# PAPER PRESENTATION ON MONEY SUITS & MORTGAGE SUITS.

**FOR THE WORK SHOP-1, ON 23.03.2024**

**Submitted by**

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**(a) Limitation, Admissibility and Appreciation of Evidence vis-a-vis burden of proof and onus of proof:-**

**Introduction:-**

A Suit for recovery of money is a civil relief and acts as an effective remedy to recover money from the borrower/debtor. The suit can be filed under Order IV of the Code of Civil Procedure 1908 before the appropriate forum having territorial and pecuniary jurisdiction by a person who has right to sue.

**LIMITATION FOR SUIT FOR PROMISSORY NOTE**

As per Article 35 of Limitation Act where a suit is based on promissory note the period of limitation is three years from the date of execution or from the date of cause of action. However as per Sec.19 of the Limitation Act a fresh period of limitation must be computed in case of any payment was made or otherwise acknowledged the debt.

**LIMITATION FOR MORTGAGE SUIT:-**

As per Article 62 of Limitation Act where a suit is based on mortgage the period of limitation is 12 years to enforce payment of money secured by a mortgage or otherwise charged upon immovable property, when the money sued becomes due. But a fresh period of limitation must be computed in case of any payment was made or otherwise acknowledged the debt. According to section 63 a suit based on mortgage for foreclosure by mortgagee is 30 years when the money secured by mortgage becomes due.

**LIMITATION FOR AN APPLICATION FOR FINAL DECREE:-**

Period of limitation for an application for final decree in a suit for sale is three years under Art.137 of the Limitation Act, 1963 and the said period is computed from the date on which the right to apply accrues.

**REDEMPTION OF MORTGAGE:-**

Limitation to file a suit for redemption is 30 years under Article 61(a) of the Limitation Act, 1963 from the date when the right to redeem accrues.

**SUITS RELATING TO ACCOUNTS:-**

Article 1 of the Limitation Act, 1963 laid that the limitation period for filing a suit for the balance due on a mutual, open, and current account is three years. The period starts running from the last item is admitted or proved is entered in the account. It means the period of limitation begins when the last transaction is entered in the account.

**Mortgage:-** Mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, *Section 58(a), Transfer of Property Act, 1882*.

There are Six types of mortgages in Transfer of Property Act namely:- 1.Simple Mortgage, 2.Mortgage by Conditional sale, 3. Usufructuary Mortgage, 4. English Mortgage, 5. Mortgages by deposit of title deeds, and 6. Anomalous Mortgage.

**Anomalous Mortgage** — A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage, Section 58(g), Transfer of Property Act, 1882.

**English mortgage** — Where the mortgagor binds himself to repay the mortgage-money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage, Section 58(e), Transfer of Property Act, 1882 . Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will transfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage, Narandas Karsondas v. S.A. Kamtam, (1977) 3 SCC 247.

**Equitable mortgage** — **1.** The requisites of an equitable mortgage are: (i) a debt; (ii) a deposit of title deeds; and (iii) an intention that the deeds shall be security for the debt, Syndicate Bank v. APIIC Ltd., (2007) 8 SCC 361. **2.** The following mortgages are equitable — (1) Where the subject of a mortgage is trust property, which security is effected either by a formal deed of a written memorandum, notice being given to the trustees in order to preserve the priority. (2) Where it is an equity of redemption, which is merely a right to bring an action in the Chancery Division to redeem the estate. (3) Where there is a written agreement only to make a mortgage, which creates an equitable lien on the land. (4) Where a debtor deposits the title-deeds of his state with his creditor or some person on his behalf, without even a verbal communication. The deposit itself is deemed evidence of an executed agreement or contract for a mortgage for such estate. This transaction, which appears to be a judicial repeal of the Statute of Frauds, 29 Car. 2, c. 3, Section 4, is expansively resorted to and is known in practice as an equitable mortgage by deposit of title-deeds. An equitable mortgage being a contract for a mortgage, the mortgagee might file a bill or claim in Equity, either for a legal mortgage, a foreclosure and conveyance or a sale.

**Mortgage By Conditional Sale** — Where, the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale, [Section 58(c), Transfer of Property Act, 1882 .

**Mortgage By Deposit Of Title-Deeds -** Where a person in any of the following towns,namely, the towns of Calcutta, Madras and Bombay and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds, Section 58(f), Transfer of Property Act, 1882.

**Simple Mortgage:-** Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee, Section 58(b), Transfer of Property Act, 1882.

**Usufructuary Mortgage** — Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage-money and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee, [Section 58(d), Transfer of Property Act, 1882 .

When an appeal is filed against preliminary decree in mortgage suit, period of limitation to file application for passing final decree begins to run from the date of appellate decree and not from the date of preliminary decree even though no stay application was filed in appeal. (Paras 8 and 9). – *Bank of India rep. by its Branch Manger, Dommeru v. Pothula Veera Krishna Rao and others* – ***2010 (5) ALT 534.*** *P.S. NARAYANA,j.*

***Burden of proof vis-a-vis onus of proof.***

What is burden of proof is set out in Section 101 of the Evidence Act. As per Section 101, specifies the basic rule about who is supposed to prove a fact. It says that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Facts can be put in two categories - those that positively affirm something and those that deny something.

The rule given in Section 101 means that the person who asserts the affirmative of an issue, the burden of proof lies on him to prove it. But there is no burden to prove the self evident facts. For instance, to assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion.

In State of Maharashtra vs. Wasudeo Ramchandra Kaidalwar, (1981) 3 SCC 199, their lordships observed that :

*"The expression 'burden of proof' has two distinct meanings*

*(1) the legal burden. i.e. the burden of establishing the guilt, and*

*(2) the evidential burden, i.e. the burden of leading evidence."*

As per Section 102, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In a case of recovery of money on a promissory note also, the initial burden is on the plaintiff to prove the execution of the promissory note. Though an attesting witness for promissory note is not necessary, if a promissory note is attested by one or more witness, the examination of attesting witness is sufficient to prove execution of document and passing of consideration.

The elementary rule Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would dis entitle the plaintiff to the same.

In G.Vasu V/s Syed Yaseen Sifuddin Quadri, our Honble High Court of Andhra Pradesh held that, we hold that once the defendant adduces evidence to the satisfaction of the Court that on a preponderance of probabilities there is no consideration in the manner pleaded in the plaint or suit notice or the plaintiff's evidence, the burden shifts to the plaintiff and the presumption 'disappears' and does not haunt the defendant any longer.

b. **Costs and Interest in Money Suit**:-

Costs:- Cost is a pecuniary allowance made to the successful party for his expenses in prosecuting or defending a suit or a distinct proceeding in a suit. The primary object of levying costs under section 35 and 35A CPC is, to compensate the litigant for the expense incurred by him in the litigation to vindicate or defend his right. It is therefore payable by a losing litigant to his successful opponent.

The expression "costs" shall mean reasonable costs relating to - (i) the fees and expenses of the witnesses incurred; (ii) legal fees and expenses incurred; (iii) any other expenses incurred in connection with proceedings.

Non payment of costs: Where costs were awarded for not filing reply to the application, for non payment of costs, only the application can be decided, but the suit as such cannot be dismissed.

If costs levied for seeking an adjournment to cross-examine a witness are not paid, appropriate course is to close cross-examination of witness and prohibit further prosecution of suit - However, where genuine and bonafide request is made for adjournment, instead of resorting to forfeiture of right to cross-examine, Court may grant time by levying costs - 2009(6) ALD 152 SC (Manohar Singh Vs. D.S. Sharma and another.)

As per section. 35 C.P.C the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for payment of costs. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

**Interest: Meaning:-**

Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money. Payments a borrower pays a lender, for the use of the money."

Before coming to definition of interest, one must notice difference between loan and debt as loan is the amount lent and debt is the amount due, it is to say loan may charge with interest and debt may include interest-AIR-1955 (noc) Madras-3187 & AIR-1972-Bombay-238; Interest is a premium payable for use of money-AIR-1959-AP-64; Debt is defined in AIR-1968 SC-1042 as liability to pay in present or in future at a fixed time or on demand or the like as ascertainable sum.

Section 2(1) of the Usurious Loans Act says, interest is a return to be made, over and above what was actually lent, where the sum is charged or sought to be recovered specifically by way of interest or otherwise.

The Constitution Bench of the Hon'ble Apex Court in Central Bank of India Vs Ravindra held that, the general idea is that the creditor is entitled to compensation for the deprivation; the money due to creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute.

"Simple interest". – That which is paid for the principal or sum lent, at a certain rate or allowance made by law or agreement of parties. Interest calculated on principal where interest earned during periods before maturity of loan is neither added to the principal nor paid to the leader. That paid on the principal lent as distinguished from compound interest which is interest paid on unpaid interest."

"Compound interest". – Interest upon interest, i.e., interest paid on principal plus accrued interest. Exists where accrued interest is added to the principal sum, and the whole treated as now principal for the calculation of the interest for the next period. Interest added to principal as interest becomes due and thereafter made to bear interest." (Union Bank Of India vs Dalpat Gaurishankar Upadyay)

The examples of statutory provisions fixed interest are Sections 80 & 117(c) of Negotiable Instruments Act-18% p.a. and Section 61 of Sale of goods Act-where contract is silent on such rate of interest apart from Interest Act and CPC-Section 34 & order 34 Rule-11, besides fixed as per the Land acquisition Act.

