1955 Mad. 154, for a good discussion.

<sup>4</sup>*Gambir Mal v. J. K. Jute Mills*, (1964) 1 M.L.J. 92 (S.C.); A.I.R. 1963 S.C. 243.

*Order XXI, rule 50(2) "Court which passed"*

1. Where a decree has been passed against a firm and execution is sought against persons other than those mentioned in Order XXI, rule 50(1), the decree-holder has to apply for leave under Order XXI, rule 50(2) to the "court which passed the decree". A controversy has arisen as to whether such leave can be granted only by the court which passed the decree, or whether the court to which the decree is transferred for execution can also grant such leave.

One view is that only the former court can grant such leave<sup>1,2</sup>. A contrary view is that by virtue of section 42, the transferee court can also determine the question<sup>3,4,5</sup>.

2. Local Amendments made by certain High Courts (Patna, Orissa and Allahabad) permit the application to be made to the transferee court also. This is one of the points on which clarification was suggested in the Fourteenth Report<sup>6</sup>.

3. The Civil Justice Committee<sup>7</sup> also felt, that though section 42 was widely expressed, yet, in view of the specific language used in Order XXI, rule 50, it was doubtful whether the powers under that rule could be exercised by any executing court, and suggested clarification.

4. It is, however, considered that these provisions should remain only with the Court which passed the decree. That Court would be in a better position to deal with such applications.

Necessary amendment<sup>8</sup> is proposed in section 42.

*Order XXI, rule 50 and joint family firms*

1. A controversy exists as to whether Order XXI, rule 50 applies to joint family firms. One view is that it does not<sup>9</sup>. The Calcutta High Court<sup>10</sup> expressed the same view in one case. But, as, in a later decision<sup>11</sup>, it has regarded

<sup>1</sup>*Pulin v. Iswar*, A.I.R. 1945, Cal. 303 (B. K. Mukherjea & Ellis JJ.).

<sup>2</sup>*Pottiswami v. Sulaiman*, A.I.R. 1942 Mad. 501.

<sup>3</sup>*Sital v. Robson and Co.*, I.L.R. 43 All. 394 ; A.I.R. 1921 All. 199.

<sup>4</sup>*Bombay Co. Ltd., v. Kahan*, A.I.R. 1931 Lah. 736 (Addison & Coldstream JJ.).

<sup>5</sup>*Abdul v. Dhanpat*, A.I.R. 1931 Lah. 507.

<sup>6</sup>14th Report, Vol. I, pages 437-438, paras. 14-15.

<sup>7</sup>Civil Justice Committee (1924-25) Report, page 387, para. 15.

<sup>8</sup>See s. 42 (as proposed).

<sup>9</sup>*Maturi v. Bhagaban*, A.I.R. 1950 Orissa 189.

<sup>10</sup>*Moti v. Chhajumal*, A.I.R. 1942 Cal. 613.

<sup>11</sup>*Jamanadhar v. Jamuna Ram*, A.I.R. 1944 Cal. 138 (Mitter and Blank JJ.).

Order XXX, rule 1 as applicable to joint family firms, it is likely that it may regard Order XXI, rule 50 as also applicable to them if the question now arose. The Patna High Court regards Order XXX, rule 1 as applicable to joint family firms<sup>1</sup>, and has observed that Order XXI, rule 50 should be read with Order XXX.

2. The Punjab High Court<sup>2</sup> has held, that in view of the amendment to Order XXX made in Punjab, Order XXI, rule 50 also applies in Punjab to joint family firms.

3. It is however considered, that even if the provisions of Order XXX, are made applicable to joint family firms<sup>3</sup>, the provisions of Order XXI, rule 50 should not apply to such firms, and that this proposition should be enacted. Necessary change is proposed.

4. It is considered unnecessary to make any other provision as regards the property against which decrees passed against joint family firms may be executed.

#### Order XXI, rule 53(1)

This follows local Amendments<sup>4</sup>. Where a decree is sought to be executed by the attachment of another decree, the procedure is that the court executing the principal decree (the decree sought to be executed) sends a notice to the court which passed the subordinate decree (i.e. the decree to be attached), requesting the latter court to stay execution of the subordinate decree until the decree-holder or judgment-debtor in the principal decree applies to the latter court to execute the subordinate decree. The amendment seeks to provide, that the judgment-debtor in the principal decree should obtain either the decree-holder's consent or the permission of the attaching court before he applies to the court for execution of the subordinate decree.

A detailed provision to deal with the cases where execution of the subordinate decree has been transferred to another court, has been made in the Madras Amendment<sup>5</sup>. But, as no difficulty has been felt without it, it has not been adopted.

<sup>1</sup>*Atish Chandra v. Krishna Chandra*, A.I.R. 1941 Pat. 596.

<sup>2</sup>*Punjab National Bank v. Raj Mal*, A.I.R. 1959 Pun. 362 (Falshaw and Dua JJ.).

<sup>3</sup>See Order 30, rule 10 (proposed).

<sup>4</sup>*Cf.* Amendments made by High Courts of Calcutta, Madras, Nagpur and Patna.

<sup>5</sup>*Cf.* Order 21, rule 53(1)(c), Madras.

<sup>6</sup>See also Civil Justice Committee (1925) Report, page 408, para. 20.

*Order XXI, rule 53(6)*

1. Where a decree is attached in execution of another decree, then, so far as the decree-holder of the attached decree is concerned, the attachment is complete and effective as soon as notice to the court which is to execute the attached decree is given. This notice is given under Order XXI, rule 53, sub-rule (1)<sup>1</sup>.

But, so far as the judgment-debtor of the attached decree is concerned, the notice of the attachment has to be given to him; and unless such notice is served upon him, any payment by him to his judgment-creditor would give him a proper discharge. To this extent, the provision in sub-rule (6) of rule 53 is, as stated by Chagla C.J.<sup>2</sup>, "a statutory exception to the principle underlying section 64". As has been explained in the Madras case<sup>3</sup>, though the general principle under section 64 is that after completion of the attachment, a dealing in regard to the attached property is forbidden, it does not follow that persons acting *bona fide* without notice should in no case be protected.

2. Now, in place of the "notice" referred to in sub-rule (6), or in addition to that, local Amendments made by several High Courts have inserted "knowledge". See the local Amendments made by the High Courts of Calcutta, Assam, Allahabad and Punjab. Thus, notice of the order *through court* is not necessary.

It may be noted that a recommendation to this effect was made by the Civil Justice Committee<sup>4</sup> also.

An amendment on the subject is proposed.

*Order XXI, rule 54(1)*

A recommendation has been made in the Fourteenth Report<sup>5</sup> to the effect, that under rule 54 an intimation should be given to the judgment-debtor to attend the court on a given date to take notice of further steps in the matter. It is considered that a literal implementation of this recommendation might cause practical difficulties. On the date on which the attachment is issued under rule 54, the court would not be in a position to fix all the future dates in the various stages. Again, if a provision is inserted to the effect that the judgment-debtor should attend at each subsequent hearing and take notice from time to time of

<sup>1</sup>*Mahadev v. Janak Singh*, A.I.R. 1954 Bom. 251, 253, left hand, para. 3, last sub-para (Chagla C. J. and Dixit J.). See also *Lakshminarasimham v. Lakshminarasimham*, I.L.R. 50 Mad. 677 ; A.I.R. 1927 Mad. 728.

<sup>2</sup>*Mahadev v. Janak Singh*, A.I.R. 1954 Bom. 251, 253, para. 4.

<sup>3</sup>*Lakshminarasimham v. Lakshminarasimham*, I.L.R. 50 Mad. 677 A.I.R. 1927 Mad. 728.

<sup>4</sup>Civil Justice Committee (1924-25) Report, page 408, paras. 20-21.

<sup>5</sup>14th Report, Vol. I, page 448, para. 38.



the various stages, that also may fail in practice, because of events (e.g., an application by a third party under rule 58) that often interrupt the progress of the proceedings. Therefore, a provision in a *modified* form has been introduced, to the effect, that the proclamation shall intimate to him the date on which the terms of the proclamation of the sale would be settled under rule 66. This amendment, while not obviating the necessity of giving notice to the judgment-debtor at subsequent stages (where such notice is required by law), will save the time taken in the issue of notice under rule 66.

*Order XXI, rule 54(2)*

The amendment to rule 54(2) provides that in the case of a land situated in a village, a copy of the order should be affixed in the office of the village panchayat also. This is intended to secure adequate publicity for the attachment.

*Order XXI, rule 54(3)*

Local Amendments made by several High Courts provide that the attachment should be effective from the date of the *order*, in the case of a transferee without consideration. The object of this amendment is to nullify any attempt by a judgment-debtor to deal with his property between the date of the order and the date of the actual attachment. These amendments, in a way, constitute a qualification to the general rule laid down in section 64 and were made in implementation of the recommendation of the Civil Justice Committee<sup>1</sup>. It is, however, felt that the insertion of such a provision would have the effect of making the attachment operative at two different dates in relation to two different classes of persons (transferees without consideration and other transferees), and that there are no strong reasons to justify such a special provision departing from the ordinary rule<sup>2</sup> as to the point of time at which an attachment becomes effective.

*Order XXI, rule 57*

Where an application for execution is dismissed either by reason of the decree-holder's default or otherwise, the question arises whether an attachment already effected ceases or not. At present, the case where the decree-holder's default entails dismissal of the application is covered, but other cases are not. (In the former case, the cessation of the attachment is, at present, *compulsory*.) Local Amendments<sup>3</sup> to the rule seek to impose an obligation on the court to direct in each case whether the attachment

<sup>1</sup>Civil Justice Committee (1925) Report, page 39, para. 24.

<sup>2</sup>On this point, see A.I.R. 1928, P.C. 139.

<sup>3</sup>*Cf.* the Amendments made by High Courts of Calcutta, Madras, Nagpur, Patna, etc.

is to be regarded as continuing or not. This is intended to avoid doubts which are felt sometimes as to whether the dismissal was in fact for "default"<sup>1</sup>. The Calcutta and Bombay Amendments are the most elaborate<sup>2</sup>. It is, however, considered unnecessary to adopt these amendments; it is felt that where the execution application is dismissed (for default), the attachment must cease.

*Order XXI, rule 57 and attachment before judgment*

The question whether the provisions of Order XXI, rule 57 apply to an attachment before a judgment, is not free from doubt.

Order XXI, rule 57 provides that where property has been attached in execution of a decree, but because of the decree-holder's default the court is unable to proceed further with the execution application, it can dismiss the application, in which case "the attachment shall cease". There is a conflict of decisions on the question whether this rule applies to attachment before judgment. In view of the words "attached in execution of a decree", it has been held that where property, etc., with a view to defeating, etc., execution application for default does not put an end to the attachment before judgment<sup>3</sup>. It is argued in support of this view, that attachment before judgment is effected only if the court is satisfied that the defendant intends to remove his property etc., with a view to defeating, etc., execution; hence it stands on different footing from attachments after judgment<sup>4</sup>. On the other hand, some High Courts have held the rule to be applicable to property attached before judgment—at least where the attachment has been followed by an application after the decree for bringing the property to sale<sup>5</sup>.

<sup>1</sup>See Civil Justice Committee (1925) Report, page 409, para. 22.

<sup>2</sup>As to Calcutta Amendment, see *Pashupati v. Deba* A.I.R. 1951 S.C. 447.

As to Madras Amendment, see *Subramaniam v. Sundaram*, A.I.R. 1963 Mad. 217.

<sup>3</sup>*Bohra Akhey Ram v. Basant Lal*, I.L.R. 46 All. 894 ; A.I.R. 1924 All. 860, approved in *Abdul Hamid v. Asghari Begum*, I.L.R. (1953) 1 All. 654 ; A.I.R. 1953 All. 173 (F.B.) ; *Shibnath Singh v. Shaikh Sabir-uddin*, I.L.R. 56 Cal. 416 ; A.I.R. 1929 Cal. 465, followed in *Ayezali v. Mahanandabarui*, A.I.R. 1949 Cal. 320 (Das Gupta J.).

<sup>4</sup>See the exhaustive review case-law in *Dattatraya V. Rambhaha* A.I.R. 1962 Bom. 236, 238, 239, 240 ; paras. 8—16 (holding that rule 57 does not apply to attachment before judgment) (Patel and Abhyankar JJ.).

<sup>5</sup>*Venkata Rao v. Surya Rao*, I.L.R. 1950 Mad. 2 ; A.I.R. 1950 Mad. 39 ; *Meyyappa v. Chidambaram*, I.L.R. 47 Mad. 43 ; A.I.R. 1924 Mad. 484. (F.B.); *Hari v. Shrinivas*, I.L.R. 55 Bom. 693 ; A.I.R. 1931 Bom. 550. (Madgavkar & Murphy JJ.) (held to be obiter in A.I.R. 1962 Bom. 236).

A general rule applying provisions of the Code (applicable to attachment made in execution) to attachments before a judgment, is now proposed<sup>1</sup>. That will resolve this conflict.

*Order XXI, rule 58*

1. A person making a claim or objection to an attachment need show, at present, merely possession of the property. According to the recommendation made in the Fourteenth Report<sup>2</sup> the inquiry must be full and cover questions of ultimate right and title. To achieve that object, changes have been proposed.

2. The question has been raised whether, in view of the fact that suits existing under rule 63 will now be replaced by an inquiry in execution (under the proposed scheme), it would not be advisable to make an express provision as to whether questions of fraud, for example, those under section 53 of the Transfer of Property Act, could be considered in proceedings under rules 58 to 63.

3. It is considered unnecessary to make any such provision for this purpose only.

4. It is considered unnecessary to make an express provision as to whether the proceedings under rule 58 *et seq* and the decisions given thereon will be binding as between the *judgment-debtor* and a third party claimant. The answer to that question would depend on the question—who are the parties to the suit and what are the matters raised therein<sup>3</sup>.

5. It is considered unnecessary to make a provision that a third person who is affected by the attachment is not bound to take proceedings under these rules and can file a regular suit. That is the existing law, and that position will continue.

*Order XXI, rule 58 and limitation*

1. When an objection or claim is dismissed after the proceedings under rules 58 to 62, the suit, if any, by the aggrieved party, can be filed under Order XXI, rule 63 within the period of 1 year<sup>4</sup>.

Since under the scheme of rules 58 to 63, as proposed, a full inquiry into title will be held, a suit would be barred under the changed scheme. But where the court does not

<sup>1</sup>See Order 38, rule 11A (proposed).

<sup>2</sup>14th Report, Vol. I, page 453, para. 49.

<sup>3</sup>For a recent decision on this aspect, see I.L.R. (1956), A.P. 374 ; A.L.R. 1957, A.P. 61 (F.B.).

<sup>4</sup>Article 98 of the Limitation Act, 1963 corresponding to article 11 of the old Act.

entertain the claim by virtue of delay or by virtue of the claim having been filed after the holding of the sale, the right of suit may be preserved<sup>1</sup>. Article 98 of the Limitation Act, 1963 should, in this context, be confined to such suits, and will require change for the purpose.

2. It is also considered that the period should be reduced from one year to one hundred and eighty days in order that the matter may not remain hanging for long. This change may also be carried out in article 98.

*Order XXI, rule 58 and court-fees*

Since orders under Order XXI, rule 58 will now be appealable as decrees, the appeals will attract full court-fees. For the purpose of court-fees, these orders should be treated as orders under section 47. Necessary reduction of court-fees should be granted by the State Governments by issuing a notification under the relevant provision of the Court-fees Act applicable to the State, as has been done in most States in respect of orders under section 47, C.P.C.

*Order XXI, rule 59*

This deals with postponement of sale pending inquiry into objections. Following changes have been proposed:—

(1) Where immovable property is advertised for sale, the court can, at present, postpone the sale pending investigation of a claim or objection to attachment.

A recommendation was made in the Fourteenth Report<sup>2-3</sup>, that the sale should not be postponed, but the court should have a discretion to direct that it shall not be confirmed until decision of the claim or objection. This has been carried out, but with an important modification. Existing power to postpone the sale is preserved (though the Fourteenth Report contemplated its deletion), as useful in certain cases.

(2) A provision has been added to the effect that where the sale has already taken place at the time of the claim or objection, the claim or objection shall not be entertained. This will resolve the conflict of decisions on the question<sup>4-5</sup> whether an objection can be investigated in such cases.

<sup>1</sup>See Order 21, rule 58, as proposed.

<sup>2</sup>14th Report, Vol. I, page 453, para. 48, last sentence.

As regards movables, the present position is retained, as under Order 21, rule 77, the sale becomes absolute immediately.

<sup>3</sup>See also the Civil Justice Committee (1925) Report, page 392, para. 25.

<sup>4</sup>The answer is "No" according to some High Courts. See A.I.R. 1926 Cal. 468 and A.I.R. 1937 Cal. 390 ; A.I.R. 1942 Bom. 263 ; A.I.R. 1953 M.B. 264. For the contrary view, see A.I.R. 1958 Mysore 140 ; A.I.R. 1931 Mad. 782 ; A.I.R. 1940 Nag. 7.

<sup>5</sup>*Cf.* the Allahabad Amendment interpreted in *Firm Tundi Ram v. Ghur Lal*, A.I.R. 1939 All. 598.

(3) Instead of investigation, the word "adjudication" is used, as it is intended that the inquiry should cover questions of title also.

*Order XXI, rule 59—Postponing confirmation of the sale*

In the draft Report circulated for comments, a provision had been proposed under which, while the confirmation of the sale itself could be postponed, the sale itself was to be held. One of the comments received on the draft Report was, that if the sale is held pending the inquiry, it may not fetch a satisfactory price. This has been considered. But it is felt, that in order to save delay, the power proposed should be given to the Court.

*Order XXI, rule 59 (security)*

A provision authorising the court to require security or to impose other conditions has been added. The Calcutta Amendment to Order XXI, rule 58 may be compared.

*Order XXI, rules 60, 61 and 62*

The existing rules 60, 61 and 62 contain detailed provisions as to the powers of the court. Since it is intended that a full inquiry should now be held, these have not been repeated *in extenso*.

*Order XXI, rule 63*

Since the inquiry under these rules is intended to be conclusive, the provisions of existing rule 63 which allow a suit to be filed to set aside the decisions passed in such inquiries are not now needed, except in the cases where the court refuses to adjudicate upon the claim on the ground of delay, etc., or on the ground that it was filed after the sale was held. The operation of rule 63 should, in effect, be confined to such cases. A provision incorporating the substance of rule 63, confined as above, is therefore proposed.

*Order XXI, rule 66*

1. A recommendation was made in the Fourteenth Report<sup>1</sup>, that to avoid the difficulties caused by mistakes in the estimated value of the property as stated in the proclamation of sale, the rule should be amended on the lines of the Patna Amendment, so as to provide (in effect) that the court should state merely the estimated value, if any, as given by the parties and insert a statement that it does not vouch for the accuracy of either. It is considered, that it would be sufficient to adopt the Calcutta Amendment which is more simple. That is what has been proposed on this point.

