CODE OF CIVIL PROCEDURE

Q. Explain Decree, Order, and Judgment and distinguish between them. What are the essential elements of a decree? What are the kinds of decree? What are the consequences of non appearance of parties? What is an ex parte decree? Discuss the remedies available to a defendant against whom an ex parte decree has been passed. All questions regarding execution of a decree shall be determined by the court executing the decree and not by a separate suit. Explain.

Decree

In a civil suit several facts might be alleged and the court may be required to rule on several claims. In simple terms, a decree is the ruling of the court regarding the claims of the parties of the suit. For example, in a suit between A and B, A may claim that a particular property P belongs A. After hearing all the arguments, the court will rule in the favor of either A or B. The final decision of the court regarding this claim i.e. whether the property belongs to A or B, is a decree.

As per **Section 2(2)**, a decree is the formal expression of an adjudication which, so far as regards
the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It can be final or preliminary.

From the above definition we can see the following essential elements of a decree -

1. There must be adjudication - Adjudication means Judicial Determination of the matter in dispute. In other words, the court must have applied its mind on the facts of the case to resolve the matter in dispute. For example, dismissing a suite because of default in appearance of the plaintiff is not a decree. But dismissing a suite on merits of the case would be a decree.

2. There must be a suit - Decree can only be given in relation to a suit. Although CPC does not define what suit means, in **Hansraj vs Dehradun Mussoorie Tramways Co. Ltd. AIR 1933**, the Privy Council defined the term suit as "a civil proceeding instituted by the presentation of a plaint".

3. Rights of the parties - The adjudication must be about any or all of the matters in controversy in the suit. The word right means substantive rights and not merely procedural rights. For example, an order refusing leave to sue in forma pauperis (i.e. an order rejecting the application of a poor plaintiff to waive court costs) is not a decree because it does not
determine the right of the party in regards to the matters alleged
in the suit.

4. Conclusive Determination - The determination of the right must be conclusive. This means that the court will not entertain any argument to change the decision. I.e. as far as the court is concerned, the matter in issue stands resolved. For example, an order striking out defence of a

tenant under a relevant Rent Act, or an order refusing an adjournment is not a decree as they do not determine the right of a party conclusively. On the other hand, out of several properties in issue in a suit, the court may make a conclusive determination about the ownership of a particular property. Such a conclusive determination would be a decree even though it does not dispose off the suit completely.

5. Formal expression - To be a decree, the court must formally express its decision in the manner provided by law. A mere comment of the judge cannot be a decree.

Examples of decisions which are Decrees - Dismissal of appeal as time barred, Dismissal or a suit or appeal for want of evidence or proof, Order holding appeal to be not maintainable.

Examples of decisions which are not Decrees - Dismissal of appeal for default, order of remand, order granting interim relief.

Order

As per Section 2 (14), the formal expression of any decision of a civil court which is not a Decree is Order. In a suit, a court may take certain decisions on objective considerations and those decisions must contain a discussion of the matters at issue in the suit and the reasons which led the court to pass the order. However, if those decisions fall short of a decree, they are orders.

Thus, there are several common elements between an order and a decree - both related to matter in controversy, both are decisions given by the court, both are adjudications, both are formal

expressions. However, there are substantial differences between them -//////////////////////////////

Decree - S. 2(2)	**Order S. 2(14)**
Can only be passed in a suit originated by the presentation of a plaint.	Can be passed in a suit originated by the presentation of a plaint, application, or petition. May or may not finally determine a right. Cannot be a preliminary order. There can be any number of orders in a suit. Only those orders which are specified as appealable in the code are appealable.
Contains Conclusive Determination of a right	
May be final, preliminary, or partly preliminary - partly final.	
In general, there can only be one decree or at the most one preliminary and one final decree in a suit.	
Every decree is appealable unless an appeal is expressly barred.	

A second appeal may lie against a decree to a High Court on certain grounds.	There is no second appeal for orders.

Judgment

As per **Section 2 (9)**, "judgment" means the statement given by the judge of the grounds of a decree or order. Every judgment should contain - a concise statement of the case, the points for determination, the decision thereon, the reasons for the decision. In the case of **Balraj Taneja vs Sunil Madan, AIR 1999**, SC held that a Judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other.

As per Rule 6 A of Order 20 the last part of the judgment should precisely state tge relief granted. Thus, a judgment is a state prior to the passing of a decree or an order. After pronouncement of a judgment, a decree shall follow.