**Three Divisions of interest:**

**1. Pre-lite; 2. Pendente-lite; and 3. Post lite.**

**Pre-lite:-**

Pre-lite: interest accrued due prior to the institution of the suit on the principal sum (due) adjudged. Interest for the period anterior to institution of suit is not a matter of Procedure as it is referable to substantive law and can be sub-divided into two sub-heads; (i) where there is a stipulation for the payment of interest at a fixed rate (contract rate) and (ii) where there is no such stipulation as per statutory provisions providing certain rate of interest and in its absence as per the interest Act (from date of demand (from date of service of demand notice) and at prevailing market rate and bank lending rate as guidance).

**Pendente-lite:**-

In addition to pre-lite interest, it is the additional interest on the principal sum adjudged or declared due from the date of the suit either at contract rate if reasonable or at such rate as the Court deems reasonable in the discretion of the Court (as per Section 34 CPC till date of decree or under Order 34 Rule 11 C.P.C. in case of mortgage debt if contract rate is unreasonable and excessive to reduce even from date of suit till expiry of the period of redemption) as not a substantive law; ( M.Rajeswar Rao & others... Vs.Chitluri Satyam (Died) & others (2013).

**Post-lite:-**

In addition to pre-lite interest on principal sum and pendent-lite interest on the principal sum adjudged or found due, it is the further interest on such principal sum (as per Section 34 CPC or under Order 34 C.P.C. as not a substantive law, from the date of the decree to the date of the payment and in mortgage decree from date of preliminary decree till expiry of period of redemption and thereafter till realization/payment as the case may be in any decree for money held due with or without charge preliminary or final or partly final decree) or to such earlier date as the Court thinks fit, in the discretion of the Court, at a rate not exceeding 6 per

cent per annum except where the transaction is a business or commercial one to grant above 6 percent but does not exceed contract rate as also laid down by the larger bench of the Hon'ble AP High court in APSRTC Vs. Vijaya. (See Rulings APSRTC Vs. Vijaya; and M.Rajeswar Rao & others... Vs.Chitluri Satyam (Died) & others (2013).)

It is well settled in (Central Bank of India Vs. Ravindra) that the use of the word may in Section 34 CPC confers a discretion on the Court to award or not to award interest or to award interest at such rate as it deems fit. Such interest, so far as future interest is concerned may commence from the date of the decree and may be made to stop running either with payment or with such earlier date as the Court thinks fit.'

**'Penal interest' :-**

However, 'penal interest' has to be distinguished from 'interest'. Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrong-doer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Penal interest can be charged only once for one period of default and, therefore, penal interest cannot be permitted to be capitalized. Further interest i.e., interest on interest, whether simple or compound or penal cannot be claimed on the amount of penal interest. (See M.Rajeswar Rao & others... Vs.Chitluri Satyam (Died) & others (2013)).

No doubt, agricultural borrowings are to be treated on a different pedestal. Even the banks cannot charge interest for agricultural lending other than half yearly rests for seasonal crops and annual rests for other purposes even to compound only as per the RBI circular instructions and directions being guidelines. Even coming to private lending/borrowing, agriculturists cannot be charged with more than 12% p.a. as per Act 4 of 38 for the other than Telangana area of the state of Andhra Pradesh, apart from the fact that the Usurious Loans Act always applies to the private lending in considering rate of interest is excessive or reasonable. In M.Rajeswar Rao & others Vs. Chitluri Satyam (Died) & others (2013). See the ruling in Corp. Bank Vs. DS Gowda & M Veerappa Vs. Canara Bank it is held that 'so far as bank transactions concerned as per the contract rate and as per RBI Guidelines fixing interest rate from time to time with a minimum and

maximum not exceeding the ceiling on rate of interest to exercise within and as per Section 21A of the Banking Regulation Act, 1949 amended by Act 1 of 1984; the debt relief laws and Usurious loans Act to apply and to scale down interest there under have no application, However the Court can under Order 34 Rule 11 and/ or under Section 34 CPC reduce the pendent-lite an post-lite interest rate even from contract rate.'

In Kota Venkaiah Choudary V/s. Ramineni Venkata Subba Rao our Andhra Pradesh Hon'ble High Court held that A plain reading of the above provision would show that though the legislature prohibited the levy of interest in excess of 6¼% per annum on any amount borrowed by an agriculturist, power was reserved to the Government to modify such rate of interest. In exercise of such power, the Government issued G.O Ms. No. 693, dated 22.9.1977 and issued a notification in A.P Gazette Part-II dated 06.10.1977 increasing the rate of interest to 12.5% per annum with effect from 06.10.1977. Therefore, as held by this Court in Nookaraju V/s Yedukondalu (supra) with effect from 06.10.1977 the Courts are empowered to scale down the rate of interest on agricultural debt to 12.5% per annum, simple interest. In this case, the trial Court thought it fit to award rate of interest at 12.5% per cent during the pendency of suit and in accordance with Section 34 of CPC awarded 6% interest per annum for the post decree period. This Court does not find any infirmity in the approach of the trial Court as well as the lower appellate Court in this regard.

**Rate of interest :-**

In M.Rajeswar Rao & others. Vs.Chitluri Satyam (Died) & others (2013) it is observed that from steep fall in bank lending rate of interest, the reduction from 24% to 12% interest awarded by the Court from date of suit to date of decree is since just and reasonable, there is nothing to interfere. However, insofar as post lite interest from date of decree till realization concerned, from the transaction is a commercial one within the meaning of Section 34 C.P.C. and the rate of interest can be charged above 6% p.a. and there are no special reasons given by the appellate Court even to reduce to 6% p.a. though for pendent lite fixed at 12% p.a. and from the several expressions referred indicate the rate of interest awarded after decree at 9% to 12% is reasonable in such lending and there is no reason to reduce from 12% that is what the rate of interest awarded for pendent-lite, the same rate

is just to award in the commercial transaction for post-lite also within the discretionary power of the appellate court.

In 2003 (66) DRJ 46 R.C. Datta Vs. Dr. Rajiv Anand a Bench of the Hon'ble Delhi High Court had held that in the absence of any documentary evidence to support the grant of interest @ 24% per annum, interest granted @ 10% per annum from the demand raised i.e. from the date of notice which in that case was 08.5.1995 would be justifiable.

In (1997) 10 SCC 681 Mahesh Chandra Bansal Vs. Krishna Swaroop Singhal & Ors. the Hon'ble Supreme Court had the occasion to examine the percentage of interest to be awarded on a suit for recovery for the period during which the suit was pending before the trial court which was of the year 1980; 12% per annum had been allowed in that case.

According to Ruttanji Ranji's case, AIR 1938 PC 67 and Vithal Dass v. Rup Chand AIR 1967 SC 188, interest can be awarded for that period (1) when there is an agreement for payment of the same, or (2) when it is payable by the usage of trade having the force of law, or (3) when the payment of the same is contemplated by the provision of any substantive law. or (4) under the Interest Act. It may also sometimes be awarded under the rule of equity. The second period is the one which intervenes the date of suit and the date of decree.

**Interest in mortgage suit:-**

In mortgage suits, court has discretion in the matter of grant of interest pendent lite and subsequent interest – It is not absolutely obligatory on court to decree interest at contractual rate upto date of redemption. – Dara Namassivaya and other Vs. Smt. Veturi Ratnalamma – **2005 (6) ALT 118**.

Civil court has discretion under Order 34 Rule 11, CPC to reduce the contractual rate of interest depending upon the facts and circumstances of each case in spite of the provision of Section 21-A of Banking Regulation Act providing for charging compound interest at contractual rate. (Paras 23 and 24). – State Bank of India, Settipalle Branch, Tirupati rep. by its Chief Manager Vs. P. Veeranarayana – **2014 (1) ALT 714.** VILAS V. AFZULPURKAR,j.

The very purpose of the enactment of Usurious Loans Act is to ensure that the persons in need of money are not exploited by the lenders – The reasonableness of the rate of interest mentioned in the contract falls within the realm of adjudication by Court on the touchstone of settled principles.(Paras 10 and 11). – *Investment Trust of India Limited, Chennai Vs. P.Varahalamma and another* – ***2013 (6) ALT 212 ( D.B. ).*** *L. NARASIMHA REDDY and S.V. BHATT,jj.*

*C.* **Contours of Judgment Writing in Money and Mortgage Suits – Special Reference to Operative Portion – Precedents:-**

The main ingredient of the decree is operative portion of the judgment. According to Order 20 Rule 6, decrees shall contain particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

Mortgage Suits - In a suit for mortgage, preliminary decree has to pass by directing the defendant to pay the suit amount with subsequent interest from the date of filing of suit to till realization and redemption period has to fix to repay the sum as per preliminary decree, if the mortgagor fails to comply with the preliminary decree, upon application of plaintiff/mortgagee, the court has to pass final decree in terms of preliminary decree, by giving liberty to the plaintiff/mortgagee to sell the schedule property for realization of decree amount.

**Distinction between Preliminary Decree and Final Decree:-**

A preliminary decree merely declares the rights and shares of the parties and leaves some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree, which inquiry having been conducted and the rights of the parties finally determined, a decree incorporating such determination needs to be drawn up which is the final decree.