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<sup>1</sup>14th Report, Vol. I, page 454, para. 50.

2. Since a proclamation under rule 54, as proposed<sup>1</sup>, would have notified to the judgment-debtor the date on which the terms of the proclamation of the sale are to be settled, an amendment is proposed to rule 66 to the effect that in such a case, a fresh notice of that date need not be given to the judgment-debtor, unless the court otherwise directs.

*Order XXI, rule 67*

An amendment has been made by the High Court of Madras to this rule, the object of which seems to be to emphasise that rule 67(1) and (2) deals *mainly* with the mode of publication<sup>2</sup>.

No such change appears to be necessary, in view of the wording of the rule.

*Order XXI, rule 68*

This is in implementation of the Fourteenth Report<sup>3</sup>. The object is to reduce the interval between the proclamation of sale and the actual sale.

*Order XXI, rule 69*

1. Under rule 69(2), a fresh proclamation of sale is necessary where the sale is adjourned for a longer period than 7 days, unless the judgment-debtor consents. As regards this sub-rule, two changes have been proposed in the Fourteenth Report<sup>3</sup>:—

(i) The period should be increased from 7 days to 30 days.

(ii) the court should have power to dispense with the consent of the judgment-debtor, where he has failed to attend in answer to the notice issued under Order XXI, rule 66.

2. The object of the amendment on the first point is to dispense with the necessity of a fresh proclamation. Increase of the period will naturally reduce the number of cases in which such proclamation will be required. Similar amendments have been made by the High Courts of Bombay, Calcutta, Punjab, Madras and Andhra Pradesh

<sup>1</sup>See Order 21, rule 54, as proposed.

<sup>2</sup>See also discussion in *Seshagiri v. Valambal*, A.I.R. 1952 Mad. 377-381, 384 (Sathanarayan Rao and Raghav Rao JJ.).

<sup>3</sup>14th Report, Vol. I, page 455, para. 55.

<sup>4</sup>See also Civil Justice Committee (1924-25) Report, page 390, para. 22.

<sup>5</sup>14th Report, Vol. I, page 456, para. 56.

(all of which substitute 30 days). This has been adopted. (The amendments by Allahabad and Patna substitute 14 days.)

3. As regards the second point, though such an amendment has been made by the High Courts of Allahabad and Patna, it is felt, that the consent of the judgment-debtor should not be dispensed with merely on the ground that he has failed to appear in answer to the notice referred to. He may be present at the time of adjournment and would like to be heard, and this opportunity need not be denied. This recommendation of the Fourteenth Report has not been carried out.

*Order XXI, rule 72*

A recommendation has been made in the Fourteenth Report<sup>1</sup> to the effect, that a decree-holder should be allowed to purchase property unless the court has prohibited him from doing so<sup>2</sup>. The object of the recommendation was to avoid the delay that is frequently caused when the warrant of sale is returned unexecuted in the absence of bidders. An amendment carrying out this recommendation was proposed in the draft Report which had been circulated. Comments received thereon, however, emphasise the need for the court being aware of *any proposal* by the decree-holder to bid. There is considerable force in this approach, and a decision has been taken not to disturb the existing rule. The recommendation has not, therefore, been carried out.

*Order XXI, rule 72A (Bombay)*

Order XXI, rule 72A has been added by the High Court of Bombay to provide that if leave to bid is granted to a mortgagee, then, as regards him, a reserve price shall be fixed, which shall not be less than the amount due as principal, etc.

The history of this rule is this:

The Subordinate Judge of Haveli wrote a letter to the High Court in 1913, stating that this was the practice followed in the mufassil, and as the rule could not now be made under section 104, Transfer of Property Act, it should be made under Order XXXIV. The Rule Committee recommended that the old rule 20 of the Supplementary Civil Circular No. 11 should be restored<sup>3</sup>. In the absence of such a rule, the mortgagee can (under a general permission to bid) recover in execution the balance from the mortgagor

<sup>1</sup>14th Report, Vol. 1, pages 456-457, para. 57.

<sup>2</sup>See also Civil Justice Committee (1925) Report, page 410, para. 24.

<sup>3</sup>See discussion in *Vrajtal v. Venkataswami*, I.L.R. 52 Bcm. 459; A.I.R. 1928 Bom. 123, 125 (Marten C. J. and Blackwell J.).

or from his estate, if the amount for which the property is sold is less than the principal, etc., due to him<sup>1</sup>.

The question whether this amendment should be adopted has been considered. It is felt that a rigid provision of such a nature is not necessary. It would to a certain extent, detract from the remedy of the mortgagee under Order XXXIV, rule 6 also.

*Order XXI, rule 75*

Local Amendments<sup>2</sup>, which have been made in implementation of the recommendation of the Civil Justice Committee<sup>3</sup>, empower the court to sell growing crops (after attachment) where they can be sold to greater advantage in an unripe state. It is, however, considered unnecessary to adopt these local Amendments, as they are of a minor character.

*Order XXI, rule 84(2)*

1. Under rule 84(1), the purchaser has to deposit 25 per cent. of the purchase money. This requirement can be dispensed with by the Court under rule 84(2), where the decree-holder is the purchaser. The Allahabad Amendment provides, that the court *shall not* dispense with this requirement where there is an application for rateable distribution of assets. In this connection, reference may be made to Order XXI, rule 72(2), under which the setting off of the purchase-money and the amount due on the decree is to be "subject to the provisions of section 73".

2. This raises an interesting question, namely, how far a decree-holder, who is a purchaser and purchases with the court's permission under rule 72, is bound to deposit 25 per cent.

3. The matter may be considered under two situations. The first is, where there is no question of rateable distribution. In such a case it has been held that an express order exempting the decree-holder from depositing 25 per cent. is not necessary<sup>4</sup>. As has been pointed out<sup>5</sup>, in such a case, to insist on his depositing the amount would be meaningless.

<sup>1</sup>*Vrajlal v. Venkataswami*, I.L.R. 52 Bom. 459 ; A.I.R. 1928 Bom. 123, 128.

<sup>2</sup>See amendments made by the High Courts of Calcutta, Madras, Nagpur and Patna.

<sup>3</sup>Civil Justice Committee (1924-25) Report, page 410, para. 25.

<sup>4</sup>*Nurdin v. Bulaqi Mal*, A.I.R. 1931 Lah. 78 (Tapp J.).

<sup>5</sup>*Kanhaiya Lal v. Sans Mal*, A.I.R. 1956 Raj. 18, 19 (Wanchoo C. J. and Dave J.) (reviews the case-law).



4. The next situation is, where there is a rateable distribution. Here the interests of the other decree-holders are involved; and therefore, even if the decree-holder is the auction-purchaser, he should deposit the 25 per cent. of the purchase-money. The Allahabad Amendment makes an express provision on the subject. But, as has been pointed out by the Madras High Court<sup>1</sup>, even in such a case the decree-holder cannot be compelled to bring into the court the *entire purchase price*. Where the purchase price is equal to or less than the decretal amount, the decree-holder's right to set off is controlled only to this extent, namely, that he is bound to bring into court such sums alone as are due to those decree-holders whose applications in execution were pending on the date of the sale. Accordingly, in the Madras case, even the literal wording of rule 199 of the Madras Civil Rules of Practice was held not to come in the way of the right to set-off.

That rule ran as follows:—

“Provided that if there are several decree-holders entitled to rateable distribution, the purchase-money shall be paid into court.”

The court held, that to the extent to which rule 199 of the Madras Civil Rules was inconsistent with the provisions in the First Schedule, it was *ultra vires* under section 157 of the Civil Procedure Code which saved old rules only to the extent to which they were consistent with the Code<sup>2</sup>.

5. It would, thus, appear that how far the decree-holder should be required to deposit the 25 per cent. is a matter depending on—

- (i) whether there is any likelihood of rateable distribution, and
- (ii) what is the extent of that distribution.

A categorical provision would not, therefore, be helpful.

#### *Order XXI, rule 89*

1. The object of this amendment is to make it clear that a person having an interest at the date of the *application* can avail himself of this rule. Compare the discussion in the Report of the Civil Justice Committee<sup>3</sup>.

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<sup>1</sup>*Murugappa v. Ramasami*, A.I.R. 1935 Mad. 893, 894 (right-hand) (Venkatasubba Rao J.).

<sup>2</sup>As to the balance payable under rule 85, see discussion in *Varalakshamma v. Jannayya*, A.I.R. 1943 Mad. 318.

<sup>3</sup>Civil Justice Committee (1925) Report, page 396.

2 The present view is, that such persons are not entitled<sup>1,2,3,4,5</sup>.

3. See also amendments made by the High Courts of—

- (i) Madras<sup>6</sup>, and
- (ii) Allahabad, and

the more specific amendments made by the High Courts of—

- (iii) Nagpur<sup>7</sup>,
- (iv) Patna<sup>8</sup>, and
- (v) Lahore<sup>9</sup>.

The language of the Madhya Pradesh Amendment has been adopted.

4. For a history of the rule, see the under-mentioned case<sup>10</sup>.

*Order XXI, rule 90*

*Sub-rule (1).*—The words “or purchaser” have been added to make it clear that an auction-purchaser can also apply. This will set at rest the conflict of decisions on the subject<sup>11</sup>.

*Order XXI, rule 90 and deposit*

A recommendation has been made in the Fourteenth Report<sup>12</sup> to the effect that a person applying to set aside the sale under rule 90 should be required to deposit an amount

<sup>1</sup>*Fatima-ul-Hasna v. Baldev*, A.I.R. 1926 All. 204. The contrary view had been taken in I.L.R. 34 All. 186.

<sup>2</sup>*Pandurang v. Govind*, (1916) I.L.R. 40 Bom. 557.

<sup>3</sup>*Sarada Kripa v. Harendra*, I.L.R. 49 Cal. 454 ; A.I.R. 1922 Cal. 271. As to the person purchasing before sale, see *Gosto Behari v. Sankar Nath*, A.I.R. 1917 Cal. 281.

<sup>4</sup>*Sundaram v. Mansa*, I.L.R. 44 Mad. 554 ; A.I.R. 1921 Mad. 157 (F.B.) (before Madras Amendment).

<sup>5</sup>*Deopati Kuer v. Mahabir*, I.L.R. 25 Pat. 529 ; A.I.R. 1947 Pat. 293.

<sup>6</sup>Interpreted in *Gutta Lakshminarasamma v. Yalamarti*, A.I.R. 1943 Mad. 684 (Leach C. J. and Shahabuddin J.).

<sup>7</sup>Interpreted in *Vithoba v. Mahadeo*, A.I.R. 1948 Nag. 303. See also *Juharmal v. Ramdas*, A.I.R. 1937 Nag. 161 (Vivian Bose J.).

<sup>8</sup>*Cf. Deopati Kuer v. Mahabir Prasad*, I.L.R. 25 Pat. 529; I.L.R. 1947 Pat. 293.

<sup>9</sup>*Cf. Ran Chandra v. Narain Prashad*, A.I.R. 1935 Lah. 51.

<sup>10</sup>*Deopati Kuer v. Mahabir Prashad*, I.L.R. 25 Pat. 529 ; A.I.R. 1947 Pat. 293.

<sup>11</sup>See Mulla, Civil Procedure Code (1953), under Order 21, rule 90, page 899, under “Auction-purchaser”.

<sup>12</sup>14th Report, Vol. 1, pages 454-455, para. 51.

not exceeding 12½ per cent. of the purchase price<sup>1</sup>, which amount can be utilised for awarding costs if the application fails. As the amount of such costs would not be very large, it is considered unnecessary to carry out this recommendation.

*Order XXI, rule 90 and objections which could have been taken earlier*

A recommendation was made in the Fourteenth Report<sup>2</sup> to the effect, that a sale shall not be set aside on the ground of any defect in the proclamation of sale at the instance of any person who did not attend (though given notice to appear) at the drawing up of the proclamation, or at the instance of any person in whose presence the proclamation was drawn up, unless the objection was taken by him before the sale was held. A similar, but somewhat wider, amendment has been made by the Allahabad High Court, the effect of which is that no application to set aside a sale can be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up. The Gujarat Amendment to this rule, is still wider and runs as follows:—

*Gujarat Amendment to Order XXI, rule 90*

“Provided also that no such application for setting aside the sale shall be entertained without the leave of the Court upon any ground which could have been, but was not, put forward by the applicant before the commencement of the sale.”

It is considered that the Allahabad Amendment should be adopted. Necessary change is proposed.

*Order XXI, rule 90 and absence of attachment*

The question whether absence of, or irregularity in attachment is, a defect in the “publication or conduct of the sale” has been discussed in several decisions<sup>3</sup>. At one extreme is the view that attachment is not necessary at all before sale<sup>4</sup>. At the other extreme stands the view that sale without attachment is void<sup>5</sup>. A third view is, that attachment is an irregularity, but not in publishing or conducting the sale. According to the fourth view, a sale is not a nullity because of a defect in the attachment or

<sup>1</sup>Cf. Allahabad Amendment.

<sup>2</sup>14th Report, Vol. I, pages 454-455, para. 51.

<sup>3</sup>See A.I.R. 1927 Cal. 847 ; A.I.R. 1947 Mad. 213 ; A.I.R. 1930 Lah. 685.

<sup>4</sup>A.I.R. 1939 Bom. 277 (Beaumont C.J.).

<sup>5</sup>Cf. Order 21, rule 64.

want thereof, but if it causes "substantial injury", it can be set aside under rule 90<sup>1</sup>. The last view seems to be the correct one. The object of *attachment* is to bring the property under the control of the court, and in the case of immovable property one of the requirements is that the order of attachment should be publicly proclaimed. The main object of the *proclamation* is to give publicity to the fact that the sale of the proclaimed property is in contemplation. The publication of the attachment is thus a step leading up to the proclamation of the sale<sup>2</sup>.

The question whether it is necessary to insert a provision to clarify the position on the subject, has been considered. In the draft Report which had been circulated, an *Explanation* had been proposed to rule 90 to the effect that absence of or defect in attachment shall be regarded as an irregularity under this rule. After some consideration, it has been decided that no such provision need be inserted.

#### Order XXI, rule 92(1)

1. Under Order XXI, rule 92(1), where no application to set aside the sale is made, etc., the court "shall make" an order confirming the sale. Since it is now proposed<sup>3</sup> that when an objection is made to attachment the court may (while holding the sale) *postpone* its confirmation, it is desirable to exclude such a situation from the operation of rule 92. Necessary change is proposed<sup>4</sup>.

2. The Madras High Court has made an amendment to this rule which provides, in effect, that where the amount deposited by the purchaser is diminished, the resultant deficiency should be made good before the sale is confirmed. It is considered unnecessary to adopt this amendment, as such cases would be very rare.

3. Where, however, a deficiency in the amount required to be deposited is discovered to exist by reason of a mistake in calculation on the part of the party, some change is needed. The existing position is that in such cases the sale cannot be confirmed even if the deficiency is very small<sup>5,6</sup>. It is felt that in such cases the deficiency should be allowed to be made good within a time to be fixed by the court. Necessary change is proposed.

<sup>1</sup>*Swaminath v. Krishnaswami*, A.I.R. 1947 Mad. 213, 215.

<sup>2</sup>*Sheodhyan v. Bholanath*, (1899) I.L.R. 21 All. 311, 313.

<sup>3</sup>See Order 21, rule 59 (proposed).

<sup>4</sup>*Cf.* the amendments made by High Courts of Allahabad and Patna.

<sup>5</sup>*Anrital v. Sadashiv*, A.I.R. 1944 Bom. 233 (Lokur J.).

<sup>6</sup>*Kalidas v. Dodda*, A.I.R. 1947 Mad. 56.

*Order XXI, rule 95*

Order XXI, rule 95 deals with delivery of property on the application of the purchaser of immovable property sold in execution of a decree. Though an express provision to the effect that the auction-purchaser is deemed to be a "party" within the meaning of section 47 is being inserted<sup>1</sup>, rule 95 has been retained, as indicating clearly the procedure to be adopted.

*Order XXI, rules 97 to 103*

1. The general scheme of rules 97 to 103 has been altered on the lines of the amendments proposed in rules 58 to 63. In substance, the amendments carry out the recommendation made in the Fourteenth Report<sup>1</sup> to the effect, that the executing court should undertake a full inquiry and determine question of title in cases of resistance or obstruction in delivery of possession, etc.

2. Apart from this, the following points may be noted:—

In the rule corresponding to rule 98, the words "or on his behalf" have been added, to cover cases of resistance, etc., by a person acting *without instigation* by the judgment-debtor and yet for his benefit<sup>2,3</sup>.

The question whether persons who did not file a claim or objection to attachment under rule 58 should be barred from agitating their claims under rule 97 or rule 100 (that is, by way of defence to an application under rule 97 or by way of an application under rule 100) has been considered. It is felt, that such a provision should not be inserted. A categorical provision of this nature would not be justified, as there may be cases where, by reason of defect in or absence of attachment or other factors, the person now applying had no knowledge of the attachment, and could not, therefore, have filed an objection under rule 58. A provision requiring such persons to obtain leave of the Court before they agitate their rights in such cases has also not been favoured, as it may work hardship.

The local Amendments to existing rule 98 make certain changes in matters of detail. Thus, the Bombay Amendment to rule 98 provides that the court may order the person or persons whom it held responsible for resistance or obstruction to pay, in addition to costs, reasonable compensation not exceeding one thousand rupees (to the decree-holder or the purchaser), for the delay and expenses caused to him in obtaining possession. The Punjab

<sup>1</sup>See the amendment proposed to section 47.

<sup>2</sup>14th Report, Vol. I, page 453, para. 49.

<sup>3</sup>*Cf.* the recommendation made by the Civil Justice Committee (1925) Report, pages 498 and 499 para. 33.

<sup>4</sup>*Cf.* section 74.

Amendment to rule 98 provides that the person detained under rule 98 shall be detained at the public expense and the person at whose instance he is being detained shall not be required to pay for his subsistence. It is, however, considered unnecessary to adopt these amendments in matters of detail.

*Order XXI, rule 97 and question of Court-fee and Limitation*

Under the proposed scheme, the orders in proceedings under rules 97 to 103 will be treated as decrees. Appeals from such orders will thus have to bear *ad valorem* court-fees. It is, however, felt that a reduction of court-fees in respect of such appeals should be granted by the State Government as has been done in the case of orders under section 47.

Under the proposed scheme, the question of filing a suit to set aside the order passed in proceedings under rules 97 to 103, will not remain. The relevant portion of article 98 of the Limitation Act, 1963, dealing with such suits, will, therefore, have to be omitted.

*Order XXI, rule 102*

Order XXI, rule 102 provides that nothing in rules 99 and 101 shall apply to resistance or obstruction, etc., by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. The words "a person to whom the judgment-debtor has transferred the property" have created a conflict on this point, namely, whether an involuntary sale is caught by these words. One view is that they are caught<sup>1-2</sup>.