Kinds of Decree

Preliminary - Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit but does not completely dispose of the suit, it is a preliminary decree. It is passed when the court needs to adjudicate upon some matters before proceeding to adjudicate upon the rest.

In **Shankar vs Chandrakant SCC 1995**, SC stated that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. CPC provides for passing preliminary decrees in several suits such as - suit for possession and mesne profits,
administration suit, suits for pre-emption, dissolution of partnership, suits relating to mortgage. In **Narayanan vs Laxmi Narayan AIR 1953**, it was held that the list given in CPC is not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the code.

Final - When the decree disposes of the suit completely, so far as the court passing it is concerned, it is a final decree. A final decree settles all the issues and controversies in the suit.

Party preliminary and partly final - When a decree
resolves some issues but leaves the rest open for further decision, such a decree is partly final and party preliminary. For example, in a suit for possession of immovable property with mesne profits, where the court decrees possession of the property and directs an enquiry into the mesne profits, the former part of the decree is final but the latter part is preliminary.

Deemed Decree - The word "deemed" usually implies a fiction whereby a thing is assumed to be something that it is ordinarily not. In this case, an adjudication that does not fulfill the requisites of S. 2 (2) cannot be said to be a decree. However, certain orders and determinations are deemed to be decrees under the code. For example, rejection of a plaint and the determination of questions under S. 144 (Restitution) are

deemed decrees.

Consequences of Non appearance of parties (Order 9)

The general provisions of CPC are based on the principle that both the parties must be given an opportunity to be heard. The proceedings must not be held to the disadvantage of one party. Order 9 lays down rules regarding the appearance and the consequences of non appearance of a party in the hearing.

Rule 1 - Parties to appear on day fixed in summons for defendant to appear and answer— On the day
fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Dismissal of Suit

Rule 2 - Dismissal of suit where summons not served in consequence of plaintiffs failure to pay cost— 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.

Rule 3 - Where neither party appears, suit to be dismissed— Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Rule 4 - Plaintiff may bring fresh suit or Court may restore suit to file— Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of
limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Rule 5 - Dismissal of suit where plaintiff after summons returned unserved, fails for one month to apply for fresh summons—

(1) Where after a summons has been issued to the defendant, or to one of several defendants, and returned unserved the plaintiff fails, for a periods of one month from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Ex parte Proceedings

Rule 6 - Procedure when only plaintiff appears— (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) When summons duly served—if it is proved that the summons was duly served, the Court may make an order that the suit shall be heard ex parte.

(b) When summons not duly served—if it is not proved that the summons was duly serve, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time— if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs' default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Rule 7 - Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance— Where the Court has adjourned the hearing of the suit ex-parte and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court

directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day, fixed for his appearance.

Absence of Plaintiff

Rule 8 - Procedure where defendant only appears— Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Rule 9 - Decree against plaintiff by default bars fresh suit—

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. and shall appoint a day for proceeding with suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Multiple plaintiffs and/or Defendants

Rule 10 - Procedure in case of non-attendance of one or more of several plaintiffs— Where there are more plaintiffs than one, and one or more

of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Rule 11 - Procedure in case of non-attendance of one or more of several defendants— Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

General Consequence of Non appearance

Rule 12 - Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person— Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject
to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively who do no appear.

This means either the suit will be dismissed or will be continued ex parte.

Ex parte Decree (Order 9)

As per Rule 6, if the defendant fails to appear before the court in spite of a proper service of the summons, the court may proceed ex-parte and

may pass a decree in favor of the plaintiff. This is called an ex parte decree. In the case of **Hochest Company vs V S Chemical Company**, SC explained that an ex parte decree is such decree in which defendant did not appear before court and the case is heard in the absence of the defendant from the very beginning.

Remedies available to the defendant against an ex parte decree

1. Application to set aside the ex parte decree - As per Order 9, Rule 13, a defendant may apply before the court that passed the decree to set it aside.

If he satisfies the court that the summons was not duly served or he was prevented by any other sufficient cause from attending the hearding, the court shall make an order setting aside the decree. For example, bona fide mistake as to the date or hearing, late arrival of train, etc. are sufficient causes for

absence of the defendant. Such an application for setting aside may be made within 30 days from the date of decree as per Section 123 of Limitation Act.

Setting aside decrees ex parte

Rule 13 - Setting aside decree BIex parte against defendant— In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs,

payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; 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: 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 and had sufficient time to appear and answer the plaintiff's claim

Explanation.—Where there has been an appeal against a decree passed ex parte under this rule, and
the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

Rule 14 - No decree to be set aside without notice to opposite party— No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

The court may impose conditions as it may deem fit on the defendant for setting asided the decree. It may ask the defendant to pay costs.