Preliminary decree in a suit for redemption of a simple mortgage (Order XXXIV Rule CPC): On the plaintiff/mortgagor depositing into Court the amount found due in respect of the mortgage as on the date of such decree with costs and expenses on or before a date, within six months, as may be fixed and thereafter, the subsequent costs and expenses together with subsequent interest, the defendant/mortgagee shall deliver up to the

plaintiff/mortgagor all documents in his possession relating to the mortgaged property. In default of the plaintiff/mortgagor paying the amounts as mentioned above, the defendant/mortgagee shall be entitled to apply for final decree directing that the mortgaged property be sold.

Final decree in favour of the plaintiff mortgagor in a suit for redemption of simple mortgage (Order XXXIV Rule 8(1) CPC): Where the plaintiff/mortgagor has made payment into court of all amounts due under the preliminary decree on or before the date fixed or before confirmation of sale made in pursuance of a final decree passed on the application of the defendant/mortgagee, the court shall, on application made by the plaintiff/mortgagor, pass a final decree directing the defendant/mortgagee to deliver up the documents referred in the preliminary decree.

**Other Reliefs:-**

Rule 7 of Order VII has a special word "other reliefs", which may always be given "as the court may think just". Even if a relief is not asked for, and if such lesser relief comes within the general relief claimed, the relief cannot be denied. Under the discretion vested in the Civil Court under Rule 7 is very broad, under the discretion provided in Order VII Rule VII, the Court may grant alternative relief, ancillary, supplementary relief, or even a relief which is not specifically asked for in the plaint and mould the relief keeping in view of circumstances after filing of the suit.

In Lavu Sri Krishna Rao vs Dr. Moturi Nagendra Rao, AIR 2007 AP 25, our Hon'ble High Court held that When a larger relief is prayed for and the claim for the same is not duly established, but when the evidence justifies grant of a smaller relief, granting of such smaller relief is permissible under Order VII Rule 7 CPC, which reads as under:

Order VII Rule 7 CPC: Relief to be specifically stated.-Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement. However, under the guise of the said provision, a relief larger than the one claimed by the plaintiff in the suit cannot be granted.

**An application under Sec. 19A (1) of Madras Agriculturists Relief Act (IV of 1938) has power to decide all questions arising between the mortgagee and the mortgagor**:- A court deciding an application under Sec. 19 A (1) has power to decide all questions arising between the mortgagee and the mortgagor as well as other' owners of the equity of redemption, as in a regular mortgage suit. If the mortgagee does not relinquish his security, the court would have to pass a mortgage', decree under Sub-section (5) of Sec. 19- A. Appeal dismissed. – *Kotipalli Thammayya and others Vs. Mattapalli Raju and others* –***1955 (1) ALT(NRC) 111.1 ( D.B. ).*** *N.D. KRISHNA RAO and VISWANATHA SASTRY,jj.*

**Second suit for mortgage not barred either on principle of res judicata or under Order 2 Rule 2 CPC.:-** Till mortgage debt is discharged and rights are determined by parties or by Court decree, any number of suits can be filed, subject to period of limitation. – *Gummuluru Sansyasinaidu and others v. State Bank of India, rep. by the Manager, Narsipatnam* – ***2011 (3) ALT 731.*** *N.R.L. NAGESWARA RAO,j.*

**Even if E.P. is not filed in execution of earlier decree or if it is time barred- second suit maintainable:**– Even if E.P. is not filed in execution of earlier decree or if it is time barred, still second suit maintainable – Second suit not barred either on principle of res- judicata or under Order 2 Rule 2 CPC. – *Gummuluru Sansyasinaidu and others v. State Bank of India, rep. by the Manager, Narsipatnam* – ***2011 (3) ALT 731.*** *N.R.L. NAGESWARA RAO,j.*

**Specific performance of an agreement to mortgage**:- Specific performance of an agreement to mortgage is different from relief for redemption of mortgage as such. – *Booz Allen and Hamilton Inc Vs. SBI Home Finance Ltd. and others – 2011 (4) SCJ 604 ( D.B. ). J.M. PANCHAL and R.V. RAVEENDRAN,jj.*

**Preliminary decree/final decree:-** In cases where there is a prior charge or mortgage before suit is filed, the case falls under Order 34 Rule 15

(1), CPC and the properties charged or mortgaged cannot be brought to sale without a final decree Order 34 Rule 15 (2), CPC covers a situation where a charge is created for the first time under the decree and it permits the property charged to be brought to sale in execution of a preliminary decree without a final decree. (Paras 60 and 64). – *Lanka Babu Surendra Mohana Benarji Vs. Canara Bank, Unguturu and another,* ***2015 (6) ALT 473 .*** *M.S. RAMACHANDRA RAO,j.*

**Right of redemption:-** Till the passing of final decree and even till the confirmation of the sale made in pursuance of the final decree or the disposal of any appeal against orders passed under Order 21 Rule 89 or 90, CPC, a right to redeem continues to subsist in the mortgagor. (Para 50). – *Lanka Babu Surendra Mohana Benarji Vs. Canara Bank, Unguturu and another,* ***2015 (6) ALT 473 .*** *M.S. RAMACHANDRA RAO,j.*

**Appeal against preliminary decree:-** In a mortgage suit, appeal filed against suit claim to the extent disallowed in the preliminary decree passed cannot be said to be not maintainable on the ground that a final decree application was made in respect of suit claim allowed in the preliminary decree and that it was allowed pending appeal. (Para 8). – State Bank of India, Settipalle Branch, Tirupati rep. by its Chief Manager Vs. P. Veeranarayana – **2014 (1) ALT 714.** VILAS V. AFZULPURKAR,j.

**Doctrine of lis pendens in mortgage suit:-** Doctrine of lis pendens applies to mortgage suits as well. – *Sunita Jugalkishore Gilda Vs. Ramanlal Udhoji Tanna (Dead) thr. Lrs. and others –* ***2014 (1) ALT(SC) 15 ( D.B. ).*** *K.S. Radhakrishnan and Arjan Kumar Sikri,jj*

**Sale in mortgage suit:-** J.Dr. in mortgage suit can seek annulment of sale by depositing the amounts as stipulated in Order 34 Rule 5, CPC at any stage before confirmation of sale. (Para 10). – Patnam Subbalakshmamma v. Sunkugari Sreenivasa Reddy and another – **2011 (3) ALT 591.** L. NARASIMHA REDDY,j.

**Execution of mortgage final decree:-** A decree holder in a mortgage suit has to proceed against mortgaged property and then to resort to other steps, in case the sale does not result in satisfaction of decree.(Para 6). – *P. Ravinder v. Manohar Reddy* – ***2010 (1) ALT 365.*** *L. NARASIMHA REDDY,j.*

**Mortgage decree against company:-** Where the J.Dr. in a mortgage decree is a company, E.P. be filed against company itself. Filing of EP against Managing Director of Company straightaway is not just. (Para 5). – *P. Ravinder v. Manohar Reddy* – ***2010 (1) ALT 365.*** *L. NARASIMHA REDDY,j.*

**Revision petition filed challenging the order passed on application made for passing final decree :-** Application to pass final decree for sale of mortgaged property in terms of preliminary decree filed. Final decree passed. Execution proceedings initiated –Revision petition filed challenging the order passed on application made for passing final decree. Not maintainable. – *Kommuru Bhaskararao and another Petitioners (R-4 and R-5). vs. Aremanda Sivanagendramma Respondent (Plaintiff-Petitioner).* – ***1996 (4) ALT 915.*** *D.H. NASIR,j.*

**Limitation to file final decree in mortgage suit:-** Preliminary decree passed granting instalments to pay decretal amount – Right to apply for final decree accrues from the date of default in payment of any instalment – Limitation period of three years starts from the date of default. – *Manotosh Kumar Mitra (dead) by LRs. Vs. Amarendranath Shaw (dead) and others – 2000 (2) ALT(SC) 29 ( D.B. ) Y.K. SABHARWAL and S. SAGHIR AHMAD,jj.*

**A suit cannot be dismissed except on appeal or by review after a preliminary decree is passed.:-** It follows that there cannot be abatement of the suit even if the L.Rs of the deceased party are not brought on record during the final decree proceedings. But, even a final decree cannot be passed for or against a dead person. So, it is necessary to bring on record the L.Rs. of the deceased before a final decree is passed. It has to be seen as to what provision is applicable when Or. 22 Rules 1, 3 and 4 are not applicable in case of death of parties during the final decree proceedings. –

*Siddavatam Mohan Reddy Vs. P. Chinnaswamy And Ors* – ***1991 (3) ALT 513.*** *NEELADRI RAO,j*

**Applicability of Order 22 Rule 10 C.P.C:-** Order 22 Rule 10 C.P.C lays down that in cases of an assignment, creation or devolution of any interest other than the cases referred to in remaining Rules of Or. 22, the suit may by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. When Or. 22 Rules 3 or 4 is not applicable in cases of death during the final decree proceedings, one has to invoke Or. 22 Rule 10 C.P.C. to bring the L.Rs. on record. (Para 7). – *Siddavatam Mohan Reddy Vs. P. Chinnaswamy And Ors* – ***1991 (3) ALT 513.*** *NEELADRI RAO,j*

**Or. 34, Rules 3 and 4:-** Preliminary decree in a mortgage suit for sale of land belonging to mortgagor. Final decree passed for delivery of possession of land to mortgagee. Not legal. – Nagamma Vs. S.P. Manipal Reddy – **1990 (2) ALT(NRC) 21.2.** J. ESWARA PRASAD,j.