It has also been held that the proper remedy of such a person is to raise the matter under section 47 and that he has no *locus standi* to maintain an application under rule 100 or to sue under rule 103<sup>3-4</sup>.

A contrary view, however, has been taken by the Patna High Court, on the ground that since old section 333 of the Code of 1882 was adopted at a time when the doctrine of *lite pendente* had not been extended to a transfer in execution, rule 102 cannot be given the extended interpretation which section 52 of the Transfer of Property Act has received<sup>5-6</sup>.

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<sup>1</sup>*Nagendra Nath v. Ram Krishna*, A.I.R. 1960 Cal. 299.

<sup>2</sup>*Bepin Chandra v. Hem Chandra*, A.I.R. 1939 Cal. 709.

<sup>3</sup>*Khem Chand v. Mool Chand*, A.I.R. 1934 Lah. 457.

<sup>4</sup>*Rajaratnam v. Sheikh Hasan Bi*, A.I.R. 1926 Mad. 968.

<sup>5</sup>*Harihar Prasad v. Lakhantai*, A.I.R. 1935 Pat. 230.

<sup>6</sup>*Guna Durga Prasad Rao v. Krishna Rao*, I.L.R. 24 Pat. 695 ; A.I.R. 1946 Pat. 134.

It is considered that the former view is preferable and will prevail. No change in the language is, however, considered to be necessary on this point.

These rules are new, and have been inserted on the lines of the Madras Amendment, Order XXI, rules 104 and 105, which empower the court to set aside *ex parte* orders, etc., passed in execution proceedings. They have been adopted as useful provisions. Order IX does not, in terms, apply to execution proceedings<sup>1</sup>. Courts have had to resort<sup>2-3</sup> to section 151, but the position in that respect is also not clear<sup>4</sup>. The amendment will settle the position<sup>5</sup>.

Section 5 of the Limitation Act has been mentioned in the Madras Amendment as applicable to applications under the new rules. This has been retained in the draft. Though section 5 of the new Limitation Act of 1963 makes its provisions applicable to all applications, it expressly excludes applications for execution. Therefore, it is desirable to mention that section expressly. It may also be noted that there is a certain amount of controversy as to whether the words "special law" in section 29 of the Limitation Act apply to the Civil Procedure Code<sup>6</sup>.

#### *Order XXII, rule 4 and ignorance of death*

The question whether, where a plaintiff is ignorant of the death of the defendant, delay in substitution of the legal representative should be excused on that ground, has arisen in several cases. Each case would seem to depend on its facts<sup>7</sup>. No express provision is, therefore, considered necessary.

#### *Order XXII, rule 4—relaxation of*

The question whether the court should have power to grant exemption in respect of the requirement of substitution in a proper case has been considered. Local Amendments giving such power have been made by the High

<sup>1</sup>See—

(i) *Arunachalam v. Veerappa*, A.I.R. 1931 Mad. 656 (F.B.).

(ii) *Bharat v. Ashgar*, I.L.R. 45 All. 148.

(iii) *Jethmal v. Sakina*, A.I.R. 1961 Raj. 59.

<sup>2</sup>*Mohammad Hanif v. Ali*, I.L.R. 55 All. 891 ; A.I.R. 1933 All. 783, 784 (F.B.).

<sup>3</sup>*Hari v. Bulaqi*, A.I.R. 1930 Lah. 20.

<sup>4</sup>*Narayana v. Muthu*, I.L.R. 50 Mad. 67 ; A.I.R. 1926 Mad. 980, 983, 984.

<sup>5</sup>Cf. A.I.R. 1963 A.P. 127.

<sup>6</sup>*Kandaswami v. Kannappa*, A.I.R. 1952 Mad. 186, 192, para. 21—holds that C.P.C. is not a special law, dissenting from the Nagpur decision in *Sita Ram v. Chuni Lal*, I.L.R. 1944 Nag. 250.

<sup>7</sup>See A.I.R. 1964 S.C. 215 ; see also A.I.R. 1951 Sim. 257.

Courts of Calcutta, Madras, Orissa, etc., in respect of a defendant who has failed to appear and contest the suit<sup>1</sup>. It is, however, felt that such a change should not be made, as it would impinge upon the rule that litigation should not proceed in the absence of the heirs of a person who is dead. These local Amendments have not, therefore, been adopted.

*Order XXII, rule 4 and legal representatives not traceable*

A suggestion received from the Calcutta High Court for the insertion of a provision to deal with cases where the legal representative of a deceased party is not traceable has been considered. Reference may, in this connection, be made to Order XVI, rule 46 of the Rules of the Supreme Court, now Order XV, rule 15 of the R.S.C. Revision (1962). The adoption of a somewhat similar provision was suggested in a judgment of the Calcutta High Court<sup>2</sup> also, and the suggestion was repeated in another case<sup>3</sup>.

The English rule is intended to cover two cases; first, where litigation is intended to be started but there is no "personal representative", and secondly, where litigation has already started and then a party dies and there is no personal representative. History of the English rule is discussed in a recent case<sup>4</sup>. The under-mentioned authorities<sup>5,6</sup> discuss the practice under the English rule.

It is, however, considered that such cases would not be many, and, therefore, the suggested provision need not be inserted.

*Order XXII, rule 5*

This follows local Amendments<sup>7</sup>. The object is to enable an appellate court to direct a subordinate court to enquire into, and give its findings on, disputes as to who is legal representative of a deceased party.

<sup>1</sup>See also discussion in the Report of the Civil Justice Committee (1925) pages 533 and 177.

<sup>2</sup>*William Harold Gibbs v. Deba Prasad Roy* (decided on 17-3-1950) 85 Calcutta Law Journal 280.

<sup>3</sup>*In the Goods of Golam Nabi Maggo* dt. 15-5-1961.

<sup>4</sup>*Pratt v. London Passenger Transport Board*, (1937) 1 A.E.R. 473, 478 (Court of Appeal).

<sup>5</sup>*Lean v. Alston*, (1947) 1 A.E.R. 261.

<sup>6</sup>Halsbury, 3rd Edn., Vol. 16, pp. 121, 134, 292 (and Vol. 9, page 176 or County Courts).

<sup>7</sup>*Cf.* the amendments made by the High Court of Madras, etc.



*Order XXII, rule 12*

The Allahabad Amendment to Order XXII, rule 12 provides that the rules relating to abatement shall not apply to proceedings after the preliminary decree. Actually this is the position according to the decisions of the most High Courts<sup>1,2</sup>, and the Allahabad Amendment seems to have been necessitated by the fact that that High Court<sup>3</sup> took a different view.

In view of the opinion of the majority of the High Courts, the amendment need not be adopted.

*Order XXIII, rule 1 (3A)*

It is considered, that where a suit is withdrawn by the next friend acting on behalf of a minor, etc., leave of the court should be obtained. Necessary amendment is proposed.

*Order XXIII, rule 1 (3B)*

It is considered, that where a suit in which the plaintiff is a minor, etc., is withdrawn, the application should be accompanied by an affidavit of the next friend as well as a certificate of the counsel to the effect that the withdrawal is for the minor's benefit. The Madras Amendment, Order XXXII, rule 7(1A) provides that where an application has been made for leave to enter into an agreement or compromise, or *withdrawal of a suit* in pursuance of a compromise, or for "taking any other action" on behalf of a minor, etc., certificate of the counsel to the effect that the agreement, etc. is for the minor's benefit should be filed. The proposed amendment has suggested itself on a study of the Madras Amendment, though it differs from it by requiring an affidavit of the next friend also.

*Order XXIII, rule 3*

It is considered that an agreement or compromise under Order XXIII, rule 3 should be in writing signed by the parties. A similar provision has been made by the Orissa Amendment to this rule, which appears to be worth adopting. It may be stated that oral agreements or compromises are difficult of proof<sup>4</sup>, and are often set up to delay the progress of the suit.

<sup>1</sup>See *Bapu v. Gulab*, A.I.R. 1929 Nag. 142 (F.B.).

<sup>2</sup>*Bhusan v. Chhabi Moni*, A.I.R. 1948 Cal. 363 (reviews case-law).

<sup>3</sup>*Mahabu v. Narain*, A.I.R. 1931 All. 490 (F.B.).

<sup>4</sup>*Cf.* discussion in *Athappa v. Peria Sami*, A.I.R. 1956 Mad. 344, 347.

*Order XXIII, rule 3 and "lawful"*

The words "lawful agreement or compromise" in Order XXIII, rule 3 have created some controversy as to whether they exclude agreements which are voidable under section 19A of the Contract Act. One view is, that such agreements are not excluded. That view is based on the reasoning that the expression "lawful" excludes only two classes of agreements—those which are "unlawful" and those which are void<sup>1,2,3,4,5,6,7,8</sup>.

But a contrary view has been taken in certain other cases<sup>9,10,11</sup>.

The matter requires to be clarified, and the wider view of these words i.e. the latter view, should, it is considered, be incorporated. Necessary amendment is proposed.

*Order XXIII, rule 3 and the words "so far as relates to"*

There is an apparent conflict of decisions as to the interpretation of the words "so far as relates to the suit" used in Order XXIII, rule 3. The question that arises in practice is, whether a decree which records the terms of a compromise in respect of matters beyond the scope of the suit is executable, or whether the terms of the decree relating to matters outside the suit can be enforced (as a contract) only by a separate suit<sup>12</sup>. It is not, however, possible to resolve the conflict of decisions by verbal changes, since the application of the rule may vary according to the facts of each case. As a general amendment is not thus possible, no change is considered necessary.

<sup>1</sup>*Qadri Jahan Begam v. Fazal Ahmad*, A.I.R. 1928 All. 494 (Sulaiman and Kendall JJ.).

<sup>2</sup>*Hussain Yar Beg v. Radha Kishan*, I.L.R. 57 All. 426 ; A.I.R. 1955 All. 137.

<sup>3</sup>*Ram Asray v. Rameshwar*, A.I.R. 1961 All. 529.

<sup>4</sup>*Western Electric Co. Ltd. v. Kailash Chand*, A.I.R. 1940 Bom. 60 (Kania J.).

<sup>5</sup>*Harbans Singh v. Bawa Singh*, A.I.R. 1952 Cal. 72 (Sinha J.).

<sup>6</sup>*Suraparaju v. Venkataratnam*, A.I.R. 1936 Mad. 347 (Wadsworth J.).

<sup>7</sup>*Kuppuswami Reddi V. Pavanammal*, A.I.R. 1950 Mad. 728 (Rajamannar C. J. and Somasundaram J.).

<sup>8</sup>*Krishnan v. Rayrappan*, A.I.R. 1959 Ker. 130 (reviews case-law).

<sup>9</sup>*Nand Lal v. Ram Sarup*, A.I.R. 1927 Lah. 546 (2) (Addison and Agha Haider JJ.).

<sup>10</sup>*Misirilal v. Sobha Chand*, A.I.R. 1956 Bom. 569, 572, para. 5 (Shah J.).

<sup>11</sup>*Pannalal v. Kishanlal*, A.I.R. 1952 Nag. 84.

<sup>12</sup>See case-law discussed in *Ram Juwan v. Davindra Nath*, A.I.R. 1960 M. P. 280, 282, paras. 17 and 18.

*Order XXV, rule 1*

Local Amendments to Order XXV, rule 1<sup>1</sup> provide, in substance, for a power to require security for costs in cases in which an element of champerty or maintenance is proved. These implement the recommendation of the Civil Justice Committee<sup>2</sup>. As the problem may not exist in all States, an all-India Amendment is not necessary.

*Order XXVI, rule 7*

The change is verbal.

*Order XXVI, rule 9*

The Calcutta Amendment takes away the power of the State Government to make rules as to persons to whom commissions to make local investigations may be issued.

It is, however, felt that the power should continue, as the State Government may be in a position to know which persons are properly qualified. Hence no change is suggested.

*Order XXVI, rule 16A*

A recommendation was made in the Fourteenth Report<sup>3</sup> relating to the powers and procedure of Commissioners while recording evidence. The recommendation was that a provision should be inserted to the effect, that the Commissioner shall, while recording evidence, have regard to the provisions of the Evidence Act, and that in case the pleader or other person examining the witnesses presses any question which the Commissioner has disallowed, he should record such question and answer but the same should not be admitted in the evidence except by the order of the Judge.

So far as a provision that the Commissioner shall have regard to the Evidence Act is concerned, an express rule in the Civil Procedure Code is not considered necessary<sup>4</sup>. So far as questions objected to by the opposite party are concerned, it is considered, that whether or not the objection is pressed, the suggested procedure should apply. Necessary amendment is proposed.

<sup>1</sup>*e.g.* amendments made by Andhra Pradesh, Madhya Pradesh, Madras and Orissa.

<sup>2</sup>Report of the Civil Justice Committee, page 517, chapter 44, para. 27 (with reference to Oudh).

<sup>3</sup>14th Report, Vol. I, pages 354-355, para. 99.

<sup>4</sup>See sections 1 and 3, Indian Evidence Act, 1872.

*Order XXVI, rule 17*

The Kerala Amendment to Order XXVI, rule 17 provides, that where the Commissioner is not a Judge of the civil court, he shall not be competent to impose penalty, but such penalty may be imposed on the application of the Commissioner by the court which issued the commission. It is considered unnecessary to adopt this minor amendment.

*Order XXVI, rule 18A (New)*

This is new, and is intended to provide that the provisions of this Order apply to execution. Cf. the Madras Amendment, Order XXVI, rule 23. The Madras Amendment is useful, as otherwise the provisions of Order XXVI do not apply to execution<sup>1-2</sup>.

(Appointment of a Commissioner in execution for effecting partition, where the parties themselves have agreed for so effecting the partition, may be allowed)<sup>3</sup>.

*Order XXVI, rule 19*

In the Report of the Law Commission<sup>4</sup> relating to British Statutes applicable to India, a recommendation was made for examining whether the provisions of certain Acts of Parliament mentioned in that Report should be incorporated in the Civil Procedure Code. The matter has been considered, and it is felt that the existing provisions of Order XXVI are adequate for practical purposes for dealing with requests received from foreign countries for recording of evidence. No change in the Civil Procedure Code is, therefore, suggested on this point.

*Order XXVI, rule 22*

Order XXVI, rule 22 provides that the provisions of certain rules shall apply to the issue, etc., of commissions issued at the instance of foreign Tribunals. The new rule proposed<sup>5</sup>—relating to questions objected to by a party should apply to such commissions also. Hence the amendment.

*Order XXVIA (Madras)*

The Madras High Court has inserted Order XXVIA, whereunder the court is empowered to issue a commission for translation of accounts and other documents which

<sup>1</sup>*Ramnath v. Wasudeo*, A.I.R. 1947 Nag. 56, para. 4.

<sup>2</sup>*Manthiri Goudan v. Arunachalam*, A.I.R. 1940 Mad. 569, 570.

<sup>3</sup>See *Mt. Nilabati v. Mt. Sukurta*, A.I.R. 1953 Orissa 237.

<sup>4</sup>5th Report (British Statutes applicable to India), pages 40 and 41 and page 45, item 49.

<sup>5</sup>Order 26, rule 16A (proposed).

are not in the language of the court. The amendment has not been adopted, as it is considered that provision regarding translation, etc., can be made in the General rules for subordinate civil courts.

*Order XXVII and suits against the Government in respect of acts of employees*

In an earlier Report<sup>1</sup> of the Law Commission, a recommendation has been made to the effect that when a suit for damages is filed against the Government in respect of any act of its employee, agent or independent contractor, the employee, etc., should be impleaded as a party to the suit. It was also stated, that any claim based on indemnity or contribution by the State may well be settled in such proceedings, as all the parties will be before the court. An amendment of the Civil Procedure Code was recommended on these lines.

The recommendation has not been carried out, as it is felt that a *mandatory* provision of the nature suggested is not needed.

*Order XXVII, rule 5*

The Fourteenth Report<sup>2</sup> recommended an amendment to give the Government a minimum period of three months for filing a written statement. Compare the Madras Amendment also.

It is, however, considered unnecessary to lay down any such *rigid period* applicable to all cases in which the Government is a party.

*Order XXX, rule 2*

An amendment has been made to Order XXX, rule 2(3) by the High Court of Orissa, under which the names of the partners disclosed in the manner stated in Order XXX, rule 2(1) "shall appear in the decree". The question whether this amendment should be adopted for facilitating the execution of the decree against individual partners has been considered, but it is felt that there is no need for any such provision.

*Order XXX, rule 8*

1. The proposed amendment follows the Bombay Amendment to Order XXX, rule 8 with minor verbal changes. The following discussion will show the significance of the Bombay Amendment.

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<sup>1</sup>First Report (Liability of the State in Tort), page 40, para. IV (iii).

<sup>2</sup>14th Report, Vol. I, page 303, para. 13.

2. When a person denies that he is a partner and appears under protest under rule 8, the plaintiff may either disregard his appearance and serve the other partners (Order XXX, rule 3), or may insist that the appearance under protest be struck out. The option is entirely with the plaintiff. The defendant cannot insist on a decision<sup>1-2</sup>. Further, he cannot resist the claim on merits independently from the "firm" (Order XXX, rule 6).

3. The Bombay Amendment deals elaborately with the case of a person served under Order XXX who appears under protest. In the absence of such a provision, hardship often results, because, while the plaintiff could postpone the decision of the question of such person's being a partner, such person himself could not get the question decided even later under Order XXI, rule 50 (according to the better view). The position is thus "incongruous", as was observed by Sir Norman McLeod<sup>3</sup>.

4. The Bombay Amendment is somewhat similar to the amendment in rule 7 of Order 48A, R.S.C. made in 1929 in view of the decision in *Weir & Co. v. Mcvicar & Co.*<sup>4</sup> holding that a person appearing under protest cannot dispute the liability of the firm, and cannot have the question of his partnership decided before other issues. [The English rule is now replaced by Revised R.S.C. (1962), Order LXXXI, rule 4, sub-rules (2) to (5)].

Stated briefly, the effect of the Bombay Amendment is, that such person can have the question whether he was a partner decided. If he is held to be a partner, that does not preclude him from denying the firm's liability. If it is held that he was not partner and not liable as such, that does not preclude the plaintiff from otherwise serving a summons on the defendant firm, etc., but in that event the plaintiff shall be precluded from alleging the liability of that person as a partner, in execution proceedings.

5. The Bombay Amendment was made in pursuance of the suggestion of Shah J.<sup>5</sup>. Shah J. held that the combined effect of rules 3, 6 and 8 of Order XXX was, that persons served as partners could raise only such defences as were open to a partner, and could not have the issue as to whether they were or were not partners tried in the suit before the final decree was passed.

<sup>1</sup>See *International, etc. v. Mehta & Co.*, I.L.R. 54 Cal. 1057 ; A.I.R. 1927 Cal. 758, 760.

<sup>2</sup>*Nizam Lal v. Baker Jaffer & Co.*, A.I.R. 1940 Bom. 390.

<sup>3</sup>*Ajit Singh v. Grunin & Co.*, A.I.R. 1925 Bom. 494, 496.