When an ex parte decree is set aside, the court should proceed to decide the suit as it stood before the decree. The trial should commence de novo and the evidence that had been recorded in the ex parte proceeding should not be taken into account.

This remedy is specifically meant for an ex parte decree.

2. Prefer an appeal against the decree under Section 96(2).

3. Apply for review under Order 47 Rule 1. 4. File a suit on the ground of fraud.

All the above remedies are concurrent and can be pursued concurrently.

Execution of a Decree

As per **Section 38**, a decree may be executed either by the court which passed it or the court to which it is sent for execution. While executing a decree, several questions and objections may arise as to the manner of execution. It would be impractical to institute new suits to resolves such matters. Thus, **Section 47** lays down the general principal that any questions that arise in relation to the execution of the decree should be resolved in execution proceeding itself and not by a separate suit. **Section 47** says thus -

47. Questions to be determined by the Court executing decree -

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this

section, be determined by the Court.

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.

Explanation II. (a) 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

(b) all questions relating to the 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.

The objective of this section is to provide cheap and fast remedy for the resolution of any questions arising at the time of execution. Institution of new suits would only increase the number of suits and would also be a burden on the parties.

The scope of this section is very wide. It confers exclusive jurisdiction to the court executing the decree in all the matters regarding the execution. It does not matter whether the matter has arisen before or after the execution of the decree. Thus, this section should be construed liberally.

Conditions -

1. The question must be one arising between the parties or their representatives to the suit in which the decree is passed.
2. The question must relate to the execution, discharge, or satisfaction of the decree.

As held in the case of **Arokiaswamy vs Margaret AIR 1982**, both the conditions must be satisfied cumulatively.

What is meant by execution, discharge and satisfaction of a decree -

This expression has not been defined in the code. However, the following questions are held to be relating to the execution, discharge and satisfaction of the decree -

whether a decree is executable, whether a property is liable to be sold in execution of a decree, whether the decree is fully satisfied, whether the execution of the decree was postponed.

The following questions have been held as not related - whether the decree is fraudulent or collusive, whether the decree has become in executable because of a compromise between the parties, a question about the territorial or pecuniary jurisdiction of the court passing the decree.

Appeal and Revision

Earlier, determination made under Section 47 was deemed to be a decree under Section 2(2). However, after the amendment in 1976, this is not so. Any determination made under an application under Section 47 is not considered a decree and is therefore not appealable under Section 96 or Section 100.

Since it is no more a decree, a revision application under Section 115 is therefore maintainable provided the conditions stipulated in Section 115 are satisfied.

Q. What are the objects and essential conditions of the

doctrine of res judicata? Illustrate the principle of constructive res judicata. Can an ex parte decree act as constructive res judicata?

Res iudicata is the Latin term for "a matter already judged", and refers to the legal doctrine meant to bar continued litigation of cases that have already been decided between the same parties. The doctrine of res judicata is based on three maxims

(a) Nemo debet lis vaxari pro eadem causa (no man should be vexed twice for the same cause) (b) Interest republicae ut sit finis litium (it is in the interest of the state that there should be an end to a litigation); and
(c) Re judicata pro veritate occipitur (a judicial decision must be accepted as correct)

The legal concept of RJ arose as a method of preventing injustice to the parties of a case supposedly finished as well as to avoid unnecessary waste of resources in the court system. Res iudicata does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, so a prevailing plaintiff could not recover damages from the defendant twice for the same injury.

Res Judicata is a rule of universal law pervading every well regulated system of jurisprudence and is based upon a practical necessity that there should be an end to litigation and the hardship to the individual if he is vexed twice for the same cause. Thus, this doctrine is a fundamental concept based on public policy and private interest. It is

conceived in the larger public interest, which requires that every litigation must come to an end. It therefore, applies to all kinds of suits such as civil suits, execution proceedings, arbitration proceedings, taxation matters, writ petitions, administrative orders, interim orders, and criminal proceedings.

Res Judicata under Code Of Civil Procedure, 1908

Section 11 of CPC embodies the doctrine of res judicata or the rule of conclusiveness of a judgement, as to the points decided either of fact, or of law, or of fact and law, in every subsequent suit between the same parties. It enacts that once a matter is finally decided by a competent court, no party can be permitted to reopen it in a subsequent litigation. In the absence of such a rule there will be no end to litigation and the parties would be put to constant trouble, harassment and expenses.