**No bar To record payments under a preliminary decree in a mortgage suit:-** Application by judgment-debtor to record payments under a preliminary decree in a mortgage suit. No execution petition pending. Not a bar to maintainability of application under Or.21, Rule 2. Right to apply under Or. 34, Rule 3 (I) for passing a final decree. Also not a bar to entertain application, under Order 21 Rule 2. – *Messrs Sri Laksbminartiyana Sago Manufacturing Co. rep. by its Partner Chintapalli Ramakrishna and another Vs. State Bank of India, Samalkota* – ***1988 (1) ALT 837.*** *SYED SHAH MOHAMMED QUADRI,j.*

**Death of plaintiff in mortgage suit:-** Held – Under Order 1, Rule 10 C.P.C., in order to effectually dispose of the suit, it is necessary to bring the legal representatives on record. (para 2). – *Kuragayala Savithri and others Vs. Konduri Chinnayyamma and others* –***1988 (1) ALT 528.*** *A. SEETHARAM REDDI,j.*

**Limitation Act not applicable to Or 34, Rule 5:-** Sale of mortgaged property not confirmed till judgment debtor filed application an under Or. 34, Rule 5 for setting aside sale and for depositing amounts due to auction purchaser-Court can allow petition of judgment debtor-Limitation Act

not applicable to Or 34, Rule 5. – *S. Subba Rao Vs. B. Suryaprakasa Rao – 1988 (1) ALT(NRC) 33.1. P.A. CHOUDARY,j.*

**Hindu son- Not a mortgage suit** :- A Hindu son is bound by the court sale of properties mortgaged by his father though he is not a party to the mortgage suit. V Narasimhulu Vs V.Ramaiah & another, 1978 (2) ALT 435.

**Conclusion:-**

A mortgagor is a borrower in the mortgage. Mortgagor owes the obligation secured by the mortgage. The borrower must meet the conditions of the underlying loan or other obligation in order to redeem the mortgage. If the mortgagor fails to meet these conditions, the mortgagee may foreclose to recover the outstanding loan. The equity of redemption can be brought to an end either by the act of parties or by a decree of the court. The sale, exchange, mortgage are the alienations as defined within the meaning of the provisions of the Transfer of Property Act, 1882. The sale and exchange are absolute alienations, but the mortgage is condition alienation. As long as the mortgage amount is not discharged, the mortgagee has got a right over the mortgaged property and insofar as mortgage amount the right of mortgagor is only to redeem the mortgaged amount.

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Note- Source of material: Gathered from different books and internet source.

**PRESENTATION**

**(FOR THE WORKSHOP TO BE HELD ON 23.3.2024)**

***(II) PARTITION SUITS-***

**(a) Persons eligible to seek Partition under Hindu Succession Act, 1956.**

**(b) Nature of Property liable for partition with Reference to Coparcenary.**

**Submitted by-**

***Smt.D.Soujanya,***
***Addl Civil Judge (Junior Division)***
***Parvathipuram.***
***Vizianagaram (District)***

**Introduction**:

"Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/ coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them .

The partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. Partition is nothing but a severance of joint status.

**Partition under Mitakshara and Dayabhaga School -**

The concept of partition under Hindu law is mainly regulated by two schools of thought, i.e., Mitakshara and Dayabhaga, respectively. Both schools have two distinct meanings for the term 'Partition.' As far as Mitakshara school is concerned, partition does not simply mean division of property into certain or specific shares amongst the coparceners, but it actually means a division of status along with severance of interest, i.e., in ancestral property, the shares of the coparceners fluctuates as per the birth and death of the coparcener, which means that whenever a birth takes place in a joint family, the shares of the coparceners decreases, whereas when the death takes place, the shares of the coparceners increases by its very nature. Under this school of thought, property rights are created by birth, and devolution is through survivorship. So, the partition is said to be completed once the shares are defined, and therefore it is not required that the division of property should take place via metes and bounds. Hence, under the Mitakshara school of thought, unity of ownership is considered as an essence of the coparcenary.

**1) Dayabhaga school**: In a Dayabhaga school every adult coparcener reserves a right to demand partition by the physical demarcation of his shares. Such partition must be in accordance with the demarcation of specific shares of partition i.e. partition by bounds and metes.

**2) Mitakshara school:** In Mitakshara school there is no demarcation of property into specific shares, and essentials of a coparcener need to be established, but the existence of Joint property is not an essential element for demanding partition. All it takes to demand a partition is a definite and unequivocal declaration that conveys his intention of separating from the family.

**De jure and De facto Partition-**

***1) De Jure* Partition**: In an undivided coparcenary, all the existing coparceners have a joint share in the property, and till the partition takes place, none of the coparceners can tell the exact amount of share that he owns in the property. Further, due to the application of the doctrine of survivorship, the interests can keep on fluctuating due to births and deaths of the other coparceners. But, when the community interest is broken down at the instance of one coparcener or by mutual agreement that the shares are now clearly fixed or demarcated, such type of partition is known as *De Jure* partition wherein there is no scope of application for Doctrine of Survivorship.

***2) De facto* Partition**: Unity of possession which signifies the enjoyment of property by the coparceners may even continue after severance of Joint status or division of community interest. The amount of shares in the property might not be fixed but no coparceners reserve the right to claim any property as falling into his exclusive shares. "This breaking up of Unity of Possession is affected by an actual division of property and is called a *de facto* partition."

**Essentials of a valid partition -**

It is pertinent to note that a coparcener reserves a right to demand partition at any time without the consent of the other coparceners. Therefore, in order to bring demand for partition the following essentials must be established:-

1. There must be an intention to separate from the Joint Family.
2. There must be a clear, unequivocal and unilateral declaration which conveys the intention to separate from the Joint Family.
3. The intention must be communicated to the Karta or to the other coparcener in his absence.

**(a) PERSONS ELIGIBLE TO SEEK PARTITION UNDER HINDU SUCCESSION ACT, 1956:-**

The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put at par with a male heir. Next in the line of numbers is the Shariat Law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities.

Sub-section (2) of section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the official gazette. Section 3 (2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. (Emphasis supplied). General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection.

1. In the case of *Danamma* vs. *Amar*, AIR 2018 SC 721, the **Hon`ble** Apex Court has held that the daughters who were born before the enactment of the Hindu Succession Act, 1956 are entitled to equal shares as son in ancestral property.

2. In *Ratnamala Vilas More* vs. *Tanaji Machindra Pawar, AIR 2018 Bom 260,* it was held that daughter of a coparcener acquires 'by birth' the status of coparcener in her own right in the same manner as the son.

3. One of the incidents of coparcenary, being the right of a coparcener to seek severance of status, even a daughter can now avail right to partition. It was categorically held that "even when the daughters are born prior to enactment of the Hindu

Succession Act, 1956, in view of the amendment to Section 6 of the said Act in the year 2005, they also acquire the status of a coparcener by virtue of birth and hence they are entitled to sue for partition". *Prakash* vs. *Phulavati* and also in *Danamma* v. *Amar.*

*4.* It is significant to note that Section 24 disentitling the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother from succeeding to the property of the intestate on remarriage is also deleted.

5. Section 30 has been suitably amended to enable a female Hindu also to dispose of property by testamentary disposition.

**In the Schedule to the Hindu Succession Act, in the list of Class I heirs, the following are added:**

(a) Son of a predeceased daughter of a predeceased daughter,

(b) Daughter of a predeceased daughter of a predeceased daughter,

(c) Daughter of a predeceased son of a predeceased daughter, and

(d) Daughter of a predeceased daughter of a predeceased son.

Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognizes the rule of devolution by survivorship among the members of the coparcenary.

The fundamental principles of the Mithakshara Law that constitute the foundation on which the edifice of the system rests are:

(i) right by birth based on spiritual benefit,

(ii) unity of ownership and fluctuating interest,

(iii) survivorship, and

(iv) the pious obligation.

* Section 24 of the Act, now deleted, disentitled certain females related to the intestate as (i) the widow of a predeceased son, (ii) the widow of a predeceased son of a predeceased son or (iii) the widow of a brother to succeed to the property of the intestate as such widow, if she had remarried on the date when the succession opened. Only these three specified categories of widows were

debarred from succession on re-marriage before the succession opened and there was no divestiture by any subsequent remarriage by them.

* Re-marriage was not made a disqualification in the case of other female relatives of the intestate.

* A female Hindu is a heir both in the parental and matrimonial families.

* The expanded list of Class-I heirs, now includes 16 persons who will all succeed as simultaneous heirs. Among them the primary heirs are son, daughter, widow and mother of whom three are women. Among the remaining 12 heirs only four are males and they too are cognates and the rest are females. Thus the statistical probability is that after about three generations i.e. by the turn of the century property will be more in the hands of women than in the hands of men requiring reformative measures to remedy the imbalance in fullness of time.

Sec. 2 (1) This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed. Explanation.— The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(b) any child, legitimate or illegitimate one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Hindu Succession Act.

Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

It has been provided that not withstanding the religion of any person as mentioned above, the Act shall not apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Indian Constitution unless the Central Government by notification in the Official Gazette, otherwise directs. See. Surajmani Stella Kujur Vs. Durga Charan Hansdah.

**"Full blood", "half blood" and "uterine blood":-**

2 (e) "full blood", "half blood" and "uterine blood"—

(i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but; by different wives;
(ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands.

(Sec. 18 says, as to full blood preferred to half blood, that heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.)