<sup>4</sup>(1925) 2 K.B. 127, 134 (C.A.).

<sup>5</sup>*Rehman Khan v. Bombay Iron Syndicate*, A.I.R. 1953 Bom. 23, 26 para. 14 (decided on 13-8-1951) (Shah J.).

6. A defence on the *merits* in execution cannot also be taken by such persons. In Order XXI, rule 50, the expression "such liability is disputed" has been construed in Bombay to be confined to *liability as a partner*. The validity of the decree *qua* the partnership property and *qua* the persons mentioned in Order XXI, rule 50 (1) (b) (c) cannot therefore be effected or impaired in proceedings under rule 50<sup>1-2</sup>. The point has now been decided by the Supreme Court<sup>3</sup>, which has held that the person served under rule 50 can only prove that he was not a partner and (in a proper case) that the decision was the result of fraud, collusion or the like.

In view of this position, the Bombay Amendment appears to be worth adopting.

#### *Order XXX, rule 10*

1. How far the word "person" in Order 30, rule 10, applies to an undivided Hindu family is a question on which there is some controversy. The Madras High Court<sup>4</sup> has in one case held that it applies only to an individual. In that case, the firm consisted of four minors consisting of a joint undivided Hindu family, who were described as "R.M.P.M. Chettiar firm", etc. The court stated, that the whole of Order XXX was a reproduction of the rules in Order XLVIII A of the Rules of the Supreme Court, and Order 30, rule 10 was based on Order 48A, rule 11 of the English Rules, which had been held to apply only to a single individual carrying on business under an assumed or trading name. The court also relied on the differences in language between rule 10 of Order XXX and rule 1, because while the former spoke of "any two or more persons", the latter spoke of "any person carrying on business".

2. On the other hand, some High Courts have taken the view, that rule 10 applies to a number of individuals carrying on business either under a firm name or under an assumed name when these individuals do not in law constitute a partnership resting on contract, provided the suit is in respect of matters connected with the business so carried on. Thus, the Calcutta High Court<sup>5</sup> has applied

<sup>1</sup>*Mandalsa v. M. Ramnarain Ltd.*, A.I.R. 1959 Bom. 529.

<sup>2</sup>*Hirakishanda v. Gulabdas*, A.I.R. 1956 Bom. 513, 514, 515 (Gajendra-gadkar and Gokhale JJ.) (Calcutta cases also discussed and Das J's judgment in *C. M. Shahani v. Havero Trading Co.*, 51 C.W.N. 488 agreed with).

<sup>3</sup>*Gambir Mal v. J. K. Jute Mills* (1964) 1 M.L.J. 92 (S.C.); A.I.R. 1964 S.C. 243 (February).

<sup>4</sup>*Chidambaram v. National City Bank*, I.L.R. 1937 Mad. 28 ; A.I.R. 1936 Mad. 707. (Venkatasubba Rao and Venkataramana Rao JJ.).

<sup>5</sup>*Jamunadhar Poddar Firm v. Jamunaram Bhakat*, I.L.R. (1944) 2 Ca 131 A.I.R. 1944 Cal. 138 (R.C. Mitter and Blank JJ.).

this rule to a joint Hindu family (dissenting from the Madras view) and held that the word "person" must be given the meaning assigned by the General Clauses Act, and should include any association or body of persons whether incorporate or not. The object of rule 10, it was stated, was to avoid hardship. Business may be carried on by correspondence, and orders placed through post, and goods may be supplied on credit on such orders. A producer or merchant living in one part of the globe cannot be expected to know or to make enquiries as to who is the owner of the business that is being carried on in an assumed name; in most cases he would only know the name of the real owner only after he had brought his suit. (See Order XXX, rule 6). If a decree obtained by such a merchant in a suit instituted against the assumed name was to be treated as void, it would open up a wide door to fraud, and would sap the credit on which commercial dealings largely rest. (It was pointed out, that in England there was no concept of joint family firms). But in a later case<sup>1</sup>, the Calcutta High Court seems to have taken a different view.

3. In an Allahabad case<sup>2</sup>, there are observations that a joint family is a "person". But the actual question in that case was whether there can be a partnership of a joint Hindu family *with itself*, and in that context the court observed, "The members of a joint Hindu family" are a body of individuals who come under this definition of "person" (in the General Clauses Act). A partnership has been held to be an "association" of persons<sup>3</sup> under the Excess Profits Tax Act. The Patna High Court has taken the wide view in a recent case<sup>4-5</sup>. So also have the Kerala<sup>6</sup> and Orissa<sup>7</sup> High Courts.

4. In the Punjab the matter has been dealt with by amending Order XXX, rule 1. The Punjab Amendment was made under a Chief Court Notification issued soon after the 1908 Code came into force. The provision as enacted by the Legislature applied only to contractual partnerships<sup>8</sup>. The position under the Punjab Amendment has been lucidly explained in the under-mentioned case<sup>9</sup>. As ex-

<sup>1</sup>*India R. L. Factories v. Parshottamdas*, A.I.R. 1960 Cal. 327, 331, para. 27 (A. N. Ray J.) following (1947) *Munshilal & Co. v. Modi Bros.*, 51 C.W.N. 563 (S. R. Das J.).

<sup>2</sup>*Mahabir v. Ram Kishan*, A.I.R. 1936 All. 855, 856.

<sup>3</sup>*A. G. Pandu Rao v. Collector of Madras*, A.I.R. 1954 Mad. 1049

<sup>4</sup>*Rameshwar v. Keshab Prasad*, A.I.R. 1962 Pat. 360 (discusses case-law).

<sup>5</sup>See also *Alekh v. Krishna*, A.I.R. 1941 Pat. 596 (Fazl Ali J.).

<sup>6</sup>*Tulsidas v. Ebrahimjee*, A.I.R. 1960 Ker. 75.

<sup>7</sup>*Hari Shankar v. General etc.*, A.I.R. 1956 Orissa 186.

<sup>8</sup>See *Atma Ram v. Umar Ali*, A.I.R. 1940 Lah. 256, 260.

<sup>9</sup>*Firm Nand Gopal v. Firm Mehnga Mall*, A.I.R. 1940 Lah. 425, 426 (Tek Chand J.).



plained there, in the Punjab, (i) a joint Hindu family firm may sue in the firm name (if any); or (ii) all members may sue joint in their individual names; or (iii) in certain circumstances (e.g. where a contract is entered into with the manager), he, as Karta, may sue in his own name alone.

5. As the controversy seems to survive even now<sup>1</sup>, some clarification appears to be desirable.

As to position at Hindu law, see Mulla<sup>2</sup>.

It is considered that instead of making a separate rule, the necessary provision should be added in rule 10.

Hence the amendment.

*Order XXXII, rule 1*

The proposed amendment is intended to make it clear that the provisions of Order XXXII apply to all kinds of suits including those in respect of which the age of majority is governed not by the Indian Majority Act but by the personal law. The present position on the subject is not clear as will be seen from the case-law by the discussion that follows. Two courses are open for clarifying the position—

(i) To provide that where the suit relates to any matter in respect of which by virtue of section 2(a) of the Majority Act, the capacity of any person to act is not governed by that Act, then Order XXXII shall not apply to a suit by or against such person, provided he is a major according to the law applicable to such matter.

(ii) To provide that even in such matters for the purposes of Civil Procedure Code, he should be governed by the age given in the Majority Act. It is considered for the purpose of procedure that there should be a uniform rule and for that reason the second course has been adopted.

The present position is this. In suits falling under personal law, the meaning of "minor" is governed by personal law, according to some High Courts. According to the view the provision in section 2(a) of the Indian Majority Act, 1875, which saves the capacity of any person "to act" in matters of marriage, etc., applies to power to sue also. The following cases<sup>3-4-5-6</sup> may be seen for the

<sup>1</sup>See the case-law discussed in *Tulsi Mulji v. Ebrahimjee*, A.I.R. 1960 Ker.

<sup>2</sup>Mulla, Hindu Law (1959), para. 251 (1) and 251 (7).

<sup>3</sup>*Bai Shirinbai v. Kharshedji*, (1898) I.L.R. 22 Bom. 430.

<sup>4</sup>*Ahmed v. Bai Fatima*, I.L.R. 55 Bom. 160 ; A.I.R. 1931 Bom. 76. (*Magdavkar and Barlee JJ.*) (suit for divorce by Muslim wife over 16).

<sup>5</sup>*Fatima v. Fazlali*, A.I.R. 1928 Cal. 303.

<sup>6</sup>*Naksetan v. Habibar*, A.I.R. 1948 Cal. 66 ; I.L.R. (1946) 2 Cal. 349.

view that the section covers capacity to sue also. On this view, the "minor" can sue without next friend in such cases, if he is major under his personal law. In the case of suits for divorce governed by special Acts, this rule may extend the majority period<sup>1</sup>.

On the other hand, the under-mentioned decisions<sup>2-3</sup> seem to take a different view, on the ground that capacity to sue is purely a question of procedure.

The following cases<sup>4-5</sup> review the case-law.

(See another exception under section 32, Presidency Small Cause Courts Act.)

*Order XXXII, rule 1 and costs*

An amendment has been made by the High Court of Punjab to Order XXXII, rule 1 empowering the court to order the next friend to pay costs. It is felt that such a power already exists, and that the provisions of section 35 are very wide to cover such an order. The amendment has not, therefore, been adopted.

*Order XXXII, rule 2A*

A recommendation was made in the 14th Report<sup>6</sup> to the effect that a provision similar to Order XXXII, rule 2A as inserted by the Madras High Court should be inserted. The Report observed, that such a provision would control vexatious litigation by next friends of minors. Under the Madras Amendment, the court has power at any stage of the suit to order the next friend to give security for costs of the defendant, if it appears that the suit has been instituted by the next friend "improperly or unreasonably". It is, however, considered that the power to demand security should be there in every case where the court thinks fit to require security, but the reasons should be recorded. An amendment on those lines has, therefore, been proposed.

*Order XXXII, rule 3*

This carries out the recommendation made in the Fourteenth Report<sup>7</sup>. At present, where a guardian for the suit

<sup>1</sup>See (i) A.I.R. 1925 Sind 95 and (ii) (1898) I.L.R. 22 Bom. 431.

<sup>2</sup>*Ithapi v. Kairhiraphil* (1881) I.L.R. 3 Mad. 248.

<sup>3</sup>*Abdul Aziz v. Pathumma*, I.L.R. 1953 Mad. 118 ; A.I.R. 1952 Mad. 754.

<sup>4</sup>*Usman v. Khatoon*, I.L.R. 17 Luck. 572 ; A.I.R. 1942 Oudh 243.

<sup>5</sup>*Najmunnissa v. Sirajuddin*, I.L.R. 17 Punjab 303 ; A.I.R. 1941 Lah. 394.

<sup>6</sup>14th Report, Vol. I, page 349, para. 89.

<sup>7</sup>14th Report, Vol. I, page 353, para. 96

is to be appointed for the defendant, notice has to be issued in all cases to the minor defendant. The amendment seeks to alter this position by providing that the issue of the notice will be discretionary.

Compare Order XXXII, rule 4A (4) as inserted by the Nagpur High Court, and the Punjab Amendment inserting a proviso to the same effect.

As will appear from a few recent decisions, the question often arises whether a decree against a minor can be set aside on the ground of the gross negligence of his guardian. Most High Courts have answered the question in the affirmative<sup>1-2,3,4,5</sup>.

The Bombay High Court has, however, taken the view, that gross negligence of the guardian cannot be made the basis of a suit to set aside the decree against a minor<sup>6</sup>.

As the matter is really one of substantive rights, it would not be proper to insert a provision on the subject in this Code<sup>7</sup>. If necessary, it can be considered when the Evidence Act is revised. Compare sections 42-44 of that Act.

*Order XXXII, rule 4(3)*

1. Punjab has amended this sub-rule to provide that consent need not be *express* and can be *presumed*.

In the absence of such a provision, the question may arise whether consent should be *express*. One view is that it should be *express*<sup>8</sup>. Another is that it can be *implied*<sup>9,10,11</sup>.

It appears to be desirable to clarify the position, and to provide that it must be in *writing*, so as to avoid disputes. Necessary amendment is proposed.

2. Generally as to mandatory character of this rule, see the case cited below<sup>12</sup>.

3. The Fourteenth Report<sup>13</sup> also took the view that the consent should not be presumed.

<sup>1</sup>*Mahesh v. Manindra*, A.I.R. 1941 Cal. 401.

<sup>2</sup>*Ganesan v. Subramanyan*, A.I.R. 1958 Mad. 148.

<sup>3</sup>*Narayanan v. Gopalan*, A.I.R. 1960 Ker. 367.

<sup>4</sup>*Murli Manohar v. Lachmanji*, A.I.R. 1959 All. 342.

<sup>5</sup>*Iftkhar Hussain v. Beant Singh* A.I.R. 1946 Lah. 233 (F.B.).

<sup>6</sup>*Krishna Das v. Vithoba*, A.I.R. 1939 Bom. 66 (F.B.).

<sup>7</sup>See Sarkar's Evidence, 10th Edn., pages 443 and 446.

<sup>8</sup>*Jagadish v. Harihar*, A.I.R. 1924 Cal. 1042.

<sup>9</sup>See discussion in *Nirmal v. Khandu Ghosh*, (1963-64) (17-2-1964) 68 C.W.N., page 343.

<sup>10</sup>*Vasireddi v. Lakhmi Narayana*, A.I.R. 1925 Mad. 30.

<sup>11</sup>*Raman v. Raman*, A.I.R. 1959 Ker. 169.

<sup>12</sup>*Ramchandra v. Gopi Krishna*, A.I.R. 1957 Pat. 260.

<sup>13</sup>14th Report, Vol. I, page 352, para. 94.

*Order XXXII, rule 4(4)*

1. Two changes were suggested by the Fourteenth Report<sup>1</sup> in Order XXXII, rule 4, as follows:—

(1) Where a court guardian, natural guardian, or *de facto* guardian is not fit and willing to act as guardian in the suit for a minor defendant, the court can at present appoint any of its own officers to be such guardian. The recommendation was, that this should be made obligatory, that is to say, a provision that the court shall appoint its own officer as a guardian in such cases should be inserted.

(2) Further, power should be given to the court to order payment of the costs of that officer from the *minor's property*.

2. It is, however, considered that a rigid provision on the lines suggested on the first point may prove inconvenient. The recommendation has not, therefore, been carried out.

3. An amendment on the second point is proposed.

*Order XXXII, rule 6*

Under the amendment to Order XXXII, rule 6, made by the Madras High Court, the Court has power to dispense with security in cases where the next friend, etc., is the manager of a joint Hindu family and the decree is in the favour of the family. Under the amendment made by the High Court of Kerala, a similar power is given where the next friend, etc., happens to be the parent of the minor. These amendments appear to contain useful provisions, which are proposed to be embodied with small modifications.

*Order XXXII, rule 7*

A provision has been proposed to the effect that where an application for the leave of the Court to a compromise, etc., is made on behalf of a minor, certificate of the counsel as well as an affidavit of the next friend or guardian for the suit should be required to the effect that the compromise, etc., is for the benefit of the minor. Compare the Madras Amendment, Order XXXII, rule 7(1A), under which such a certificate is required in respect of an application for leave to enter into an agreement or compromise or withdrawal of a suit in pursuance of a compromise or for taking *any other action* on behalf of a minor or another person under disability. The proposed amendment has suggested itself on a study of the Madras Amendment, though it requires an affidavit of the next friend, etc., himself also. The Madras Amendment applies to "any other action", but it is considered unnecessary to go to that length<sup>2</sup>.

<sup>1</sup>14th Report, Vol. I, page 352, para. 95.

<sup>2</sup>See also Order XXIII, rule 1, as proposed to be amended.

*Order XXXII, rule 15*

The Madras Amendment to Order XXXII, rule 15 excludes the operation of rule 2A (security demanded from next friend or guardian) in relation to persons of unsound mind, etc. It is however, considered unnecessary, to have any such provision.

The question whether supervening insanity should be dealt with has been considered. At present rule 2 does not apply in such cases.<sup>1</sup>

From the discussion in Annual Practice under Order XVI, rule 17 and Order XVII, rule 4, it would appear that in England the action must be carried on by the next friend (who will usually be the receiver in lunacy).

As such cases are not frequent, no amendment is suggested.

*Order XXXII, rule 16*

This amendment is intended to bring the rule in line with the substantive provisions contained in sections 83 to 87B of the Code of Civil Procedure.

Compare the amendment made by the High Court of Andhra Pradesh.

It is considered unnecessary to add any explanation defining expressions like "Ruler" etc., as these have been already defined in sections 83 to 87B.

*Order XXXIII and "pauper"*

A recommendation has been made in the Fourteenth Report<sup>2</sup> to replace the word "pauper" by "poor person". Since, however, the expression "pauper" has come to acquire a special meaning in legal parlance and has become familiar, it is considered unnecessary to disturb it. It is used in English statutes also<sup>3</sup>.

*Order XXXIII, rule 1*

A recommendation was made in the Fourteenth Report<sup>4</sup>, to the effect, that the *Explanation* to Order XXXIII, rule 1 should be amended so as to enable a person who is not entitled to property worth rupees one thousand to sue as a pauper, or "alternatively so as to define a pauper as a person who is not possessed of sufficient means, other than the subject-

<sup>1</sup>*Firm Dookaran Das, v. Debi Sahai*, A.I.R. 1936 Lah. 7, 8 (Buckett J.).

<sup>2</sup>14th Report, Vol. I, page 598, para. 17 (6).

<sup>3</sup>Appeal (*forma pauperis*) Act, 1892, 1893 (56 & 57 Vic. C. 22).

<sup>4</sup>14th Report, Vol. I, page 598, para. 17 (4).

matter of the suit to enable him to pay the fee prescribed by law." It appears to be unnecessary to re-cast the whole *Explanation* in this manner. But certain modifications, which are summarised below, have been proposed:

(i) The amount of rupees one hundred is proposed to be raised to rupees one thousand;

(ii) In considering the question of sufficient means, the subject-matter of the suit (see Bombay Amendment) and necessary wearing-apparel are proposed to be excluded;

(iii) The question whether the date of presentation of the application or the date of its hearing should be the relevant date for considering pauperism, has been dealt with.

The decisions on the subject<sup>1,2,3</sup> reveal a conflict of views. A provision has, therefore, been inserted to the effect that property acquired by the applicant after presentation of the petition and before decision of the application should be taken into consideration.

The Madras Amendment to Order XXXIII, rule 1, *Explanation* (iii) provides that where a plaintiff sues in a representative capacity, the question of pauperism shall be considered with reference to the means possessed by him in such capacity. It is considered unnecessary to make an express provision on the subject, though the correct position is that reflected in the Madras Amendment.

#### *Order XXXIII, rule 3*

Under the Allahabad Amendment, persons detained in prison are exempted from appearing personally for presentation of a pauper application. It is, however, considered unnecessary to adopt this amendment, as in its absence no practical difficulties have been felt.