Section 11 says thus:
No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II. For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V. Any relief claimed in the plaint, which
is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI. Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII. The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII. An issue heard and finally decided by a Court of

limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

The doctrine has been explained by Justice Das Gupta as follows - The principle of Res Judicata is based on the need of giving a finality to the judicial decisions. What it says is that once a case is res judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvas the matter again.

Essential Elements for Res Judicata

1. The matter in issue in a subsequent suit must directly and substantially be same as in the previous suit.
2. The former suit must have been between the same parties or between parties under whom they or any of them claim.
3. Such parties must hae been litigating under the same title in the former suit.
4. The court which decided the former suit must be a court competent to try the subsequent suit or the suit in which such issue is subsequently raised. 5. The matter directly and substantially in issue in the

subsequent suit must have been heard and finally decided by the court in the former suit.

Give Illustrations

The onus of proof lies on the party relying on the theory of res judicata.

Exceptions to application

Res iudicata does not restrict the appeals process, which is considered a linear extension of the same lawsuit as the suit travels up (and back down) the appellate court ladder. Appeals are considered the appropriate manner by which to challenge a judgment rather than trying to start a new trial. Once the appeals process is exhausted or waived, res iudicata will apply even to a judgment that is contrary to law.

The provisions of section 11 of the Code are mandatory and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act which defines with precision the grounds of such evidence as fraud or collusion. It is not for the court to treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper inference from facts.

In Beliram & Brothers and Others v. Chaudari Mohammed Afzal and Others it was held that where it is established that the minors suit was not brought by the guardian of the minors bona fide but was brought in collusion with the defendants and the suit was a fictitious suit, a decree

obtained therein is one

obtained by fraud and collusion within the meaning of section 44 of the Indian Evidence Act, and does not operate res judicata. The principle of res judicata in section 11 CPC is modified by section 44 of the Indian Evidence Act, and the principles will not apply if any of the three grounds mentioned in Section 44 exists.

Failure to apply

When a subsequent court fails to apply res iudicata and renders a contradictory verdict on the same claim or issue, if a third court is faced with the same case, it will likely apply a "last in time" rule, giving effect only to the later judgment, even though the result came out differently the second time.

Constructive Res Judicata

The rule of direct res judicata is limited to a matter actuallu in issue alleged by one party and denied by other either expressly or impliedly. But constructive res judicata means that if a plea could have been taken by a party in a proceeding between him and his opponent, and if he fails to take that plea, he cannot be allowed to relitigate the same matter again upon that plea. In affect, the partly impliedly gives up the right to that plea by not pleading it in the previous suit. This principle is embodied in Explanation IV of Section 11.

Explanation IV. Any matter which might and ought to have been made ground of defence or attack in such

former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Give Illustrations -

In the case of **Kesar Das Rajan Singh v. Parma Nand Vishan Dass, AIR 1959,** a peculiar situation arose. In this case the plaintiff had filed a suit on the basis of a promissory note. However, the plaintiff himself left the country and in subsequent proceedings since he was unable to provide the promissory note to his advocate in the foreign country the suit got dismissed. The plaintiff later on filed another suit in the local courts. The defendant took the plea that the present suit was barred by res judicata. The Court held that the judgment on the previous suit since it did not touch upon the merits of the case, therefore could not be held to be res judicata for the present suit .

Ex parte decree as Res Judicata

An ex parte decree, unless it is set aside, is a valid and enforceable decree. However, the real test for res judicata is whether the case was decided on merits. The real test for deciding whether the judgment has been given on merits or not is to see whether it was merely formally passed as a matter of course, or by way of penalty for any conduct of the defendant, or is based upon a consideration of the truth or falsity of the plaintiff's claim, notwithstanding the fact that the evidence was led by him in the

absence of the defendant. Thus, a decree may not act as res judicata merely because it was passed ex parte.

It therefore acts a res judicata.

Q. "Every suit shall be instituted in court of lowest grade competent to try it", Explain. Explain the provisions of CPC which

are applied in determining the forum for institution of a suite relating to immovable property. State principles which guide a plaintiff in determining the place of filing a suit. Explain.