1. If two or more heirs succeed together to the property of an intestate, they shall take the property,— (a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and (b) as tenants-in-common and not as joint tenants. (See. Sec. 19).

2. A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate. (See. Sec. 20).

3. Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder. (See. Sec. 21).

4. The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder: Rule 1.— Of two heirs, the one who has fewer or no degrees of ascent is preferred. Rule 2.— Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. Rule 3.— Where neither heirs is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously. (See. Sec. 12).

Property of a female Hindu to be her absolute property.— (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act. (2) Nothing contained in sub- section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. (See. Sec. 14).

**a) Rules of succession in the case of males:-**

i. Class I heirs are sons, daughters, widows, mothers, sons of a pre-deceased son, widows of a pre-deceased son, son of a, pre-deceased sons of a predeceased son, and widows of a pre-deceased son of a predeceased son.

ii. The property of a Hindu male dying intestate, or without a will, would be given first to heirs within Class I. If there are no heirs categorized as Class I, the property will be given to heirs within Class II.

iii. If there are no heirs in Class II, the property will be given to the deceased's agnates or relatives through male lineage.

iv. If there are no agnates or relatives through the male's lineage, then the property is given to the cognates, or any relative through the lineage of females.

v. If there is more than one widow, multiple surviving sons or multiples of any of

the other heirs listed above, each shall be granted one share of the deceased's property. Also if the widow of a pre-deceased son, the widow of a pre-deceased son of a pre-deceased son or the widow of a brother has remarried, she is not entitled to receive the inheritance.

Class II heirs are categorized as follows and are given the property of the deceased in the following order:

- ➢ Father
- ➢ Son's / daughter's son
- ➢ Son's / daughter's daughter
- ➢ Brother
- ➢ Sister
- ➢ Daughter's / son's son
- ➢ Daughter's / son's daughter
- ➢ Daughter's / daughter's son
- ➢ Daughter's /daughter's daughter ➢ Brother's son
- ➢ Sister's son
- ➢ Brother's daughter

(Sec. 8 of the Act deals with general rules of succession in the case of males.— The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—
(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule; (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and (d) lastly, if there is no agnate, then upon the cognates of the deceased.)

**b) <u>Rules of succession in the case of females:-</u>**

The property of a Hindu female dying intestate, or without a will, shall devolve in the following order:

1. upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband,
2. upon the heirs of the husband.
3. upon the father and mother
4. upon the heirs of the father, and

5. upon the heirs of the mother.

(Sec. 15 of the Act prescribes general rules of succession in the case of female Hindus. — (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,— (a) firstly, upon the sons and daughters (including the children of any pre- deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother.

Sec. 15(2) of the Act says that notwithstanding anything contained in sub-section (1),

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre- deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre- deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.)

**Exceptions:-**

1.If a relative converts from Hinduism, he or she is still eligible for inheritance. The descendants of that converted relative, however, are disqualified from receiving inheritance from their Hindu relatives, unless they have converted back to Hinduism before the death of the relative.

2. Any person who commits murder is disqualified from receiving any form of inheritance from the victim.

**The Hindu Succession (Amendment) Act,2005:-**

Under this Amendment Act, 2005 ( Act No. 39 OF 2005 ) Section 4, Section 6, Section 23, Section 24 and Section 30 of the Hindu Succession Act, 1956 were amended. It revised rules on coparcenary property, giving daughters of the deceased equal rights with sons, and subjecting them to the same liabilities and disabilities. The amendment essentially furthers equal rights between males and females in the legal system. In section 4 of the Hindu Succession Act, 1956 (30 of 1956), sub-section (2) has been omitted.

1. Any property possessed by a Hindu female is to be held by her absolute property and she is given full power to deal with it and dispose it of by will as she likes. Parts of this Act was amended in 2005 by the Hindu Succession (Amendment) Act, 2005

**Substitution of new section for section 6.:-**

'6. Devolution of interest in coparcenary property.-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,- (a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-

(a) The daughter is allotted the same share as is allotted to a son; (b) the share of the pre- deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter; and (c) the share of the pre- deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre- deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.- For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect- (a) the right of any creditor to proceed against the son, grandson or great- grandson, as the case may be; or (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.-For the purposes of clause (a), the expression “son”, “grandson” or “great- grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation.- For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.’.

**Amendment of Schedule:-**

In the Schedule to the principal Act, under the sub-heading “Class 1”, after the words “widow of a pre-deceased son of a pre-deceased son”, the words “son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre- deceased daughter of a pre-deceased son” shall be added.

**Judgments after 2005 Amendment:-**

1. The effect of 2005 amendment was considered in **Ganduri Koteshwaramma & Anr vs Chakiri Yanadi & Anr ((2011) 9 SCC 788)** which was decided in 12-10-2011. In this case, the **Hon'ble** Apex Court held that the new section 6 provides for a parity of rights in the coparcenary property among male and female member of a join Hindu family on and from 09-09-2005. In this case, the object of the Act was observed. In Rohit Chauhan Vs. Surinder Singh and Others – ((2013) 9 SCC 419) case, new section 6 was discussed. Shasidhara Vs Ashwin Uma Mathad case (Civil Appeal No. 324 OF 2015 (Arising Out of SLP(C) No.14024/2013, dated 13-01-2015) was not decided finally becaused the matter was remanded. In Balhar Singh Vs. Sarwan Singh and others – LAWS(SC)-2015-2-150, the Court relied on Chander sen case. But, Chander Sen case was relating to separated father property. When matter was referred to Larger Bench, the matter was withdrawn by the parties as the parties moved a memo for withdrawal.

In Prakash and Ors Vs. Phulavati and Ors – (2016) 2 Supreme Court Cases 36 , it was held that daughter must be alive and the father must be alive to apply the new section 6. The finding in Phulavati's case that "father was alive" is against the ratio laid down in Ganduri and Shashidhar cases. Prakash and others Vs Phulavathi's case is not laying binding law because it was decided on the principle that "vesting and no divesting" and that it was decided relying on Sheela Devi's case and other series of rulings which were decided under the belief of "coparcenary abolished after 1956 and all those rulings are against the ratio laid down in Gurupadappa Khandappa's case.

In Uttam Vs. Saubhag Singh and others – 2016(2) RCR (Civil) 309, it was observed that new amendned section 6 is not applicable. From the above , it is clear that Ganduri Koteswaramma case binds all till the matter is settled by the Larger Bench of the Hon'ble Supreme Court.

**Vineeta Sharma vs Rakesh Sharma, AIR 2020 SC 3717:**

**It was held by the Hon'ble Supreme Court that :** The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(i) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or

alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(ii) Since the right in coparcenary is by birth, it is not necessary that father of the coparcener should be living as on 9.9.2005.

(iii) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(iv) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted.

**Is registration mandatory for partition ?**

1) The Transfer of Property Act, which requires a registered instrument in the case of transfer of immoveable properties, does not require that a release, surrender, or partition of immoveable properties should be effected by a registered instrument, or even by a writing although in one sense each of them involves a transfer of property. A partition between coparceners or co-owners partakes the character of a release and conveyance, and it cannot be said to be either a sale or an exchange.

2) No writing would, therefore, be necessary for a partition. If however the parties to a release, surrender or partition embody the transaction in writing, the question of registration would arise under the provisions of Sec. 17 of the Registration Act. Ref: Velusami And Anr. vs Velusami Konar And Ors., AIR 1962 Mad 153. Significantly enough, it was observed in A. Sarojamma vs A. Parvath Reddy (Died) per LR.

**In Roshan Singh & Ors vs Zile Singh & Ors, AIR 1988 SC 881.** the **Hon'ble** Supreme Court while considering the necessity to effect registration of an instrument of partition held in paragraph 9:

"Two propositions must therefore flow:

(1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered Section 49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition.

(2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition"

**Unregistered partition deed:-**

Non-registration of a document which is required to be registered under Sec. 17(1) (b) of the Registered Act makes the document inadmissible in evidence under Cl. (cf) of Sec. 49 of the Registration Act, even though such a document can be used for a collateral purpose and that oral evidence can be adduced to establish that there was as disruption in status of the joint family.See. Chinnappareddigari Pedda Muthyala Reddy vs Chinnappareddigari Venkata Reddy AIR 1969 AP 242. In this case, it was further observed that it has been held in a series of decisions that an unregistered partition deed can be looked into for the purpose of finding out whether there has been severance in status. It is unnecessary to refer to all of them in view of the categorical pronouncement of the Supreme Court in Naini Bai Vs. GIta Bai.

**Effect of unregistered partition deed:-** The effect of unregistered partition deed and held that an unregistered partition deed is inadmissible in evidence and cannot be looked into for the terms of partition but can be looked into for the purpose of establishing a severance in status. See. Chinnappareddigari Pedda Muthyalareddy vs Chinnappareddigari Venkata Reddy, AIR 1969 AP 242. Latest ruling of 2017, Moghal Sardar Hussain Baig vs Syed Farveej Begum, CRP.No. 1115 of 2017,dated 1207-2017.

***Family arrangement: How to prove it?***

If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the Indian Stamp Act and Indian Registration Act.