#### *Order XXXIII, rule 5*

1. The Allahabad Amendment to Order XXXIII, rule 5 (a) adds the words "and the applicant on being required by the court to make any amendment within a time to be fixed by the court, fails to do so". It is considered unnecessary to make an express provision on this point.

2. As regards suits barred by any law, the Madras High Court has added a clause (d-1), under which the court shall reject the application where the suit appears to be

<sup>1</sup>*G. Muddappa v. G. Rudramma*, A.I.R. 1921 Madras 97.

<sup>2</sup>*Bai Bal Gouri v. Moti Lal*, A.I.R. 1923 Bom. 247.

<sup>3</sup>*Pravish Chandra v. Municipal Corporation, Howrah*, A.I.R. 1930 Cal. 147, 149.

barred by any law. As contrasted with this, the Allahabad High Court has inserted an *Explanation* to rule 5 to the—effect that an application shall not be rejected under clause (d) merely on the ground that the proposed suit appears to be barred by any law. It may be noted, that the existing language of rule 5(d)—“where his allegations do not show a cause of action” has been interpreted widely by the courts.<sup>1</sup> It is therefore considered unnecessary to disturb the language of the rule.

*Order XXXIII, rule 6*

The Madras Amendment to Order XXXIII, rule 6 expands the scope of the rule so as to allow evidence to be taken in respect of all the prohibitions specified in rule 5. This has been considered, and the provisions of rule 7(1) and rule 7(2) noted, whereunder the evidence is confined to pauperism though the arguments are not so confined.<sup>2</sup> It is considered unnecessary to adopt the Madras Amendment, as such matter need not be raised by way of evidence at this stage.

*Order XXXIII, rule 8 and interlocutory orders*

Whether a temporary injunction (or attachment before judgment) can be issued during the pendency of an application for permission to sue as a pauper is not free from doubt. One view is that for the exercise of these powers, the suit commences on presentation of the application, while another view is that it commences only when the application is granted. The under-mentioned decisions<sup>3-4</sup>, take the first view.

*Cases taking a contrary view are cited below<sup>5-6</sup>*

The question whether a provision to the effect that the court shall not be precluded from making any order under clauses (a) to (e) of section 94 during pendency of the application has been considered. As the problem may not occur frequently, no amendment is suggested.

*Order XXXIII, rule 11*

1. The change proposed is consequential.<sup>7</sup>
2. The question whether a dismissal under Order IX, rule 3 or Order IX, rule 5 should be expressly mentioned in Order XXXIII, rule 11 has been considered. The Madras

<sup>1</sup>Mulla, Civil Procedure Code (1953), page 1065.

<sup>2</sup>Cf. Mulla, Civil Procedure Code, (1953), page 1068.

<sup>3</sup>*Tota Ram, v. Dattu*, A.I.R. 1943 Bom. 143, 144.

<sup>4</sup>*Chanu Lal v. Shama*, A.I.R. 1955 Nag. 259 (reviews case-law).

<sup>5</sup>*Purna Chandra v. Tara Prasad*, A.I.R. 1917 Cal. 852.

<sup>6</sup>*Thimayya v. Sadasivappa* A.I.R. 1952 Mysore, 76.

<sup>7</sup>See Order VII, rule 9 (proposed).

Amendment to Order XXXIII, rule 11, which deals elaborately with a claim being abandoned in part, has also been considered. That amendment further makes a provision that where the plaintiff is dispaupered, the court may order the plaintiff to pay the requisite court-fee within the requisite time and in default dismiss the suit and make an order for court-fee as in the existing rules. It is, however, considered unnecessary to make these changes of a minor character.

*Order XXXIII, rule 15 and costs*

Order XXXIII, rule 15 allows the filing of a second suit where the application to sue as a pauper is refused. But the condition for the second suit is that the applicant "first pays the costs" of the Government and the opposite party incurred in opposing the application. Whether this payment of costs is a condition precedent to the very institution of the second suit is a matter on which the position is not clear from decisions.<sup>1-3</sup> The word "first" would indicate a condition precedent. It is considered that there should be a power in the court to give time (in suitable cases) for payment of the costs. If such a power is given, the word "first" should be omitted. Necessary change is proposed.

*Order XXXIII, rule 15 and "refusal"*

Order XXXIII, rule 15 speaks of an order "refusing to allow the applicant to sue as a pauper". Whether this applies in cases where the application has been "rejected" under rule 5 is a matter which is not free from difficulty. It would suffice to draw attention to only a few of the decisions<sup>4-6</sup>. The language of the rule supports the interpretation that it is confined to "refusal" under rule 7. It is considered unnecessary to disturb the language.

*Order XXXIII, rule 15A (New)*

1. This is new.
2. Where the court rejects an application to sue as a pauper under Order XXXIII, rule 5 or refuses to allow a person to sue as a pauper under rule 7, the question arises whether the court is bound to give time to the pauper to pay court-fees and (on such payment) to treat the plaint as filed on the day on which the application was filed.

<sup>1</sup>*Shyam Sundar Lal v. Savitri Kumwar*, A.I.R. 1935 All. 723.

<sup>2</sup>*Abdul Rehman v. Aminabi*, A.I.R. 1943 Bom. 409.

<sup>3</sup>*Ram Krishna v. Vandaya*, A.I.R. 1936 Mad. 24.

<sup>4</sup>*Ganesh Prasad v. Radhe Shyam*, A.I.R. 1950 Nag. 82.

<sup>5</sup>*Harindra v. Continental Bus Service Ltd.*, A.I.R. 1958 Cal. 182.

<sup>6</sup>*Ramzan Ali v. Satul* A.I.R. 1948 All. 244, 251, paras. 47 and 50.



The matter assumes practical importance for the purposes of limitation with reference to section 3, *Explanation*, Indian Limitation Act, 1908, re-enacted in section 3, *Explanation*, Limitation Act, 1963. The position is not very clear, as will be seen from an analysis of the decisions of some of the High Courts attempted below.

*Bombay*.—In a Division Bench ruling<sup>1</sup>, the matter was discussed at some length and the following conclusions reached:—

(i) An application under Order XXXIII, rule 2, is required to contain the particulars required for plaints, is to be signed and verified in the same manner and is capable of being itself treated as a plaint. If it is granted, it becomes a plaint under Order XXXIII, rule 8 and is numbered and registered.

(ii) Even before deciding whether to grant an application or not, the court may at any time during the pendency of the proceedings, treat the application as a plaint and allow the applicant to pay the requisite court-fees and give up his request to be allowed to sue as a pauper, as in the under-mentioned Privy Council case<sup>2</sup>.

(iii) Even if the court decides to reject the application under Order XXXIII, rule 5 or refuses to allow the applicant to sue as a pauper under Order XXXIII, rule 7, it may treat the application as an unstamped plaint, and either before or at the time of passing the order, allow the applicant time under section 149 to pay the requisite court-fees and upon such payment within the time allowed, number and register the plaint.

But in doing so the court should have regard to the provisions of Order XXXIII, rule 15 and make the payment of costs mentioned therein a condition precedent. In all these cases, for the purposes of limitation the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made.

(iv) But, once the court passes an order rejecting the application under rule 5 or refuses to allow, etc., under rule 7, without keeping the application alive as an unstamped plaint and without granting the applicant time to pay the requisite court-fees, the proceedings come to an end, and it has no power to do so by a separate and subsequent order. In that situation the only remedy of the applicant is to file a regular suit under Order XXXIII, rule 15, which suit must be

<sup>1</sup> *Mahadev v. Bhikaji*, A.I.R. 1943 Bom. 292, 296, 297 (Broomfield and Lokur JJ.) (case-law reviewed).

<sup>2</sup> *Skinder v. Orde*, (1878—1880) 6 I.A. 126 ; I.L.R. 2 All. 241.

taken as instituted on the day it is actually filed, and the pauper cannot avail himself of the time spent in the pauper proceedings to save the bar of limitation.

This case was, however, not cited before the court (apparently), in a later Bombay Case<sup>1</sup>, which held that where the application is refused under Order XXXIII, rule 7(3), the court cannot under section 149 allow the applicant to pay the requisite court-fee and treat the application as a plaint.

*Calcutta.*—The Calcutta decisions are not uniform. The more recent view is that when an application is rejected under rule 7, and the applicant seeks to deposit the full court-fee, the suit must be considered to have been instituted only after the payment of the court-fee. This view was taken by Edgley J.,<sup>2</sup> dissenting from or distinguishing earlier rulings of the same High Court<sup>3-4</sup>.

*Madras and Andhra Pradesh.*—A number of decisions of the Madras High Court have recognised the practice of granting time while rejecting an application for leave to file a suit as a pauper, the time being granted under section 149<sup>5-6,7,8</sup>. The practice was stated to have developed out of a feeling of charity towards *bona fide* pauper suitors, and statutory support for this practice without first paying the costs of parties opposing the application was stated to be lacking.<sup>9</sup>

The Madras practice has been followed in Andhra Pradesh also<sup>10</sup>.

*Allahabad.*—The question has come up before the Allahabad High Court more than once in Full Bench decisions. In an earlier Full Bench case<sup>11</sup>, the following propositions were laid down:—

(a) While rejecting the application under rule 5, the court can under section 149 allow the applicant to pay the court-fee and treat the application as a plaint;

<sup>1</sup>*Vanni Rao v. Pran Lal*, A.I.R. 1944 Bom. 63.

<sup>2</sup>*Biswanath Das v. Khjeerali* I.L.R. (1939) 2 Cal. 68; A.I.R. 1939 Cal. 394.

<sup>3</sup>*Jyadishwari v. Thinuari*, I.L.R. 62 Cal. 711 ; A.I.R. 1936 Cal. 28.

<sup>4</sup>*Kalidasi v. Santosh Kumar*, I.L.R. (1939) 1 Cal. 112 ; A.I.R. 1938 Cal. 730 (reviews case-law).

<sup>5</sup>*Krishna v. Janki*, A.I.R. 1935 Mad. 878.

<sup>6</sup>A.I.R. 1934 Mad. 467.

<sup>7</sup>*Anasuyamma v. Subbareddi*, A.I.R. 1943 Mad. 646.

<sup>8</sup>*Brahmaramba v. Seetharamayya*, A.I.R. 1947 Mad. 405.

<sup>9</sup>*Ganga v. Suraiya*, A.I.R. 1950 Mad. 50, 51.

<sup>10</sup>*Sulemani Begum v. Ghulam Mohammed*, A.I.R. 1960 A. P. 381, 382 (D.B.).

<sup>11</sup>*Channamal v. Bhagwant* I.L.R. 1937 All. 22 ; A.I.R. 1936 All. 584.

(b) But while refusing to allow him to sue him as a pauper under rule 7, it cannot allow him to pay court-fee and treat the application as a plaint;

(c) After rejecting the application, it cannot, by a separate and subsequent order, allow payment under section 149.

The court made a suggestion<sup>1</sup> for amendment of the rule in these words:—

“Order XXXIII, rule 7 may well be amended so as to empower the court, while refusing to allow the applicant to sue as a pauper, to grant him time to convert the application into a plaint and pay the necessary court-fee”.

The Court, however, also pointed out that under rule 15, the applicant could not be allowed to institute the suit without payment of costs, and those provisions should not be evaded. In a later Full Bench case<sup>2</sup>, it was held, that in cases where the application was still pending or even at the time of refusing to grant leave, the court could grant time under section 149 to pay the court-fee, and if the court-fees are paid within that time, the plaint would be deemed to have been filed on the date on which application to sue as a pauper was made. The Full Bench decision of 1936 was reviewed in another case<sup>3</sup>, wherein the following propositions seem to have been laid down:—

(a) An order under section 149 can be passed only when the document is before the court. Once the court has lost seisin of the case, it cannot grant time to pay court-fee under that section.

(b) But, since it often happens that pauper applications, where contested, take some time and in the meantime, the limitation for filing the suit on payment of court-fees expires, therefore, if a *bona fide* application has been filed and the court is not satisfied that the petitioner is pauper it should, before signing the order disallowing the prayer to be allowed to sue as a pauper, grant time for payment of court-fees. If an oral or written application for time for payment of court-fees is made, it is the duty of the court to pass a suitable order on the application, and if by mistake or oversight it is not done, it can correct its error *later* by reviewing the order.

<sup>1</sup>At page 589 of the A.I.R. 1936 All. 584.

<sup>2</sup>*Dvendra Kumar v. Mahanta Raghuraj*, A.I.R. 1955 All. 154, 158 para. 24 (F.B.).

<sup>3</sup>*Kalap Nath v. Shyama Nand*, A.I.R. 1955 All. 159 (Full Bench).

*Madhya Pradesh High Court* holds<sup>1</sup> that even if the application is dismissed, there remains the plaint, and the court can grant time under section 149 and that time can be extended also.

*Lahore*.—The Lahore view seems to be, that while dismissing the application to sue as a pauper, if the court asks the applicant to deposit the court-fee by a certain date, and the court-fee is so deposited, the suit would be deemed to have been filed on the date on which the application under Order XXXIII, rule 2 was first made<sup>2-3</sup>.

*Patna*.—Seems to hold that the time can be given at the time of dismissing the application<sup>4</sup>, but not afterwards<sup>5</sup>.

*Assam*.—Holds that time may be granted under section 149<sup>6</sup>, if there is a prayer to that effect.

*Rajasthan*.—The Rajasthan High Court has, in 1954, made an amendment to rule 15 to the effect, that nothing in rule 5 or rule 7 shall preclude the court from granting time for payment of court-fees, and upon such payment, the suit is deemed to have been filed on the day on which the original application was presented. (An earlier decision<sup>7</sup> of Rajasthan High Court had discussed the matter, but had not expressed any final opinion on the point.)

(See also Kerala Amendment to Order XXXIII, rule 7).

3. It is considered that the Rajasthan Amendment should be adopted so as to clarify the position with the modification that the right to costs of those opposing the application should also be safeguarded<sup>8</sup>. It would be convenient to put this as a separate rule qualifying rules 5, 7 and 15. Necessary amendment is proposed.

*Order XXXIII, rule 17 (New)*

A recommendation was made in the Fourteenth Report<sup>9</sup> for applying the provisions relating to suit by a pauper to defence of a suit filed *against* a pauper. This has been carried out with the modification that it will be confined to cases where a set-off, etc., is filed.

Compare the Bombay Amendment made in relation to the City Civil Court.

<sup>1</sup>*Bhanu v. Daluna*, A.I.R. 1959. M. P. 169.

<sup>2</sup>*Ram Het Gir v. Banwari Lal*, A.I.R. 1938 Lah. 41, 42.

<sup>3</sup>For earlier cases, see I.L.R. 17, Lah. 831 ; A.I.R. 1937 Lah. 151.

<sup>4</sup>*Mathura Singh v. Sudama Davi*, A.I.R. 1954 Pat. 170.

<sup>5</sup>*Bank of Behar v. Ram Chander*, A.I.R. 1929 Pat. 637, 639.

<sup>6</sup>See A.I.R. 1961 Assam 113.

<sup>7</sup>*Bhairu Dan v. Ratan Lal*, I.L.R. (1952) 2 Raj. 497, 508.

<sup>8</sup>*Cf. Mahadev v. Bhikaji*, A.I.R. 1943 Bom. 292, 296.

<sup>9</sup>14th Report, Vol. I, page 598, para. 17 (5).

*Order XXXIV, rules 3(2), 5(3) and 8(3)*

The proposed amendments make it clear, that before making a final decree in a mortgage suit, notice must be issued to all interested parties. The Madras Amendment to Order XXXIV, rule 5(3) may be compared, and the suggestion made in the under-mentioned case may also be seen<sup>1</sup>.

A review of the case-law will be found in the following decisions<sup>2-3</sup>.

*Order XXXIV, rule 15*

1. Under the Allahabad Amendment, where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realised by sale of that property in execution of that very decree.

2. The question whether a decree creating a charge can be executed and the property sold in execution, or whether a separate suit is necessary, has been discussed in many cases. On the one hand, if, after the decree creates a charge, the elaborate procedure under Order XXXIII has to be undergone, then the object of creating a charge will not be easily carried out. On the other hand, the wide wording of rule 15 suggests, at first sight, a contrary interpretation.

3. Two situations may be considered. One is, where the decree *directs* sale or provides that the money charged shall be recovered *from* the property. In such a case there is no difficulty<sup>4</sup>. But, regarding the second situation, namely, where the decree does not so direct sale and recovery of money from the property, and merely *creates* a charge on the property, the position is not very clear. The question, of course, is mainly one of construction of the decree<sup>5</sup>. But still some uncertainty appears to exist.

The question has mainly arisen where the decree creates a charge, but is silent about its enforcement, that is it says nothing further after *declaring* the charge. One approach is, that if the decree is executable, then a separate suit is not necessary<sup>6-7</sup>. Another approach is, that if the amount

<sup>1</sup>*Suresh Chandra v. United Bank of India*, A.I.R. 1961 Cal. 534, 536 para. 9.

<sup>2</sup>*Baljit Singh v. Munshee Lal*, A.I.R. 1959 All. 251.

<sup>3</sup>*Teeka Ram v. Tara Chand*, A.I.R. 1954 Nag. 135, 140.

<sup>4</sup>See the discussion in *Manindra v. Radha Syam*, A.I.R. 1953 Cal. 676.

<sup>5</sup>As to charge of unpaid vendors see *Gurupadappa v. Basappa*, A.I.R. 1940 Bom. 276 (Kania J.).

<sup>6</sup>*Manindra v. Radha Syam*, A.I.R. 1953 Cal. 676, explaining A.I.R. 1945 Cal. 322.

<sup>7</sup>See also A.I.R. 1951 All. 141, 147, 154 (F.B.).

is declared to be a charge, a sale in execution is irregular<sup>1</sup>, but it is not void<sup>2</sup>.

4. Though the case-law does not reveal a *direct conflict*, the application of the principles laid down in the cases gives rise to problems, and for that reason, the amendment made by the Allahabad High Court seems to be worth adopting. The effect of the amendment would be, that the mere creation of a charge gives a right to sell the property charged<sup>3</sup>.

Necessary change is proposed.

*Order XXXVII (summary procedure)*

In the Fourteenth Report<sup>4</sup> recommendations have been made for—

- (a) simplification of rules relating to summary procedure on the lines of the Bombay Amendment, and
- (b) extension of summary procedure to subordinate courts in important industrial and commercial towns like Ahmedabad, Asansol, Kanpur and Jamshedpur.

Action under (a) above can be taken by the High Court under section 128(2) (a) and action under (b) above can be taken by the State Government under Order XXXVII, rule 1(b) as amended in 1956. It is considered unnecessary to make any provision on these matters of detail in the Code itself.

*Order XXXVIII, rule 8*

Verbal changes have been proposed in this rule on the lines proposed to Order XXI, rule 58<sup>5</sup>.