In India, courts are hierarchically established. The lower courts have less powers than the higher or superior courts. The Supreme Court of India is at the top of the hierarchy. There are numerous lower courts but only one High Court per State and only one Supreme Court in the Country. Thus, it is immpractical to move superior courts for each and every trivial matter. Further, the subject matter of a suit can also be of several kinds. It may be related to either movable or immovable property, or it may be about marriage, or employment. Thus, speciality Courts are set up to deal with the specific nature of the suit to deal with it efficiently. Similarly, it would be inconvenient for the parties to approach a court that is too far or is in another state. All these factors are considered to determine the court in which a particular suit can be filed. CPC lays down the rules
that determine whether a court has jurisdiction to hear a particular matter or not.

These rules can be categorized as follows - Pecuniary Jurisdiction, Territorial Jurisdiction, Subject matter jurisdiction, and Original Jurisdiction.

Pecuniary Jurisdiction

As per **Section 15**, every suit shall be instituted in the Court of the lowest grade competent to try it. This is a fundamental rule which means that if a remedy is available at a lower court, the higher court must not be approached. More specifically, this rule refers to the monetory value

of the sute. Each court is deemed competent to hear matters having a monetory value of only certain extent. A matter that involves a monetory value higher than what a court is competent to hear, the parties must approach a higher court. At the same time, the parties must approach the lowest grade court which is competent to hear the suit.

However, this rule is a rule of procedure, which is meant to avoid overburdoning of higher courts. It does not take away the jurisdiction of higher courts to hear matter of lesser monetory value. Thus, a decree passed by a court, which is not the lowest grade court compenent to try the matter, is not a nullity. A higher court is always competent to try a matter for which a lower court is compenent. This rule applies to the parties as it bars the parties to approach a higher court when a lower court is competent to hear the
matter.

Example

Valuation

Territorial Jurisdiction

Territorial Jurisdiction means the territory within a Court has jurisdiction. For example, if a person A is cheated in Indore, then it makes sense to try the matter in Indore instead of Chennai. The object of this jurisdiction to organize the cases to provide convenient access to justice to the parties. To determine whether a court has territorial jurisdiction, a matter may be categorized into four types -

1. Suits in respect of immovable property

Section 16 - Suits to be instituted where subject matter is situated — Subject to the pecuniary or other limitations prescribed by any law, suits— (a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property, (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property, (d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situated: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.— In this section "property" means property situated in India.

Section 17 - Suits for immovable property situated within jurisdiction of different Courts— Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Court, the suit my be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situated : Provided that, in respect of the value of the subject matter

of the suit, the entire claim is cognizable by such Court.

Section 18 - Place of institution of suit where local limits of jurisdiction of Courts are uncertain— (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those
Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction : Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.
(2) Where a statement has not been recorded under sub-section (1), and objection is taken before an Appellate or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the Appellate or Revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

2. Suits in respect of immovable property - It is said that the movables move with the person. Thus, a suit for a movable person lies in the court, the territory of which the defendant resides.

Section 19 - Suits for compensation for wrongs to person or movable— Where a suit is for

compensation for wrong done to the person or to movable property, if the wrong was done within the
local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts. **Illustrations**
(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.
(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

3. Suits for compensation for wrong (tort) - Section 19 applies to this as well.

4. Other suits

Section 20 - Other suits to be instituted where defendants reside or cause of action arises— Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction—
(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that
in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) A is a tradesman in Calcutta, B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi A, B and C being together at Benaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benaras, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

Objection as to Jurisdiction

Section 21 - Objections to jurisdiction— (1) No objection as to the place of suing shall be allowed by any appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues or settled at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or

Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.

As held in Pathumma vs Kutty 1981, no objection as to the place of suing will be allowed by an appellate or revisional court unless the following three conditions are satisfied -

(i) The objection was taken in first instance. (ii) The objection was taken at the earliest possible opportunity and in cases where issues are settled at

or before settlement of issues (iii) there has been a consequent failure of justice.

All the three conditions must be satisfied simultaneously.

Q. Special Suits - State the procedure for institution of suits by and against minors or persons of unsound mind.

Order XXXII

As per Rule 1, the definition of minor given in Majority Act, 1875 applies - a person who has not attained the age of 18 yrs or for a minor for

whose person or property a guardian or next friend has been appointed by the court or court of wards, the age of majority is 21 yrs.

Read all Rules in Order 32.

Ram Chandra vs Ram Singh AIR 1968 - SC held that a decree passed against a minor or a lunatic without appointment of a guardian is a nullity and is void and not merely voidable.