1. If the family arrangement is stamped, but not registered, it can be looked into for collateral purposes. A person cannot claim a right or title to a property under the said document, which is being looked into only for collateral purpose.
2. A family arrangement which is not stamped and not registered, cannot be looked into for any purpose, in view of the specific bar in Section 35 of the Indian Stamp Act. A document must be read as a whole.
3. As to the nature of transaction under the document, it cannot be decided by merely seeing the nomenclature. Mere usage of past tense in the document should not be taken indicative of a prior arrangement.

**Family arrangement:-**

A family arrangement can be arrived at orally. The terms in the family arrangement may be recorded in writing as a memorandum of what has been agreed between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what has been agreed upon so that there be no hazy notions about it in the near future. It is only when the parties reduce the family arrangement in writing with an object of using that writing as proof of what they have arranged and, where the arrangement has been brought about by the document as such, that the document would require registration as it is then that it will be a document of title declaring for future what rights in what properties the parties possess.

The expression collateral purposes is no doubt a very vague one and the Court must decide in each case whether the parties who seek to use the unregistered document for a purpose which is really a collateral one or as is to establish the title to the immovable property conveyed by the document. But by the simple devise of calling it collateral purpose, a party cannot use the unregistered document in any legal proceeding to bring about indirectly the effect which it would have had, if it is registered.

When the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and where the arrangement is brought about by the document as such, that the document would require registration as it is, then that it would be a document of title declaring for future what rights in what properties the parties possess."

The essential requirements of the Indian Stamp Act, Indian Registration Act, 1908 and the Transfer of Property Act have to be complied with, where the transaction is intended to operate as a transfer. These Acts cannot be evaded by the parties merely describing the document as a family settlement or arrangement when, in truth and substance it is either a transfer of property or deed of partition as was observed in Raghubir Datt Pandey Vs. Narain Datt Pandey, AIR 1930 All. 498 (2).

**A memo of partial partition:-**

In Kalaivani @ Devasena and another V. J.Ramu and 8 others, 2010 (1) CTC 27, it was observed as follows:

"In a partition Suit, plaintiff sought to mark a document styled as a memo of partial partition. Objection to the marking of the said document was raised on the ground that rights were created under the same and therefore it is inadmissible in evidence. The Trial Court accepted the objection and rejected the document. However High Court held that though the document is unregistered and unstamped, it can be looked into for collateral purposes, provided the deficit stamp duty along with penalty is paid upto date."

**Partition lists containing a list of the properties:**

In Gnanamuthu Nadan v. Velukanda Nadathi, 19 Mad LW 494: (AIR 1924 Mad 542), the partition lists containing a list of the properties which fell to the share of a sharer in a partition, though they were signed by the co-sharers and duly attested, were held not to require registration when they contained no words which could be construed as creating partition of status. In that case the heading of that document gave the name of the particular sharer and set out various items as his share. The list was signed and attested, and it bore a date. It was found in evidence that the lists were drawn by lots in the names of individuals, to whose share the items fell. The learned Judges held that the written deed could be treated only as minutes of agreement and not a completed partition and that, though unregistered, could be admitted in evidence.

Whether a document is a partition deed or it is only a memorandum of partition/ family settlement, the recitals as well as the surrounding circumstances of the document are to be looked into. A Court of law is expected to dissect the transaction, scrutinise its legal implications and the legal consequences which follow. Please see ruling of His Lordship Hon'ble Sri Justice M.Venu Gopal, Madras High Court in Manickam vs Chinnasamy, C.R.P.PD.No.58 of 2010 and M.P.No.1 of 2010 decided on 28 July, 2011

Where the settlement is clearly of a nature which purports or operates neither to create, to assign or extinguish any title or interest, in present or future, in immovable property, nor does it 'declare' any such right, title or interest, it need not be registered. The nature of such a document is described as an acknowledgment of an antecedent title, as per decision of Privy Council, Khunnilal V. Govind Krishna Narain (1911).

**Recognition of a pre-existing right:**

Where a document is a record of a family arrangement, it is not liable to compulsory registration because it is based upon the recognition of a pre-existing right. Held in 1937, Audesh Singh Vs. Sirtaji Kaur, AIR 1937 Oudh 347:

In Smt. R. Seethamma @ Seetha vs M. Thimma Reddy, Appeal Suit No.349 of 2016, Judgment dt.27-04-2017, it was observed that the expression instrument of partition, as originally defined in section 2 (15) of the Indian Stamp Act, 1899 did not include a Memorandum recording past partition. This is despite the fact that a memorandum would also come within the definition of the word instrument. Realizing that this created a loophole in the law relating to Stamp Duty, the State of Andhra Pradesh made an amendment to the Indian Stamp Act, 1899 by A.P. (Amendment) Act 17 of 1986, w.e.f., 16.08.1986. By this amendment, the words and a memorandum regarding past partition was inserted in the definition of the expression instrument of partition under Section 2 (15) of the Indian Stamp Act, 1899.

**b) NATURE OF PROPERTY LIABLE FOR PARTITION WITH REFERENCE TO COPARCENARY:**

1) Joint-family property or coparcenary property.
2) Separate property or self-acquired property.

- Joint-family property or coparcenary property indicates the property in which all the coparceners have community of interest and unity of possession. Such property may be –

- Ancestral property;
- Property jointly acquired by the members of the joint family;
- Separate property of a member “thrown into the common stock”;
- Property acquired by all or any of the coparcener with the aid of joint family funds.

**Partition of coparcenary property-**

According to Hindu law, both a major and minor coparcener have a right to get a share during the partition irrespective of whether they are demanding a partition as sons, grandsons, or great-grandsons. A coparcener can make a demand for partition anytime with or without reason, keeping in mind that this demand has to be complied upon legally by the Karta of the family. Here, all the coparceners have an undivided interest in the property, and through a partition, the title is divided amongst them, thereby leading to exclusive ownership. In the case of minor, the only condition that has to be considered for demanding partition is that the suit for partition has to be filed by a guardian of the minor on behalf of the minor.

If an intention is expressed to partition the coparcenary property, then each share of coparceners becomes clear and ascertainable. It is pertinent to note that once the share of the coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as joint tenants but they will possess the property as tenants-in-common. Tenancy in common is an arrangement where two or more people share rights in the property.

**Various modes of partition-**

- **Partition by father-** The father under the Hindu Law has superior powers in comparison to the other coparceners wherein by virtue of his rights i.e. ‘***patria potestas***’, he can separate himself from the Joint familyis and also separate each and every son, including minors by affecting a partition.

- **Partition by agreement-** If all the coparceners dissolve the joint status, it is known as Partition by agreement. The court does not have the power to recognize any partition unless there is an agreement between the parties on mutually agreeable terms. Moreover, a Partition agreement can

also be an internal arrangement among the family members, wherein the rights are compromised in order to keep the dignity of the family and avoid unnecessary litigation. It is pertinent to note that coparceners by a mutual agreement, can agree that they would not affect partition till the happening of certain event, specific time period or even till the life of a particular coparcener.

- **Partition by Suit-** The most common way to express one's intention to separate himself from the joint family property is filing a suit in the court. As soon as the plaintiff expresses his unequivocal intention to get separated in the court, his status in the joint family property comes to an end. However, a decree from the court is required which decides the respective shares of the coparceners. The severance of status takes place from the date of filing such a suit in the court. Both a minor and a major coparcener may approach the court for this purpose.

- **Partition by Conversion-** Conversion to a non-Hindu religion can lead to severance of status of coparcener belonging to the Joint Family. The member who converted into religion would lose his membership of the coparcenary but it will not affect the status of other coparceners.

- **Partition by Arbitration-**In this mode of partition, an agreement is made amongst the coparceners of a joint family in which they appoint an arbitrator to arbitrate and divide the property. Such a partition becomes operative from the date thereof.

- **Partition by Notice-**The essential element of partition is the intention to separate which must be communicated to other coparceners. Therefore, a partition may come into effect even by notice to the coparceners, whether accompanied by a suit or not.

**Right to Demand Partition-**

As a common rule, every coparcener of a Hindu joint family is permitted to demand partition of the coparcenary/ Hindu joint family property.

(a) **Special power of father:** A Hindu father reserves a right to effect a partition between himself and his sons. Despite the express consent or dissent of his sons, he can exercise this right. Therefore the severance of the property can be done as per the special power given to the father.

(b) **Son, Grandson and Great-grandson:** All coparceners, who is major and of sound mind is entitled to demand partition anytime irrespective of whether they are sons, grandsons or great-grandsons. A clear demand made by any coparcener, with or without reasons, is sufficient and the Karta is legally bound to comply with his demand.

(c) **Daughter**:-Moreover, daughters, son in a mother's womb, adopted son, son born after void or voidable marriage, an illegitimate son etc. also reserves a right to demand partition.

In the case of *Pachi Krishnamma v. Kumaran*, the court stated that the daughter claimed his share as equal to the son in the partition of joint family property, but she failed to prove her customs which says that a daughter can get an equal share as to the son. But after the amendment of 2005 in Hindu Succession Act, it gave the power that a daughter has the right to ask for partition and can claim an equal share as to the son in the partition of joint family property

- **DISQUALIFIED COPARCENER:**

Any coparcener who is incapable of enjoying and managing the property due to any deformities like incurable blindness, lunacy, leprosy, etc. from the time of the birth would be considered disqualified and will be disentitled to get a share during partition, but, if in a joint family, a member has no congenital disqualification, then he would acquire a right by birth, in the coparcenary property, and thus, if he becomes insane subsequently over time, then he would not be deprived of his interest.