*Order XXXVIII, rule 11A*

This is new, and is intended to clarify the position as to whether the provisions of Order XXI, rule 57 apply to attachment before a judgment<sup>6</sup>. The provision has been framed in general terms, as it would not be appropriate to apply the provisions of Order XXI, rule 57, only.

*Order XXXIX, rule 1*

A recommendation was made in the Fourteenth Report<sup>7,8</sup> to take away the power of courts to issue an injunction to

<sup>1</sup>*Seethalakhshmi v. Srinivasa*, A.I.R. 1958 Mad. 23.

<sup>2</sup>*Sudhamoyee v. Jessore etc. Co.*, A.I.R. 1945 Cal. 322 (B. K. Mukherjea and Akram JJ.). (This was explained in the Calcutta case of 1953 on the ground that there was no order for sale).

<sup>3</sup>*Kaushalendra v. Sen and Sanyal*, A.I.R. 1953 All. 588 (D.B.).

<sup>4</sup>14th Report, Vol. I, page 275, para. 22 read with para. 21.

<sup>5</sup>See Order 21, rule 58 as proposed.

<sup>6</sup>See notes relating to Order 21, rule 57.

<sup>7</sup>14th Report, Vol. I, page 450, para. 43, last sentence.

<sup>8</sup>See also Civil Justice Committee (1925) Report, page 413, para. 6.

stay an execution sale. It was felt that such injunction held up execution proceedings, and that no harm could ensue if the sale were to be allowed to go on.

It is, however, considered that there may be cases where such a power is really needed, particularly where interests of a third party are in issue<sup>1</sup> (or, even in the case of party to the decree, where the decree is challenged on the ground of fraud, etc.) The change has not therefore been carried out.

*Order XXXIX, rule 2*

This is consequential<sup>2</sup>.

*Order XXXIX, rule 2A (New)*

1. The object of this amendment is to provide for the consequences of the breach of an injunction issued under rule 1, which is at present uncovered. It extends the existing provisions for breach of an injunction granted under rule 2. [See Order XXXIX, rule 2, sub-rules (3) and (4) to injunctions under rule 1 as well.]

2. Compare the Calcutta Amendment to Order XXXIX, rule 1(2), as construed in the under-mentioned case<sup>3</sup>. See also Order XXXIX, rule 2A (Allahabad)<sup>4</sup>. The position at present is not very clear<sup>5</sup>.

3. There is a certain amount of controversy<sup>6,7</sup> as to whether a court to which a suit is transferred can punish disobedience of an injunction issued by the predecessor court. From the practical point of view it is advisable to give this power to the transferee court, and that has been made clear in that portion of the new rule which corresponds to existing Order XXIX, rule 2(3).

*Order XXXIX, rule 8*

The object of the amendment is to provide that orders under rules 6 and 7 of Order XXXIX can be made without notice in urgent cases. Cf. Order XXXIX, rule 3. At pre-

<sup>1</sup>As to applications for injunction by a person who was not a party to the decree, see *Deochandra v. Amalendu*, A.I.R. 1958 Pat. 146.

<sup>2</sup>See Order 39, rule 2A, proposed, which covers the matter contained in Order 39, rule 2(3) and (4).

<sup>3</sup>*Shyam Sunjar v. Satchidananda*, I.L.R. (1957) Cal. 315 ; A.I.R. 1955 Cal. 351. Also see A.I.R. 1934 Cal. 818.

<sup>4</sup>As to the Allahabad Amendment, see *Balbhaddar v. Bala*, A.I.R. 1930 All. 387, 388 and *Janak v. Kedar*, A.I.R. 1941 All. 140, 141 (cases before the Amendment).

<sup>5</sup>See A.I.R. 1963 A.P. 136, 137 ; A.I.R. 1947 Mad. 98 ; *Sitaram v. Lachmi Narain*, A.I.R. 1946 Pat. 47, 49 ; A.I.R. 1936 Pat. 23 ; *Panna v. Seth* A.I.R. 1945 Nag. 134, A.I.R. 1955 Cal. 351.

<sup>6</sup>*Mouna Guruswami v. Sheikh Mohaundi*, A.I.R. 1923 Mad. 92.

<sup>7</sup>*Mineral Development Ltd. v. State of Bihar*, A.I.R. 1962 Pat. 443.

sent there is no such provision, though courts can take prompt action by appointing a receiver or granting an injunction *ex parte*<sup>1</sup>.

*Order XL, rule 1 (2) and Allahabad Amendment*

Under the Allahabad Amendment to Order XL, rule 1 (2), the prohibition against removal from possession, etc., of any person whom a party to the suit has no personal right so to remove, has been narrowed down to any person not being a party to the suit. That is to say, where a party to the suit is to be removed, this prohibition does not apply. The under-mentioned decisions show the origin and effect of the amendment<sup>2-4</sup>.

As the view of most of the other High Courts is that sub-rule (2) does not bar the removal of a party to the suit from possession<sup>5</sup>, the amendment has not been adopted.

*Order XLI, rule 1*

1. Recommendations on certain points relating to Order XLI, rule 1 were made in the Fourteenth Report<sup>6</sup> as follows:—

(i) In case of appeals under special enactments to which Parts II and III of the Limitation Act do not apply, exclusion of the time requisite for obtaining copies of the judgment was not allowed and yet Order XLI, rule 1 required the appellant to file copies of the judgment and decree. If parts II and III of the Limitation Act are made applicable to proceedings under any enactment, this difficulty would not arise. In the meanwhile, an amendment similar to Order XLI, rule 1 as made by Madras may be made.

(ii) In the case of partition decrees, the decree contains a number of "allotment papers" and the filing of these allotment papers put the appellant to heavy expense in obtaining copies. The Patna High Court has provided that in appeals from final decrees in partition suits containing allotment papers, the appellate court may accept copies of the decree containing only a portion of the papers. This may be adopted by other High Courts<sup>7</sup>.

(iii) The requirement that a memorandum of appeal should be accompanied by a copy of the judgment of the lower court occasions extra expense when

<sup>1</sup>A.I.R. 1943 Bom. 148.

<sup>2</sup>*Tulsa v. Chiranjit*, A.I.R. 1943 All. 1.

<sup>3</sup>*Bireswar v. Sudhansu*, A.I.R. 1947, All. 157.

<sup>4</sup>*Anandi Lal v. Ram Swarup*, I.L.R. 58 All. 495.

<sup>5</sup>*Uru Kendappa v. Mallesappa*, A.I.R. 1960 A. P. 79 (discusses case-law).

<sup>6</sup>14th Report, Vol. I, page 385, para. 2, second sub-para.

<sup>7</sup>14th Report, Vol. I, page 386, para. 4.



two or three suits or appeals have been disposed of by a single judgment. In such cases, though the decrees are different, the judgment is the same and yet the appellant is put to the expense of filing more than one copy of the same judgment. By an amendment made by the Punjab High Court, this difficulty has been met by providing that when more cases than one are disposed of by a single judgment, the appellate court may dispense with the necessity of filing more than one copy.

(iv) While the memorandum is required to set forth the grounds of appeal, there is no provision corresponding to Order VII, rule 7 that it should state the relief which the appellant seeks, though Order XLI, rule 35 requires that the appellate decree shall contain a clear specification of the relief. It is sometimes difficult to know precisely what relief the appellant seeks. Order LVIII, rule 3 of the R.S.C. requires that the notice for appeal shall state the precise form of the order which the appellant proposed to ask the court of appeal to make. A similar provision may be made by amending Order XLI, rule 1<sup>1</sup>.

2. So far as the first point is concerned, no amendment is necessary, since the new Limitation Act, 1963, section 29(2) practically applies all sections contained in Parts II and III of that Act to appeals governed by special laws.

The recommendation on the second point seems to be a matter of detail, and could be carried out by the High Courts if they so desire.

The recommendation on the third point has been carried out in the proposed amendment, which follows the amendment in force in Punjab with shall modifications.

As regards the recommendation on the fourth point, it may be noted that the emphasis in the Report of the Evershed Committee<sup>2</sup> was on the grounds of appeal and not so much on the precise form of the order sought. At that time, in the Rules of the Supreme Court as in force in England, there was apparently no provision for statement of the *grounds* and it was in that context that the recommendation was made. It is considered unnecessary to add a provision for stating the precise form of the order, as no practical difficulty has been caused by its absence.

3. The question of condonation of delay is dealt with separately<sup>3</sup>.

<sup>1</sup>14th Report, Vol. I, pages 386, 387, para. 6.

<sup>2</sup>Final Report of the Committee on Supreme Court Practice and Procedure (1953), Cmd. 8878, page 161, para. 503.

<sup>3</sup>See Order 41, rule 3A (proposed).

4. In the Report of the Law Commission on the Registration Act<sup>1</sup>, a somewhat revised scheme in respect of registration of decrees was suggested. Stated broadly, the main feature was, that when a plaint concerning immovable property is filed, a copy thereof should be sent to the registering officer by the court, and when the decree is passed in the suit, a copy of that also should be sent by the court. Consequentially, it was suggested that if there was an appeal, a copy of the memorandum of appeal should also be sent and so on. In this context, a recommendation was made to the effect that a memorandum of appeal relating to immovable property should have annexed to it a Schedule of immovable property.

Appeals relating to immovable property.

As the main scheme suggested in that Report has not yet been implemented, this amendment suggested in the Civil Procedure Code has not been carried out.

*Order XLI, rule 3A (New)*

In the Fourteenth Report<sup>2</sup>, attention was drawn to the practice which was previously followed of admitting an appeal subject to objections as to limitations being raised at the time of hearing, where the memorandum of appeal was accompanied by a petition seeking condonation of delay under section 5, Limitation Act. This practice has been disapproved by the Privy Council, which has stressed the expediency of adopting a procedure securing at the stage of admission the final determination (after due notice) of question of limitation affecting the competence of the appeal. Following this advice, the High Courts of Andhra Pradesh, Bombay and Madras have made appropriate amendments to the rule, and the Fourteenth Report recommended that the similar amendments be made by other High Courts.

The proposed amendment carries out this recommendation, and follows the Madras Amendment, Order 41, rule 1(3) with verbal modifications. The Bombay Amendment is contained in Order XLI, rule 3A (Bombay).

*Order XLI, rule 5*

An amendment has been proposed so as to empower the appellate court to stay:—

- (i) proceedings for final decree;
- (ii) actual making of the final decree.

It is considered unnecessary to provide for stay of execution of the final decree, as such stay could be obtained in an appeal against the final decree.

<sup>1</sup>6th Report (Registration Act), pages 37, 38, para. 103.

<sup>2</sup>14th Report, Vol. I, pages 385 and 386, para. 3.

The amendment has suggested itself by the Madras Amendment, which has been incorporated with certain modifications.

*Order XLI, rule 5 and date of effect of stay order*

1. There is a conflict of decisions on the question whether a stay order operates immediately or only when it is communicated to the court or to the officer conducting the sale, as the case may be. According to one view an order takes effect immediately<sup>1-2</sup>. A contrary view is that an order is in the nature of prohibitory order and becomes effective only on communication<sup>3-4</sup>.

2. The Calcutta decisions are not uniform<sup>5</sup>. Mulla prefers the view<sup>6</sup> that the order should take effect only when it is communicated to the executing court.

3. It is, however, considered that ordinarily the order should be effective immediately, and a provision to the contrary may be abused by interested parties attempting deliberately to delay transmission of the order from the appellate court to the lower court. It is considered unnecessary to make any amendment in the rule on this point.

*Order XLI, rule 11*

1. This carries out the recommendation made in the Fourteenth Report<sup>7</sup>. The object is to provide that even where the appellate court dismisses an appeal without notice to the lower court, it shall deliver a formal judgment and a decree shall be drawn up.

2. It appears to be unnecessary to impose this requirement where the appeal is dismissed for default under sub-rule (2).

*Order XLI, rule 11 and appeals under section 47*

A recommendation was made in the Fourteenth Report<sup>8</sup> to the effect that in the case of orders in execution of money-decrees, restrictions should be placed on the right of

<sup>1</sup>*Karam Ali v. Raja*, A.I.R. 1949 Lah. 108, 113 (F.B.).

<sup>2</sup>*Liakat Mian v. Padampad Singhamia*, A.I.R. 1951 Pat. 130 (Special Bench).

<sup>3</sup>*Venkatachelapati Rao v. Kameswaramma*, A.I.R. 1918 Mad. 391 (F.B.).

<sup>4</sup>*Parsotam Saran v. Brahmanand*, L.L.R. 50 All. 41 ; A.I.R. 1927 All. 401 (F.B.).

<sup>5</sup>See *Jatish Chandra v. Kshirode Kumar*, A.I.R. 1943 Cal. 319, 324.

<sup>6</sup>Mulla, Civil Procedure Code (1953), page 1190.

<sup>7</sup>14th Report, Vol. I, page 388, para. 9. For uniformity, a general amendment is proposed.

<sup>8</sup>14th Report, Vol. I, page 442, para. 21.

appeal by requiring the appellant judgment-debtor to deposit, or at least to give security for, the decretal amount, as a condition precedent to the admission of the appeal. The Report referred to the proposal of the Civil Justice Committee<sup>1</sup> to that effect, and recommended the acceptance of the proposal.

The Civil Justice Committee had stated that after trial, it was only just that such a protection should be given to the successful decree-holder. It is, however, considered that the imposition of such a rigid provision may cause hardship. The change has not, therefore, been carried out.

#### *Order XLI, rule 14*

A recommendation was made in the Fourteenth Report<sup>2</sup> to the effect, that in the case of parties who had not appeared in the court below and who had not filed any address for service, provision may be made to dispense with service of notice of appeal. A somewhat similar recommendation was made by the Civil Justice Committee<sup>3</sup> also, which observed that the necessity of serving each of those respondents against whom the suit had proceeded *ex parte*, with notice of appeal or of any interlocutory motion, led to an unnecessary delay. It stated, that this was more specially the case where the appellant had obtained an interim stay of execution, as it would be easy for an *ex parte* defendant to collude with the defendant-appellant and evade service of notice. Amendments on these lines have been made by the High Courts of Allahabad, Andhra Pradesh, Assam, Calcutta, Madhya Pradesh, Madras, Mysore and Punjab in Order XLI, rule 14 and by Orissa and Patna by inserting Order XLI, rule 14A. It is, however, felt that it is unnecessary to carry out the suggested change, as not much delay is caused by the necessity of service of notice of appeal.

#### *Order XLI, rule 18*

The Fourteenth Report recommended the adoption by High Courts of some local Amendments<sup>4-5</sup>, whereunder, if on the day of hearing of the appeal, it is found that the notice to the respondent has not been served and the appellant fails to deposit the expenses of serving the notice again, the court has power to order that the appeal be rejected. This is a matter of detail which may be left to High Courts.

<sup>1</sup>Civil Justice Committee Report, page 401.

<sup>2</sup>14th Report, Vol. I, page 393, para. 21.

<sup>3</sup>Civil Justice Committee (1925) Report, page 117, para. 27, second sub-para.

<sup>4</sup>See the amendment made by the Madras High Court.

<sup>5</sup>See 14th Report, Vol. I, page 293, para. 22.

*Order XLI, rule 18 and refund*

A recommendation was made in the Fourteenth Report<sup>1-2</sup>, for an amendment allowing the refund of process fees where an appeal is dismissed without notice to the other party.

It is felt that this should be left to be dealt with by the practice of the courts. No amendment is therefore suggested.

*Order XLI, rule 20*

There is some controversy as to whether a respondent can be added in an appeal after the period of limitation for appeal has expired. The decisions on the subject will be found discussed in the under-mentioned cases<sup>3-5</sup>. Some of these decisions proceed on the inherent power of the Court to add the respondents in such cases.

It is considered, that the correct view is, that after the period of limitation has expired against a party, he ceases to be "interested in the appeal" under rule 20 as interpreted by the Privy Council<sup>6</sup>.

Whether such party can be impleaded under the inherent power or whether a separate appeal can be filed against that respondent after obtaining leave of the Court under section 5, Limitation Act, are different matters.

It is considered unnecessary to make any amendment to cover such cases

*Order XLI, rule 22*

A suggestion has been made to the effect that a respondent should not be allowed to file a cross-objection in which the appellant is not interested. While that would be the ordinary rule<sup>6-7-8-9</sup>, a rigid provision may not be desirable, because there may be cases where a different rule might have to be applied<sup>10-11-12</sup>. The suggestion has not, therefore, been carried out.

<sup>1</sup>14th Report, Vol. I, page 393, para. 22.

<sup>2</sup>See also Order 41A, rule 2, inserted in Madras.

<sup>3</sup>*P. Anandu v. M. Acharyulu*, A.I.R. 1958 A. P. 43 (F.B.)

<sup>4</sup>*Notified Area Committee, Buria v. Govind Ram*, A.I.R. 1959 Pun. 277, 278 (F.B.).

<sup>5</sup>*Chokalingam v. Seethai*, I.L.R. 6 Rangoon 29; A.I.R. 1927 P. C. 252.

<sup>6</sup>*Venkataswarlu v. Ramamma*, I.L.R. 1950 Mad. 874, A.I.R. 1950 Mad. 379 (F. B.).

<sup>7</sup>*Chanda Bibi v. Mohan Ram*, A.I.R. 1934 Pat. 134.

<sup>8</sup>*Cooperative Hindusthan Bank Ltd. v. Surendra Nath*, A.I.R. 1932 Cal. 527.

<sup>9</sup>*B. I. G. Ins. Co. v. Ramhath*, A.I.R. 1962 Pat. 140.

<sup>10</sup>*Kanij Fatima v. Jai Narain Ram*, A.I.R. 1944 Pat. 334.

<sup>11</sup>*Basistha v. Shanker*, I.L.R. 29 Pat. 160, 169, A.I.R. 1952 Pat. 323.

<sup>12</sup>*Musleha Bibi v. Ram Narain*, (1918) I.L.R. 40 All. 536.

*Order XLI, rule 23A (New)*

This carries out the recommendation made in the 14th Report<sup>1</sup>, and is intended to widen the powers of the appellate court to remand a case in the interests of justice<sup>2</sup>.

See also the Allahabad, Andhra and Madras Amendments to Order XLI, rule 23 and Punjab Order 41, rule 23A. Under-mentioned cases on these Amendments are helpful<sup>3,4,5</sup>.

*Order XLI, rule 25*

This carries out the recommendation made in the 14th Report<sup>6</sup>. The object is to require the lower court (where a case is remanded) to return the evidence *within a period* fixed by the appellate court.

*Order XLI, rule 26A (New)*

This carries out the recommendation made in the 14th Report<sup>7</sup>. The object is to require the appellate court, while remanding a case, to fix the date of hearing before the lower court, so as to avoid the delay caused by issue of notices by the lower court.

*Order XLI, rule 27*

This carries out the recommendation made in the 14th Report<sup>8</sup>. The object is to provide that additional evidence may be allowed by the appellate court if the evidence could not be produced in the lower court because it was not within the knowledge, etc., of the party seeking to produce it now.

See also Allahabad, Madras<sup>9</sup> and Patna Amendments.