Q. Suits by and against the Govt.

Read **Order 27** and **Section 79-82.**

Q. Interpleader Suit -

Section 88 and Order 35

Section 88 - Where interpleader suit may be reinstituted? Where two or more persons claim adversely to one another the same debts, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself: Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

Procedure - Read Order 35 Rule 1 – 4

Q. What do you understand by Set Off and Counter Claim? Distinguish between Legal and Equitable set off.

A set-off is a kind of counter-claim that operates as a defence to a claim. The doctrine of Set Off allows the defendant to put his own claim against the plaintiff before the court under certain circumstances.Technically, a set off can be defined as a discharge of reciprocal objligations to the extent of the smaller obligation. For example, A files a suit against B claiming 5000/- . B may take a defence that A owes 3000/- to B as well. Thus, B is basically asking to set off 3000/- of A's claim and pay only 2000/-.

In **Jayanti Lal vs Abdul Aziz AIR 1956, SC** defined Set Off a the extinction of debts of which two persons are reciprocally debtors to one another by the credits
of which they are reciprocally creditors to one another.

By claiming set off, the defendant is spared from filing a separate suit against the plaintiff. Thus, it reduces the number of suits before the court.

Provisions of Set off are specified in CPC under **Order VIII Rule 6**

6. Particulars of set-off to be given in written statement -

(1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the

pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, presents a written statement containing the particulars of the debt sought to be set off.

(2) Effect of set-off—The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off : but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effect, C pays Rs. 1,000 as surety for D: then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000 C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000 B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

Essential Conditions for Set Off -

The suit must be of recovery of money. Example - A sues B for 20,000/-. B cannot set off the claim for damages for breach of contract for specific performance.

The sum of money must be ascertained. See Illustration c, d, e.

The sum claimed must be legally recoverable. For example, winnings in a wager cannot be claimed in a set off.

The sum claimed must be recoverable by all the defendants against the plaintiff if there are more than one defendants.

The sum claimed must be recoverable from all the plaintiffs by the defendant if there are more than one plaintiffs.

In the defendant's claim for set off, both the parties must fill in the

same character as they fill in the plaintiff's suit. See illustrations a, b, h.

Equitable Set off

The provisions of Rule 6 given above are for **Legal Set off**. However, these provisions are not exhaustive. This means that a set off is still possible in certain situations even when some of the above conditions are not satisfied. For example, in a transaction where by goods are exchanged for services as well as payment, the defendant may be allowed to claim a set off for an uncertain amount for damaged goods. In a suit by a washerman for his wages, the defendant employer should be able to set off the price of the clothes lost by the plaintiff. In such a case, driving the plaintiff to file another suit would be unfair. A set off in such situations is called an **Equitable Set off**.

SC illustrated equitable set off in the case of **Harishchandra vs Murlidhar AIR 1957**as follows -

Where A sues B to recover 50,000/- under a contract, B can claim set off towards damages sustained by him due to the breach of the same contract by A.

However, there is still one condition that must be satisfied for equitable set off - the set off claim must <u>originate from the same transaction.</u>

Legal Set Off	**Equitable Set Off**
Sum must be ascertained.	Sum need not be ascertained.

Claim need not originate from the same transaction.	Claim must origination from the same transaction.
Legal set off can be claimed as a right by the defendant and the court is bound to adjudicate upon the claim.	Equitable set off cannot be claimed as a right but by court's discretion.
Court fee must be paid on set off amount.	No court fee is required.
The amount must not be time barred.	The amount may be time barred. However, if the defendant's claim is time barred, he can claim only as much amount as is given in the plaintiff's claim.

6A. Counter-claim by defendant -

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, 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 against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time

limited for delivering his defence has expired whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. (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.

(3) The plaintiff 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.

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

6B. Counter-claim to be stated - Where any defendant seeks to rely 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.

6C. Exclusion of counter-claim - Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, 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 it thinks fit.

Q. On what grounds does a second appeal lie? Section 100.

Second appeal—

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An appeal may lie under this section from an appellate decree passed ex parte.

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

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

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

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

Section 100A - No further appeal in certain cases— Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order or such single Judge in such appeal or from any decree passed in such appeal.

Section 101 - Second appeal on no other grounds— No second appeal shall lie except on the ground mentioned in section 100.

Section 102 - No second appeal in certain suits— 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 three thousand rupees.

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

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

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

Substantial question of law -

The expression substantial question of law has not been defined anywhere in the code. However, SC interpreted it in the case of **Sir Chuni Lal Mehta &**

Sons Ltd vs Century Spg & Mfg Co Ltd (AIR 1962 SC 1314) as follows -

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or call for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in

determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the

facts and circumstance of each case whether a question of law his a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

Posted by CS Futurz at 6:55 AM

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