- **SONS BORN AFTER PARTITION:**

After-born sons are usually categorized under two heads; firstly, those sons who are born or conceived after partition, and secondly, the sons born after partition but begotten before the partition. In other words, if a son is said to be in her mother's womb, then he would be treated in existence in the eyes of the law and can re-open the partition to receive an equal share along with his brothers. On the other hand, if a son is begotten or born after partition, and if his father has taken his share in the property and has got separated from the other sons, then also the newborn son would be entitled to his father's share from the partition, but here, in this case, he wouldn't be entitled to re-open the partition for his separate property.

- **SON BORN OF A VOID OR VOIDABLE MARRIAGE:**

A male child born of a void or voidable marriage is considered to be the legitimate child of his parents and, thus, is entitled to inherit their separate property as per the law. He cannot inherit the property of parent's relatives.As far as statutory legitimacy is concerned; the male child can be treated as a coparcener for the properties held by the father. He does not have a right to ask for partition during the putative father's lifetime. Furthermore, he can ask for partition only after the father's death. So, it can be concluded that the rights of a son born of a void or voidable marriage are much better than an illegitimate child but are inferior to those of a child born of a valid marriage.

- **ADOPTED SON:**

According to the present scenario, an adopted son can become a member of the joint family through a valid adoption. This change was brought after the passing of HAMA, 1956, where all the laws related to adoption were clarified and modified. Now, post-adoption, an adopted son is considered dead for the natural family and is presumed to be born in the adoptive family, meaning thereby, he acquires a right by birth in the joint family property from the date of adoption. Therefore, he is entitled to demand a partition in joint family property and have a right to an equal share to that of the adoptive father.

- **ILLEGITIMATE SON:**

Under Hindu law, an illegitimate son's right to get a share during the time of partition depends upon the caste to which he belongs to. Presently, an illegitimate son cannot inherit from the father, but he can inherit from his mother. As far as three castes are concerned, *viz.* Brahmins, Kshatriyas and Vaishyas, an illegitimate son is not regarded as a coparcener under it and do not have any vested interest in the joint Hindu family property, and thus, he is not entitled to demand a partition. However, he is entitled to maintenance out of his father's estate.

**In Revan Siddappa and another VS Mallikarjun and others, 2023 SCC Online SC 1087, it was held by the Hon'ble supreme court that-**

> 24. We cannot accept the aforesaid interpretation of Section 16(3) given in Jinia Keotin (supra), Neelamma (supra) and Bharatha Matha (supra) for the reasons discussed hereunder:

25. The legislature has used the word "property" in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired. Section 16 contains an express mandate that such children are only entitled to the property of their parents, and not of any other relation.

26. On a careful reading of Section 16 (3) of the Act we are of the view that the amended Section postulates that such children would not be entitled to any rights in the property of any person who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment. However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents.

35. In our view, in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents.

41. In the instant case, Section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral.

- **Minor coparcener:**

The test for partition in case of a minor coparcener is whether the partition is in the benefit or interest of the minor or whether it can cause danger to the interests of the minor person. It is pertinent to note that it's upon the discretion of the court to decide that a particular case falls under the ambit of interests of the minor.

As per the Hindu Law, if at all a minor has an undivided share in a Joint Family the Karta of the Joint family will act as a guardian of the minor. However, when it comes to the right to demand partition by a person, the rights of the minor and rights of major are similar in nature. The minor reserves a right to claim partition just like an adult coparcener by filing a suit through his guardian. But, if it is found that the suit is not beneficial to the minor the suit can be dismissed. Therefore, it is the duty of the court to serve justice to the minor by protecting their rights and interests.

- **Suit for partition and Joint Hindu Family-**

Where there were no accounts of the joint family income nor any substantial proof that has been submitted in order to show that property as alleged was actually purchased by father from the Joint family income and on the other hand, the defendant brother was successful in proving by cogent and necessary evidence that the property in dispute was actually acquired from his own income and resources i.e. without taking any aid from the joint family income, therefore, the suit filed by plaintiff-brother is liable to be dismissed.
Moreover, it was further held that if at all any family member were living in the same premises, there could not be any presumption or any inference with regard to the joint family nucleus so far as income is concerned until and unless it is proved in accordance with any cogent legal evidence.

- **Suit for partition and separate possession filed by minor son-**

When the suit was filed by minor son for partition and there was no dispute with regard to fact that Karta and his son both were entitled to half of the share in the suit property, however, at a later stage it was found that the Karta had sold a

portion of the suit property without having the consent and knowledge of the minor son. Then it was accordingly held that in the event of partition between the parties the portion which is sold already by Karta under sale in question cannot be allotted to his proposed share and as such no prejudice per se would be caused to the minor son due to the sale in question and so impugned order holding a sale in question and so it was accordingly held that the impugned order is valid and it does not require any inference.

- **Suit for partition filed by widow -**

If at all a suit is instituted by a partition i.e. a member of a Joint Hindu Family, all the coparceners have to be made parties to it, as defendants. Further, wherein the partition is sought between the branches, then only branches who are representative parties shall be made parties to the suit. It is imperative to note that all the females in the family are entitled to get the share at the time of partition. or a purchaser of a coparcener's vested interest can also be implicated as defendants.

In the case of *Jingulaiah Subramanyam Naidu v. Jinguliah Venkatesulu Naidu*, in the instant case, a partition was sought of the property in the name of the wife of the opposite party and they were accordingly claiming that they were as the joint family proprieties and therefore no as such titleholder of the instant property has been made. Therefore, the apex court held that when there is a partition of a particular property, the titleholder must be made a necessary party for such property.

**Shares to female members during partition -**

The allocation of shares to female members in Mitakshara coparcenary partition gives rise to considerable uncertainty and doubt, especially after the passage of new enactments that codify the law of succession, adoption and maintenance.

Most of this is due to partial codification of the Hindu Law. codifying the Hindu law of marriage, succession, adoption and maintenance, the legislature left the law of partition unchanged and even ignored the law of partition to be amended. Under the practice, however, Section 6 of the Hindu Succession Act provides for the retention of a coparcenary under Mitakshara, thus granting succession rights to female members of Class I of the Schedule or to male members who claim through such female members.

- Partition at the lifetime of the father

(a)Taking a liberal view that a wife's right to a share on partition during the father's lifetime exists due to her co-ownership in the property of the husband, the wife should be allocated a share on partition during the father's lifetime.

(b)Even if it is to be presumed that it is in place of maintenance, there is no express or implied provision which, during the lifetime of the family, negates its right to such a share on the partition. Such a case cannot be protected by Section 22(2) of the Hindu Adoptions and Maintenance Act, 1956, if it has an impact at all, as it deals only with the maintenance issue subsequent to devolution of property by maintenance.

(c)If a preliminary decree has been passed in the partition dispute, she will be entitled to both the shares i.e. share on the partition as well as the inheritance.

(d) Where succession opens after a partition suit is introduced but before the preliminary decree is passed, the issue should be considered as open. Moreover, the most preferable point of view would be that she is entitled to the share.

(e) Where a mother or wife receives a share under the Hindu Succession Act on the death of the husband or son and thereafter an actual division among the coparceners takes place

(f) The right of a woman to share in the partition after her father's death was "replaced" by the 1937 Hindu Women's Rights to Property Act. In repealing the Hindu Women's Rights to Property Act of 1956, the Hindu Succession Act cannot be regarded as reviving the mother's right in the absence of any explicit legislative provision to that effect.

(g) The share given to a mother on the partition after the death of the father is in lieu of maintenance. Since the Hindu Adoptions and Maintenance Act codified the law and gave the mother a specific right, the old rule should be considered to have been abrogated if it remains.

**Conclusion:**

Partitioning is a method that performs the role of bringing to an end a Hindu joint family. Through the partitioning process, a joint family property

becomes every coparcener's self-acquired property as per its shares. Partitioning can be achieved by separating the land by metes and boundaries, or by severing the mutual relationship, or both. Precisely, partitioning happens in the real sense only when a Hindu Undivided Families joint status ends. The legal position is well settled that on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition. Further, the principle of law is that a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers.

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# PARTITION SUITS

STATUS OF THIRD PARTY PURCHASER &
PRELIMINARY, FINAL DECREE & MESNE PROFITS

Presented by SMT. M.SAROJANAMMA,
Principal Junior Civil Judge -cum-
Judl. Magistrate of I Class, Bobbili

## STATUS OF THIRD PARTY PURCHASER

**Who is Third Party purchaser?**

when the matter is pending before the competent judirction of any suit or proceeding, which is not collusive and in which any right to property is directly or specifically in question that property cannot be transferrred or dealt with by any party to the suit or proceeding to affect the rights of any other party is called third party purchaser.

The instances the third party purchaser come to the picture.

**- Based on the latin maxim ubi jus ibi remedium where there is a right there is a remedy.**

**Lispendence: This doctrine is based on common law maxim pendente lite nihil innovator** which means during pendency of a litigation nothing new should be introduced. It creats hot ship on an innocent pruchaser it is based on public policy.

The transfer during the pendency is not ipso facto void but only voidable at option of the parties. The doctrine is not applicable where the right of the transfer are alone are effected and not of other party to the suit the third party purchaser right is protected.

In fact, Section 52 of Transfer of Property Act does not prevent any party from dealing with property, it merely lays down a condition that the suit property which is a subject matter to the suit should

not be alienated, hampering the rights of the other property, unless such alienation is permitted by the court.