*Order XLI, rule 30*

This seeks to make certain amendments regarding pronouncement of judgments, etc., of an appellate court, on the lines of those proposed for trial courts<sup>10</sup>.

<sup>1</sup>14th Report, Vol. I, page 405, para. 46.

<sup>2</sup>As to inherent power of remand, see discussion in—

(i) A.I.R. 1931 Mad. 791 ;

(ii) A.I.R. 1922 Mad. 505, 508, left 509 left 510 (F.B.).

<sup>3</sup>*Kewalram v. Mihial*, A.I.R. 1960 All. 655.

<sup>4</sup>*Veerbhadrapa v. Venkatappa*, A.I.R. 1961 A.P. 226.

<sup>5</sup>*Ramakrishna v. Rangayya*, A.I.R. 1954 Mad. 783.

<sup>6</sup>14th Report, Vol. I, pages 405-406, para. 47, earlier half.

<sup>7</sup>14th Report, Vol. I, page 406, para. 47, last sentence.

<sup>8</sup>14th Report, Vol. I, page 405, para. 45, second sub-para.

<sup>9</sup>See *Krishna Reddi v. Rami Reddi*, A.I.R. 1954 Mad. 848, 850, para. 4.

<sup>10</sup>See the amendment proposed to Order 20, rule 1.

*Order XLI and first appeals to High Court*

Certain recommendations relating to appeals to the High Court from original decrees of Subordinate Courts were made in the 14th Report<sup>1</sup>, which drew attention to Order XLIA inserted by Madras. These can be carried out by the High Courts.

*Order XLI and second appeals*

Certain recommendations have been made in the 14th Report<sup>2</sup> as to the memorandum of appeal in second appeals. These can be considered by the High Courts.

*Order XLIII, rule 1*

Since an express provision regarding restoration of orders dismissing for default an application under Order XXI, or for setting aside of *ex parte* orders on such applications is proposed<sup>3</sup>, it is considered that an express provision allowing appeal from such orders should be inserted. In drafting the amendments, assistance has been taken from the Madras Amendment, Order XLIII, rule 1, clause (j).

2. As a new rule regarding breach of injunctions is being inserted<sup>4</sup>, a provision making orders punishing such breach appealable is being inserted.

3. Clause (u)—The change in clause (u) is consequential<sup>5</sup>.

*Order XLIII, rule 1(m)*

There are certain points on which there is some conflict or uncertainty as to clause (m) of Order 43, rule 1, which allows an appeal from order "recording or refusing to record an agreement, compromise or satisfaction". These points are as follows:—

(i) Does an appeal lie where the order is followed by a consent decree? One view is that no appeal lies<sup>6</sup> in such cases, the reason being that once a compromise decree is passed, all previous orders merge in it. While the decree is outstanding, it is stated, the person affected cannot adopt "a short and inexpensive cut" and appeal against the order. But, as against this, a contrary view is, that the order is appealable irres-

<sup>1</sup>14th Report, Vol. I, pp. 393-394, paras. 20, 22, 23, 24.

<sup>2</sup>14th Report, Vol. I, page 390, para. 17.

<sup>3</sup>See Order 21, rules 104 and 105 (proposed).

<sup>4</sup>Order 39, rule 2A (proposed).

<sup>5</sup>See Order 41, rule 23A (proposed)

<sup>6</sup>*Onkar v. Gamna Lakka*, A.I.R. 1933 Bom. 205 (Murphy and Nanavati JJ.).

pective of whether a consent decree follows it or not<sup>1-2-3</sup>, since the rule contains no limitation.

(ii) Is the right of appeal available in all cases, or is it available only where the order was passed *after* contest? One view is, that it is available in all cases<sup>4-5</sup>, while another view is that it is not available where there was no contest in the lower court<sup>6</sup>, (about the compromise). The latter view is based on the reasoning that if there was no contest, there would be no materials before the court on which to come to a decision. But the former view supports itself on the ground that two questions, namely (i) which order is appealable, and (ii) whether the appeal is likely to succeed, should be kept separate.

(iii) Is the right of appeal confined to cases where the order refusing to record the compromise was based on the ground that the compromise was not valid *in law*, or does it extend to cases where there is a dispute about the factum of the compromise? One view is, that an order holding that no compromise has been proved is not appealable<sup>7</sup>, the reasoning being, that where the court refuses to record the compromise, it is not an order "under rule 3", because that rule presupposes the existence of an agreement, compromise or satisfaction. But in some cases<sup>8</sup>, an appeal on facts was allowed<sup>9</sup>.

It is, however, considered unnecessary to make any amendment on these points in the rule, as it is felt that the existing language, which is based on the wording of Order XXIII, rule 1, need not be disturbed

#### Order XLIII, rule 1(w)

1. Order XLIII, rule 1(w) allows an appeal against an order granting an application for review. But Order XLVII, rule 7(1), last sentence, lays down the

<sup>1</sup>*Mathura Prasad v. Parmanand*, A.I.R. 1960 M.P. 161 (reviews case-law).

<sup>2</sup>*Haridas v. Ishwar*, A.I.R. 1933 Cal. 94, following A.I.R. 1929 Cal. 689 (F.B.).

<sup>3</sup>*Ram Narayan v. Ram Krishna*, A.I.R. 1936 Mad. 385.

<sup>4</sup>*Rama Narayana v. Ramakrishna*, A.I.R. 1936 Mad. 385 (Wadsworth J.)

<sup>5</sup>*Suraparaju v. Venkatarathmiah*, A.I.R. 1936 Mad. 347 (Wadsworth J.).

<sup>6</sup>*Amar Nath v. Smt. Malan*, A.I.R. 1954 Pun. 259.

<sup>7</sup>*Shanti Sarup v. Firm Jahangir Mal*, A.I.R. 1924 Lah. 248 (Martineau J.).

<sup>8</sup>A.I.R. 1933 Cal. 94.

<sup>9</sup>In *Nand Lal v. Ram Sarup*, A.I.R. 1927 Lah. 546, 548, left (Addison and Agha Haidar JJ.), the view taken in A.I.R. 1924 Lah. 248 was cited, but appears to have been not accepted.



grounds on which the order can be objected to in appeal. Obviously, Order XLIII, rule 1 must be so read as to harmonise with Order XLVII, rule 7. The position is not clear at present<sup>1</sup>.

2. It may be noted that the High Courts of Calcutta, Patna, Rangoon and Lahore and the Chief Court of Oudh have taken the same view, so that an appeal lies only on the grounds mentioned in that rule<sup>2</sup>.

3. The Bombay High Court held in one case<sup>3</sup>, that an appeal is open against the order granting the review quite irrespective of the limitation contained in rule 7. After this decision, the Bombay High Court has deleted clause (a) from rule, so that there is no appeal now<sup>4</sup>, except on the ground mentioned in Order XLVII, rule 7.

4. This is also the view of the Allahabad High Court<sup>5</sup>.

This was the earlier Madras view also, but some doubt has been thrown by observations in a later case<sup>6</sup>.

As Order XLVII, rule 7(1) is proposed to be modified so as to allow appeal without restriction as to grounds<sup>7</sup>, this controversy will not survive now.

#### Order XLIV, rule 1(2)

Order 44, rule 1(2) provides that an application by a pauper for leave to appeal as a pauper must be rejected unless he can show that the decision is erroneous, etc. A suggestion has been put forth that this provision is unconstitutional under articles 13 and 14 (since no such restriction is applicable to appeals by non-paupers). It is, however, felt that the existing provision is *prima facie* reasonable, as it is intended to prevent frivolous appeals by a pauper. It can be justified on the ground that a person who has failed in one court should show a *prima facie* case

<sup>1</sup>For a review of case-law on this point, see *M. Agaih v. M. Abdul Kareem*, A.I.R. 1961 A. P. 201 (F.B.).

<sup>2</sup>*Sarajubala Guha v. Aswini Kumar*, I.L.R. (1946) 2 Cal. 527; A.I.R. 1946 Cal. 530 (F.B.);

*Sundar Mal v. Upendra Nath*, (1915) 1 Pat. L.J. 193 ; 35 I.C. 15 ;

*A. T. K., P. L. M. Mathu v. Lashminarayan*, (1928) I.L.R. 6 Rang. 254 ;

*Sikandar v. Baland* (1927), I.L.R. 8 Lah. 617, A.I.R. 1927 Lah. 435 (2) (Tek Chand J.).

*Bankey Behari v. Abdul Rahman*, (1932) I.L.R. 7 Luck. 350.

<sup>3</sup>*Daso v. Karbasappa*, A.I.R. 1926 Bom. 121.

<sup>4</sup>*Kunversi v. Pitamberdas*, A.I.R. 1927 Bom. 599 ; *Shidramappa v. Gurusantappa*, A.I.R. 1929 Bom. 183 ; *Narayan v. Rango*, A.I.R. 1933 Bom. 183.

<sup>5</sup>*Ali Akbar v. Khurshed Ali* (1905) I.L.R. 27 All. 695 ; *Munnu v. Kunja Behari*, (1922) I.L.R. 44 All. 605 ; A.I.R. 1922 All. 206.

<sup>6</sup>*Ananthalakshmi v. Hindustan, etc., Trust Ltd.*, A.I.R. 1951 Mad. 927.

<sup>7</sup>See Order 47, rule 7 as proposed.

before he can be permitted to appeal as a pauper. It need not, therefore, be disturbed.

*Order XLIV, rule 1A (New)*

This is new and is inserted to empower the court to grant time for payment of court-fees when the application for appeal as a pauper has failed<sup>1</sup>.

*Order XLIV, rule 2*

The changes are verbal, as a provision for *defence* of a suit as a pauper is being added<sup>2</sup>. As to filing cross-objections, see Order XLI, rule 22(5).

*Revision and Stay of Execution*

Detailed provisions regarding stay of execution by the Revising Court were recommended in the Fourteenth Report<sup>3</sup>. No amendments have, however, been proposed on these points, as it is considered that since revision is a matter of discretion, a statutory provision is not required<sup>4</sup>.

*Order XLVII, rule 7*

Order XLVII, rule 7(1) provides that any order granting an application for review may be objected to on the ground that the application was in contravention of the provisions of rule 4, or after the expiration of the period of limitation and without sufficient cause. The effect of this provision as interpreted by the courts is, that it prevents the appellant from objecting (to the order granting review) on grounds other than those mentioned in rule 7, both in a direct appeal from the order granting review and in an appeal from the final decree that may be passed on review<sup>5</sup>. It is considered, that this restriction is not called for. Suitable modifications have, therefore, been proposed to remove it.

*First Schedule, Appendix B, Form No. 2*

Regarding the forms of summons to the defendant, a recommendation was made in the Fourteenth Report<sup>6</sup> for inserting a provision that if the written statement is not presented within the specified time, the suit is liable to be heard *ex parte*.

This has not been carried out, as it is considered that a provision of that character would not be appropriate.

<sup>1</sup>Compare Order 33, rule 15A (proposed).

<sup>2</sup>See Order 33, rule 17 (proposed).

<sup>3</sup>14th Report, Vol. I, page 420, para. 14.

<sup>4</sup>See also the body of the Report.

<sup>5</sup>For a history of the rule, see *Sarju Bala v. A. K. Ghosh*, A.I.R. 1946 Cal. 530 (F.B.).

<sup>6</sup>14th Report, Vol. I, page 302, para. 11, read with page 301, para. 9.

*First Schedule, Appendix E, Form No. 16A*

This is new and lays down a form of affidavit of assets to be made by a judgment-debtor where money decree remains unsatisfied<sup>1</sup>.

*First Schedule, Appendix E, Form No. 24*

This is consequential<sup>2</sup>.

*First Schedule, Appendix E, Form No. 29*

This is consequential<sup>3</sup>.

*First Schedule, Appendix G, Forms regarding intimation by respondent as to defence*

In the Fourteenth Report<sup>4-5</sup>, a recommendation was made to the effect that the respondent should be required to intimate whether he wants to defend the appeal, so that the appellant may know whether he should incur the expenses of preparing a paper-book or a large number of copies thereof. This has, however, not been carried out, as it is felt that it would not serve much useful purpose.

*First Schedule, Appendix H, Form No. 2A (new)*

This is consequential<sup>6</sup>.

*First Schedule, Appendix H, Form Nos. 11 and 11A*

The forms for minor defendant and for the guardian have been split up, as it is considered that the two forms should be separate. A combined form as at present is somewhat confusing. In re-drafting the forms, the following considerations have been borne in mind:—

(i) Under Order XXXII, rule 3(4) as proposed<sup>7</sup>, it will be discretionary for the court to give notice to the minor;

(ii) Under Order XXXII, rule 3(2) (even as it stands), the application can be made either by the minor or by the plaintiff.

See also Form No. 11 as substituted by the former Nagpur High Court, and compare existing Form No. 4.

<sup>1</sup>See amendment proposed to Order 21, rule 41.

<sup>2</sup>See Order 21, rule 54, as proposed to be amended.

<sup>3</sup>See Order 21, rule 66C 2 (proposed).

<sup>4</sup>Cf. 14th Report, Vol. I, page 394, para. 23.

<sup>5</sup>See also Forms Nos. 6A, 6B (Appendix G) inserted by Madras.

<sup>6</sup>See Order 16, rule 1 (proposed).

<sup>7</sup>See Order 32, rule 3(4) (proposed).

*Omission of illustrations*

In previous Reports of the Law Commission, the omission of illustrations to the relevant enactments has been recommended.

No such recommendation is being made in the case of the Civil Procedure Code. It is considered that since this is an amending Bill only, such change is not necessary.

(An example of illustrations will be found under Order XXXV, rule 5.)

*Third Party proceedings*

1. The Fourteenth Report<sup>1</sup> recommended that the High Court may consider the advisability of extending the application of the third-party proceeding to commercial towns like Ahmedabad, Kanpur and Asansol. This can be done under existing section 128(2)(e) of the Civil Procedure Code. Hence no amendment has been proposed.

2. Some High Courts—Andhra Pradesh, Madras and Kerala—have dealt with third-party proceedings in a separate Order. Order VIIIA.

See also (i) rules 151—157, Bombay High Court (Original) side rules, 1957 and (ii) Order VIII, rules 23—30, inserted by the Bombay High Court for Bombay City Civil Court only.

*Filing forms of process*

The recommendations made in the Fourteenth Report<sup>2</sup>, for the adoption of a rule requiring the parties to file with the plaint or application printed forms of process legibly filled in (leaving only the date of appearance of the opposite party and the date of issue of process blank) can be conveniently implemented by the rules of the High Court. Hence no draft amendment has been prepared.

*Consolidation of suits*

The question whether a provision for consolidation of suits is necessary has been considered<sup>3</sup>. A power to make such rules is already vested in High Courts under section 128(2)(h). In practice, Courts resort to consolidation under their inherent powers<sup>4</sup>. It is, therefore, unnecessary to insert an express provision in the rule.

<sup>1</sup>14th Report, Vol. I, page 276, para. 2, last two sentences.

<sup>2</sup>*Cf.* 14th Report, Vol. I, page 304, para. 15.

<sup>3</sup>*Cf.* Order 17, rule 1, County Courts Rules, 1936.

<sup>4</sup>See Commentary in Mulla, C.P.C. (1953) on section 151.

APPENDIX III  
COMPARATIVE TABLE

*Showing the recommendation made in the Fourteenth Report by the Law Commission (Reform of Judicial Administration) and the provision, whereunder the recommendation has been dealt with in this Report.*

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 273, para. 17 (Urging the conferment of powers on subordinate courts under s. 92, C.P.C.)	This does not necessitate a change in the law. It requires only suitable orders by State Government under s. 92.
Page 275, para. 22, read with para. 21.	Order 37.
(Summary procedure should be extended to subordinate courts in important commercial towns.)	(Left for State Governments and High Courts.)
Page 276, para. 23, last two sentences	Note on third party proceedings (at the end).
(Extension of third party procedure to courts in commercial towns.)	(Left for High Courts.)
Page 299, para. 6.	Order VI, rule 15.
Page 303, para. 12 and page 330, para. 53.	See also Order IX, rule 6.
(Verification of pleadings to be on oath.)	(Not carried out.)
Page 302, para. 11.	Order V, rule 5 and Order VIII, rule 1. Also Appendix B.
(Form of Summons be amended by providing (i) a direction to the defendant to file a written statement by a date which should be the date fixed for the settlement of issues and (ii) a notice to the defendant that if the written statement is not filed by that date, the matter may be dealt with <i>ex parte</i> .)	Form No. 2. (Not carried out.)
Page 303, para. 12.	See under Fourteenth Report, page 299.
(Written statement to be verified on oath.)	
Page 303, para. 13.	Order XXVII, rule 5.
(Not less than 3 months time from the date of summonses be given to Government for filing of written statement.)	(Not carried out.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 304, para. 14. (Service of processes be effected on the registered address of the parties.)	Order VI, rule 14A (New). (Carried out.)
Page 304, para. 15. (Process forms should be filled in and filed by parties with plaint.)	Note on filing of form of process (at the end). (Left for High Courts.)
Page 310, para. 24, last sub-para. (Service of summonses by post.)	Order V, rule 19A (New), consequentially, Order V, rule 20A is omitted. (Carried out in substance.)
Page 311, para. 25. (Failure to effect service in the ordinary manner after two attempts to be deemed a sufficient reason for ordering substituted service.)	Order V, rule 20. (Not carried out.)
Page 316, para. 32, first sub-para. (Production and filing of list of documents by defendant with his written statement.)	Order VIII, rule 1. (Carried out with modification.)
Pages 316-317, para. 32. (Penal costs against a party for wrongful or unreasonable refusal to admit documents.)	Order XII, rule 2. (Not carried out.)
Page 325, para. 45 and page 328, para. 50. (List of witnesses to be filed.)	Order XVI, rule 1. (Carried out in substance.)
Pages 327-328, para. 49. (Credibility of witnesses brought without summonses not to be doubted on that ground.)	Order XVI, rule 1. (Not carried out.)
Page 328, para. 49, last sentence. (Process-fees not payable for witnesses brought privately.)	Order XVI, rule 7A (5) (New). (Carried out.)
Page 327, para. 49, middle. (Parties should, in the first instance, be made responsible to procure attendance of their witnesses, but in that case the impartiality of witnesses not to be suspected on that ground.)	Order XVI, rule 17A (New). (Carried out in a different form.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 330, para. 53.  (Judgments on allegations in pleadings would be possible if verification of plaints on oath is required.)	Order VI, rule 15. See also Order 9, rule 6.  (Not carried out.)
Page 340, para. 71.  (Parties to enter the witness-box before their other witnesses examined.)	Order XVIII, rule 3.  (Not carried out.)
Page 345, para. 80.  (Power to dictate record of evidence to be given.)	Concerns section 138, and Order XVIII, rules 5, 8, 13, etc.  (Not carried out. See discussion under s.138 and Order XVIII, rule 5.)
Page 348, para. 87.  (Only findings on issues and the final orders in the judgments need be read out.)	Order XX, rule 1.  (Carried out.)
Page 349, para. 89.  (Courts to be empowered to order the next friend to give security for payment of defendant's costs.)	Order XXXII, rule 2A (New).  (Carried out in a modified form.)
Page 352, para. 95.  (Appointment of officer of Court to be mandatory on the failure of the appointed natural or <i>de facto</i> guardian, to agree to act as a guardian of the minor.)	Order XXXII, rule 4.  (Not carried out.)
Page 352, para. 95.  (Court guardian may be awarded cost from the minor's state).	Order XXXII, rule 4.  (Carried out.)
Page 353, para. 96.  (Notice to the minor to be discretionary with the court.)	Order XXXII, rule 3.  (Carried out.)
Pages 354-355, para. 99, last sentence.  (Commissioner recording evidence should record the disallowed question and the answer thereof. It will be for the court to admit or not to admit such a question.)	Order XXVI, rule 16A (New).  (Carried out with modification.)
Page 377, paras. 23 and 24.  (The limit of Rs. 1,000 under section 102 C.P.C. be raised to Rs. 2,000, and this restriction against second appeals in suits below the specified amount be extended to all suits, except suits involving rights in respect of immovable property.)	Section 102.  (Carried out in part and with modification.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whersunder dealt with <sup>1</sup>
Pages 377-378, paras. 25-26. (Kerala Amendment of section 100, which provides for a second appeal in case the finding of the lower appellate court on any question of fact was in conflict with the finding of the trial court disapproved.)	Section 100. (Necessary action to be taken separately.)
Page 385, para. 2, last sentence. (Filing of an appeal under special enactments without copies of the decree or judgment of the lower court to be permitted.)	Order XLI, rule 1. (Not carried out in view of the new Limitation Act.)
Page 385, para. 3. (Condonation of delay under section 5, Limitation Act in filing the appeal to be decided before admitting the appeal.)	Order XLI, rule 3A (New). (Carried out in substance.)
Page 386, paras. 4 and 5. [(i) In appeal from final decrees in partition suits containing allotment papers, the filing of only a portion of the said papers should be sufficient.  (ii) Where more cases than one are disposed of by a single judgment, only one copy of the judgment of the lower court to be sufficient for filing an appeal.]	Order XLI, rule 1. (Not carried out.)  (Carried out.)
Pages 386, 387, para. 6. (Precise order sought in appeal to be stated.)	Order XLI, rule 1. (Not carried out.)
Page 388, para. 9. (A brief judgment should be delivered by subordinate appellate courts, when dismissing appeals under Order 41, rule 11, C.P.C.)	Order XLI, rule 11. (Carried out.)
Page 390, para. 17. (Memorandum of appeal to be accompanied by certified copies of judgments of both courts.)	Order XLI and second appeals. (Left for High Courts.)
Page 392, para. 16, last sub-para. (In admitting second appeals, the judge should state the point or points of law which arise for consideration.)	Section 100. (Not carried out.)
Page 392, para. 17. (Certified copies of judgments of both the lower courts and a true translation of the disputed document to be filed with the memorandum of appeal.)	Order XLI and second appeals. (Left for High Courts.)

<sup>1</sup>See Notes on Clauses.



Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 393, para. 20. (The addresses of the appellant and the respondent to be stated in the memorandum of appeal.)	Please see under 14th Report, pages 393-394.
Page 393, para. 21. (No notice of appeal necessary on persons against whom proceedings were <i>ex parte</i> in lower court.)	Order XLI, rule 14. (Carried out.)
Page 393, para. 22. [(i) Process fee to be paid with memorandum of appeal ; otherwise appeal to be rejected ; (ii) Process fee to be refunded in case of summary dismissal ; (iii) Process forms to be filed by appellant.]	Order XLI, rule 18.  (Left to High Courts.)
Pages 393-394, paras. 20, 22, 23 and 24. (Memorandum of appeal to state appellant's address for service ; service of notice to be permitted by registered post ; contesting respondent to enter appearance in appeal by filing a memorandum of appearance within a specified period.)	Order XLI and first appeals. (Left to High Courts.)
Page 394, para. 23. (Contesting respondent to intimate whether he wishes to defend, etc.)	First Schedule, Appendix G. (Carried out.)
Page 405, para. 45, second sub-para. (Scope of Order 41, rule 27 be expanded.)	Order XLI, rule 27. (Carried out.)
Page 405, para. 46. (Order 41, rule 23 be amended by empowering the appellate court to remand a case whenever it thinks it necessary in the interest of justice.)	Order XLI, rule 23A. (Carried out in substance.)
ages 405, 406, paragraph 47, earlier half. (Remand order to fix period for re-submission of case.)	Order XLI, rule 25. (Carried out.)
Page 406, para. 47, last sentence. (In the remand order, a date should be fixed on which the parties should appear before the lower court to receive directions regarding the suit.)	Order XLI, rule 26A. (Carried out.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 406, para. 48, second sub-paragraph. (Section 98 C.P.C. be amended to bring it in line with clause 36 of Letters Patent.)	Section 98. (Carried out in substance.)
Page 420, para. 14. (A provision be made limiting the powers of the court to grant stay in revision applications.)	Revision and stay of execution. (Not carried out.)
Pages 422-423, paragraph 19 and also page 420, para. 13. (Recommendations for amending section 115 C.P.C.)	Section 115. (Carried out in substance.)
Pages 437-438, paras. 14-15. (Certain additional powers be conferred on the court to which a decree is transferred for execution.)	Section 42. (Carried out in part.)
Pages 439-440, para. 18. (Provision for constructive <i>res judicata</i> in execution proceedings suggested.)	Section 47. (Carried out.)
Page 441, paragraph 20, second sub-para. (No appeals against orders in execution cases regarding payment of an amount within the limits of the small cause jurisdiction of the court executing the decree.)	See under "Appeals against orders under section 47". (Not carried out.)
Page 442, para. 21. (Admission of appeals against orders in execution of money-decrees to be made conditional on deposit of security.)	Order XLI, rule 11. (Not carried out.)
Pages 443-444, paras. 25 and 28. (Oral pleas of payment of the decretal amount to be excluded from recognition by courts.)	Order XXI, rules 1 and 2. (Carried out in substance and rule made more stringent.)
Page 444, para. 27. (Special form of money-orders for remitting decretal amounts.)	Order XXI, rule 1. (Not carried out.)
Page 444, para. 28. (No limitation for getting certification of payments made through a bank or a post office.)	Order XXI, rule 2. (Not carried out, but other modification proposed.)
Page 445, para. 29. (Modification of the tabular form of execution-application.)	Order XXI, rule 11. (Not carried out.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 445, para. 30. (Courts not to reject execution-application summarily for defects.)	Order XXI, rule 17. (Carried out.)
Page 445, para. 31. (Order of return of execution-application to be specific as to amount.)	Order XXI, rule 17. (Carried out.)
Page 447, para. 34, middle. (Increase of period under Order 21, rule 22 to 3 years.)	Order XXI, rule 22. (Carried out with modification.)
Page 447, para. 34, last portion. (Omission to issue notice under Order 21, rule 22 not to be fatal.)	Order XXI, rule 22. (Not carried out.)
Page 448, paragraph 36. (Notice of arrest of judgment-debtor to be discretionary.)	Order XXI, rule 37. (Not carried out.)
Page 448, paragraph 38. (Change suggested regarding notice under Order 21, rule 66.)	Order XXI, rules 54 and 66. (Carried out with modification.)
Page 449, para. 40. (Stay of execution proceedings under Order 21, rule 26 should be conditional on furnishing of security.)	Order XXI, rule 26. (Not carried out.)
Page 450, paragraph 43, first sentence. (No temporary injunction regarding stay of execution sales.)	Order XXXIX, rule 1. (Not carried out.)
Page 451, para. 45. (The issue of the existence of a garnishee debt to be tried by the executing court.)	Order XXI, rule 46A <i>et seq.</i> (New). (Carried out.)
Page 453, paragraph 48, last sentence. (Sale not to be postponed pending objections against attachment, but confirmation may be postponed.)	Order XXI, rule 59 (proposed). (Carried out with modification.)
Page 453, para. 49 (portion concerning Order 21, rule 58). (Inquiry under Order 21, rule 58 to be elaborate and to cover questions of title.)	Order XXI, rule 58 <i>et seq.</i> (Carried out in substance.)

<sup>1</sup> See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 453, para. 49 (portion concerning Order 21, rule 97).	Order XXI, rule 97 <i>et seq.</i>
(Suits under Order 21, rule 103 to be barred. Inquiry under rule 97 <i>et seq.</i> to be elaborate.)	(Carried out in substance.)
Page 454, para. 50.	Order XXI, rule 66.
(Estimate of the value of the property to be sold need not be given by court, etc.)	(Carried out in part.)
Pages 454-455, para. 51.	Order XXI, rule 90.
(Application to set aside execution sale under rule 90 not to be entertained unless amount not exceeding 12½ per cent. of sale price deposited.)	(Not carried out.)
Pages 454-455, para. 51.	Order XXI, rule 90.
(Sale not to be set aside at the instance of certain persons for defect in pro- clamation.)	(Carried out in a wider form.)
Page 455, para. 53.	Order XXI, rule 31.
(Period under Order 21, rule 31 to be reduced.)	(Carried out in substance.)
Page 455, para. 54	Order XXI, rule 32.
(Period under Order 21, rule 32 to be reduced.)	(Carried out.)
Page 455, para. 55.	Order XXI, rule 68.
(Period between the date of publication of the proclamation of sale and actual sale.)	(Carried out.)
Page 456, para. 56, first three lines on the page.	Order XXI, rule 69.
(Adjournment of a sale and fresh pro- clamation.)	(Carried out in part.)
Page 456, para. 57.	Order XXI, rule 72.
(Bid at a court sale by the decree- holder.)	(Not carried out.)
Page 476, last two paragraphs on the page.	Section 80.
(Notice under section 80, C.P.C. to the Government and under similar provi- sions to other bodies like railways and the municipal committees, etc., to be dis- pensd with. But a provision for costs where suit filed without notice to be made.)	(Carried out, but provision for costs considered unnecessary.)

<sup>1</sup>See Notes on Clauses.

Page of Fourteenth Report, Volume I	Provision of the Civil Procedure Code whereunder dealt with <sup>1</sup>
Page 480, para. 11, third and fourth sub-paragraphs.	} Order XX-A (New).  } (Carried out in substance.)
Page 482, paragraphs 15 and 17	
Pages 483-484, para. 20.	
Page 484, para. 23, second sub-para.	
(Notice charges, expenses on witnesses brought by summonses, inspection charges and charges for obtaining copies of decrees and judgments should be allowed towards costs of the suit.)	
Page 598, paragraph 17 (4).	Order XXXIII, rule 1.
(Definition of "pauper" to be amended.)	(Carried out with modification.)
Page 598, para. 17 (5).	Order XXXIII, rule 17.
(Defence as a pauper be allowed.)	(Carried out with modification.)
Page 598, para. 17 (6).	Order XXXIII.
(Expression "pauper" to be replaced by the expression "poor person".)	(Not carried out.)

#### APPENDIX IV

##### SUMMARY OF RECOMMENDATIONS IN RESPECT OF OTHER ACTS

###### 1. *Suits Valuation Act, 1887*

Rules should be made by High Courts under section 9 of the Suits Valuation Act<sup>2</sup>.

###### 2. *Limitation Act, 1963*

(i) The period of limitation under article 125 of the Limitation Act, 1963 (application for certification of payment or adjustment, etc.), should be increased from 30 days to 90 days<sup>3</sup>.

(ii) In article 98 of the Limitation Act, 1963, the portion relating to a suit under Order 21, rule 63 should be suitably amended in view of the proposed amendment to Order 21, rules 58 to 63, of the Civil Procedure Code for expanding the scope of the inquiry under those rules<sup>4</sup>.

(iii) Article 98 of the Limitation Act, 1963 should be suitably altered by omitting the portion concerning a suit to set aside the orders passed in proceedings

<sup>1</sup>See Notes on Clauses.

<sup>2</sup>See Appendix II, section 15.

<sup>3</sup>See Appendix II, Order 21, rule 2.

<sup>4</sup>See Appendix II, Order 21, rule 58.

under Order XXI, rules 97 to 102, Civil Procedure Code, in view of the amendments proposed to those rules for expanding the scope of the inquiry under those rules<sup>1</sup>.

3. *Court Fees Act, 1870*

(i) In respect of appeals against orders under Order XXI, rule 58, which will be appealable as decrees under the proposed amendment to the Civil Procedure Code, a reduction of court-fees should be granted by State Governments, by issuing a notification under the relevant provision of the Court Fees Act applicable to the State, as has been done in most States in respect of order under section 47, Civil Procedure Code<sup>2</sup>.

(ii) Similar action should be taken in respect of appeals against orders under Order 21, rule 97 *et seq* as proposed to be amended<sup>3</sup>.

4. *Indian Evidence Act, 1872*

The question how far a decree against a minor can be set aside on the ground of gross negligence of his guardian may be considered, if necessary, when the Evidence Act is revised<sup>4</sup>.

5. *Law of Public Trusts*

Certain points concerning public trusts, arising from the recommendations of the Hindu Religious Endowments Commission, may be considered when the law of Public Trusts is revised<sup>5</sup>.

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<sup>1</sup>See Appendix II, Order 21, rule 97.

<sup>2</sup>See Appendix II, Order 21, rule 58.

<sup>3</sup>See Appendix II, Order 21, rule 97.

<sup>4</sup>See Appendix II, Order 32, rule 3.

<sup>5</sup>See Appendix II, section 92.

#### NOTE BY SHRI S. K. HIRANANDANI

I regret I am unable to agree with the conclusion of the majority of the Members that the rule-making power should continue to vest in the High Courts. In my opinion the consideration of uniformity is an over-riding consideration which should outweigh all other considerations. It was with a view to achieving such uniformity that the power to make rules under the Companies Act which under the Act of 1913 vested in the High Courts (section 246) was under the new Act of 1956 conferred on the Supreme Court (section 643). The same consideration weighed with us while making our report on the law of insolvency. In that report we have recommended that the rule-making power under the new law should vest in the Supreme Court.

2. Article 44 of the Constitution contemplates a uniform civil Code applicable throughout the territories of India. If we are not able to achieve uniformity in our procedural laws, it is difficult to see how we can achieve such uniformity in our substantive laws. Since Independence the policy has been to integrate laws and make them applicable to the whole of India. Consistent with this policy the case for a uniform Civil Procedure Code is fairly strong.

3. The main justification for vesting the power of making rules in the High Courts is to provide for local conditions. Tremendous changes have taken place in the country in the political, social, economic and other spheres since the Code was passed in 1908, particularly during the post-independence period. All these changes have minimised if not altogether eliminated local variations. Except perhaps in some minor matters, for which adequate provision can be made without affecting the general uniformity of the Code, I can hardly conceive of any local conditions which require a different law of civil procedure for different areas. There is thus little justification for continuing the power of High Courts to modify the rules contained in the first schedule to the Code on the ground of local needs.

4. During more than half a century that the Code of Civil Procedure, 1908 has been in force, High Courts have made numerous amendments which have virtually disintegrated the Code. For example, in Order V which deals with a comparatively minor matter of the manner of service of summons, High Courts have made as many as 40 amendments. In Order XXI, the number of amendments made by the High Courts of Allahabad, Bombay, Calcutta, Madras, Madhya Pradesh, Patna and Punjab

have reached the colossal figure of about 200. We have analysed and classified all these amendments and have recommended the incorporation in the Code of many of them which are of a general character and which we think should apply to the whole of India. It is hoped that after the Code is revised in the manner proposed by us, it will be a neat and comprehensive piece of legislation applicable to the whole of India. If the High Courts are again permitted to make amendments in the rules contained in the first schedule, the code is likely to revert back to the chaotic condition in which we find it at present. I will give one illustration of how the uniformity of the Code may in some vital matters be affected if the High Courts continue to exercise the power to amend the rules in the schedule. We have proposed a radical change in Order XXI, Rules 58 and 63. We have recommended that where a claim is filed under Rule 58 the executing Court should have full power to decide the claim and that no suit should lie. It is possible that some of the High Courts may not agree with our view and would like to retain the existing rules. Such High Courts would be free to amend Rules 58 and 63 and restore the position which obtains at present. The result will be that while in State A a suit will not lie under Rule 63, it will lie in State B. Obviously, this will not be a satisfactory state of affairs. A more serious anomaly is also likely to arise. Supposing a Court in State A transfers a decree passed by it to a Court in State B for execution. In such a case both the Courts would be competent to execute the decree (section 38) but the transferee Court would execute it in such manner as may be prescribed by rules in force in the State in which the transferee Court is situated (section 40). Now if a property is attached by the Court in State A and a claim is filed in respect thereof, the claimant cannot file a suit if the Court rejects the claim. But if a property is attached by the transferee Court in State B, such a suit would lie. Thus, in the execution of the same decree, two different laws would be applicable.

5. In order to achieve uniformity, the draft report on the Code of Civil Procedure circulated by us to State Governments, High Courts, etc., proposed the setting up of an all-India committee consisting of Judges and lawyers. Excepting the High Courts of Bombay and Madras, no other High Court has raised any objection to the proposal. The proposal was approved in principle by majority in the Conference of Chief Justices of High Courts held in 1962. The conference merely suggested certain changes in the composition of the proposed all-India committee.

6. In order that the proposed all-India Committee should be able to act efficiently and expeditiously, it should be small and compact committee. I suggest that the committee may consist of the following persons:

- (1) The Chief Justice of India or a Judge of the Supreme Court nominated by him (Chairman).



- (2) The Attorney-General.
- (3) Four Judges of High Courts nominated by the Chief Justice of India, of whom one shall be a Judge having experience of the original side of a High Court.
- (4) Five advocates elected by the Bar Council of India.

In my opinion, no useful purpose would be served by giving representation on the committee to the subordinate judiciary. Nor do I think that it is necessary to include in the committee an advocate from each State. We have now in the All-India Bar Council a representative body of the Bar. The selection of the advocates on the proposed all-India committee should be left to that body.

7. In order to provide for local conditions which is the main argument against an all-India committee, the committee may be empowered to make rules for a particular State or States only, where local conditions warrant such a course.

8. If for any reason the idea of an all-India committee is not accepted I would suggest another method of achieving uniformity. Let the rules continue to be made by the High Courts, but they should be subject to the approval of the Supreme Court. It is true that the rules made by High Courts under clauses (2) and (3) of article 227 require the approval of the Governor. I am not sure if the rules contemplated by that article are intended to be of the same nature as those contained in the first schedule to the Code of Civil Procedure. But assuming that this is so, I see no constitutional objection to a law made by Parliament with reference to the entry 'Civil Procedure' in the Concurrent List providing that the rules made by the High Courts in exercise of the power conferred upon them by that law should be subject to the approval of the Supreme Court.

13th December, 1964.

S. K. Hiranandani.