- A transferee pendente lite can be made a proper or necessary party to the suit, Order I Rule 10 CPC, a fortiori, lis pendens transferees are not required to be joined as parties, but Order 22 Rule 10 CPC allows an alienee pendente lite to do so at the court's discretion, as was held in Amit Kumar Shaw vs. Farida Khatoon, (2005) 11 SCC 403.

- Section 19(b) of the Specific Relief Act states that anyone else claiming under him by a title after the contract, excluding a transferee for value, has paid his money in good faith and without knowledge of the original contract. A transferee pendente lite is bound by the decree. Hence cannot take the plea that he is a bona fide purchaser for value without notice of litigation.

- As is evident from Section 19(b) of the Specific Relief Act, it is the responsibility of the future purchaser — specifically, the subsequent buyer of suit property—to inquire about the title or interest of the person in actual possession as of the date the sale transaction was performed in the buyer's favour.

- As per, Rule 102 Order 21 CPC— Nothing in Rules 98 and 100 shall apply to resistance or obstruction in the 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 a suit.

- Where the suit property is transferred by either of the original parties to the suit, to the subsequent purchaser, during the pendency of the case, the transferee becomes a third party purchaser to the pending suit.

- As was held in *Hari Narain* v. *Man Chand, (2010) 13 SCC 128,* it was held that the second sale cannot have the overriding effect on the first sale, thus rights of the third party transferee remain secondary.

- As per Section 60 of the Transfer of Property Act, 1882, the mortgagor/borrower has a right to redeem the mortgage on payment of the entire mortgage money to the secured creditor.

- In *Shakeena* v. *Bank of India*, 2019 SCC Online 1059, wherein the Supreme Court held that the borrower has a right of redemption only before the time the mortgage is foreclosed or the estate is sold. It was further held that issuance of a sale certificate as per Rule 9(7) of the Rules is a complete and absolute sale for the purpose of SARFAESI and the sale certificate need not be registered, as Section 17(2)(*xii*) of the Registration Act, 1908 provides that a sale certificate issued by a Civil or Revenue Officer in respect of property sold in a public auction does not require registration.

- According to Section 31-B of SARFAESI [as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016], any debt due to a secured creditor by sale of assets over which security interest is

created, shall take priority over any debt due to the Central Government, State Government or local authority.

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- The onus lies not only on the court's interpretation of Section 5226 and Section 19(b)27 but also on the legislature to build statutes safeguarding the interests of the third party transferee.

Section 52. Transfer of property pending suit relating thereto. During the [pendency] in any Court having authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government], of [any] suit or proceeding [which is not collusive and] in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[Explanation.-For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order, has been obtained, or has become unobtainable by reason of the expiration of any period of

limitation prescribed for the execution thereof by any law for the time being in force.]

In Md. Noorul Hoda v. Bibi Raifimnisa and Ors. (1996) 7 SCC 767, it was held that Article 59 of the Limitation Act, 1963 would apply to set aside or cancel an instrument, a contract or a decree on the ground of fraud and the starting point of limitation is the date of knowledge of the alleged fraud. It was further observed that when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. It was also stated that the word 'person' in Section 31 of the Specific Relief Act is wide enough to encompass the person seeking derivative title from his seller and therefore, if he seeks avoidance of the instrument, decree or contract and seeks a declaration to have the decree set aside or cancelled he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the decree set aside, first became known to him. Thus, it is clear that the limitation starts to run from the date of knowledge of the facts entitling the vendee to have the sale deed set aside, which was much beyond three years prescribed by Article 59 of the Limitation Act, 1963. 'Person' in Section 31 of the Specific Relief Act encompassing the person seeking derivative title from his seller may encompass the

subsequent purchaser, but the same is not suffice to construe that to seek avoidance of an instrument, the presence of the person seeking derivative title from his seller makes the presence of the seller superfluous and unnecessary.

In Gomi Bai and Ors, v. Uma Rastogi and Anr,, it was pointed out that it is now well settled that the plaintiff has to implead the subsequent purchaser as defendant to the suit and has to plead that subsequent purchaser is not bona fide purchaser for value, that such subsequent purchaser had notice of the contract of sale of immovable property in favour of plaintiff and also seek a decree directing the original vendors as well as subsequent purchaser to execute sale deed in favour of the plaintiff. It was further held that to that extent, initial burden is on the plaintiff to come and depose that the subsequent purchaser is not entitled for the benefit under Section 19(b) of the Specific Relief Act. It is then the onus shifts to the subsequent purchaser and to prove the negative. It was also noted that the plaintiff seeking specific performance did not make any allegation against the subsequent purchaser in the plaint after impleading the subsequent purchaser through an interlocutory application and that even in the prayer portion of the plaint, no direction was sought to the subsequent purchaser to execute sale deed in favour of the vendee along with the vendors. Consequently, it was held that the vendee did not plead as required under law to deny equities in favour of the subsequent purchaser. It was pointed out that as held by various Courts, in a case of this nature, the plaintiff has to necessarily take two important steps-(i) an averment has to be made in the plaint that the subsequent purchaser

arrayed as defendant has notice of prior agreement and is not a bona fide purchaser for value; (ii) the plaintiff has to pray the trial Court to enforce specific performance of contract of sale by directing his/her vendors as well as subsequent purchaser to execute sale deed. In the present case, though the subsequent purchaser was impleaded as a party to the suit for specific performance much after the expiry of the period of limitation, no specific averments were incorporated and no prayer of any sort was made against him by way of any consequential amendment in the plaint. No direction was sought to have sale deed from the subsequent purchaser also along with the vendor. While it is, thus,. Clear that the subsequent purchaser is a necessary party to the suit for specific performance, O.S. No. 20 of 1993 should be considered to be deficient in pleading appropriately to deny any equities in favour of the subsequent purchaser.

In Vimala Ammal v. C. Suseela, it was held that the subsequent purchaser was a necessary party in the suit for specific performance and the decree should direct both the owner and the subsequent purchaser to execute conveyance in favour of the agreement holder. Earlier precedents were referred to wherein, it was held that the title resided in the subsequent purchaser and he had also to necessarily join in the conveyance and so, where the subsequent purchaser is a necessary party, unless he is impleaded and a decree is sought as indicated earlier, the title remained with the subsequent purchaser.

Reference can also be made to the leading decision on this aspect in Durga Prasad v. Deep Chand. The Supreme Court noted that:

The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a 'purchaser's' suit for specific performance). According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone.

The Hon'ble Apex Court in Durga Prasad 's case (supra), also noted that there may be equities between the vendor and the subsequent transferee and unless they fight the question out as between themselves and it is decided as an issue in the case, the normal rule should be to require that the money be paid to the vendor and not to the subsequent purchaser. This is indicative of the necessity to have the presence of both the vendor and the subsequent transferee for determination of the rights and equities between them in respect of either specific performance or cancellation of the subsequent sale.

→ The Hon'ble Apex Court made it clear that in equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties and the purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract. The Apex Court reiterated the two tests to be satisfied for determining the question who is a necessary party-

(1) There must be a right to some relief against such party in respect of the controversies involved in the proceedings;

(2) No effective decree can be passed in the absence of such party. The Supreme Court also pointed out that necessary parties are those persons in whose absence no decree can be passed by the Court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings. It further held that all the questions involved in the suit referred to in sub-rule (2) Order I Rule 10 of the Code of Civil Procedure make it abundantly clear that the Legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other. It was held that any intervener must be directly and legally interested in the answers to the controversies involved in the suit. This decision by the Apex Court puts beyond doubt the necessity of the subsequent purchaser being made a party to the suit for specific performance. It also further indicates that a person directly and legally interested in the answers to the controversies involved in the suit regarding the rights set up and the relief claimed, will undoubtedly be a proper party and may also be a necessary party. If the vendor is not made a party to the suit to declare the sale deed executed by the vendor in favour of the subsequent purchaser as null and void, the vendor’s rights and interests would be affected without notice to and without an opportunity of hearing for the vendor. Any grant of such declaration of nullity of sale deed is likely to make the vendor answerable for any claim by the subsequent purchaser for equities or the rights

regarding the consideration paid by him or the damages or loss sustained by him or the compensation or reimbursement to which he may be entitled to. Though all rights of ownership in the property are conveyed and passed from the vendor to the subsequent purchaser under a registered conveyance, the absence of subsisting interest for the vendor in the property is only so long as that sale deed stands. If the sale deed were to be rendered legally ineffective in a judicial proceeding, the vendor will not only subject himself to any consequential claims from the subsequent purchaser due to the sale in his favour being nullified but also to the claims of the vendee to subject the vendor to specifically perform his contractual obligations in respect of the same property.

→ **In declaration sult**, the sale deed is null and vold and under Section 34 of the Specific Relief Act, any person entitled to any right as to any property, may institute a suit against any person denying or interested to deny his title to such right and undoubtedly the vendor is denying the right of the vendee. Section 35 of the Specific Relief Act makes it clear that such a declaration is only binding on the parties to the suit and the persons claiming through them respectively, and when such a judgment is not in rent but in personam, any such declaration about the sale deed being a nullity without the presence of the executant of the sale deed appears to offend Sections 34 and 35 of the Specific Relief Act. The subsequent purchaser as a person claiming through the vendor cannot represent the vendor’s Interest in such a suit, as it is not a case of the vendor claiming through the subsequent

purchaser. Even for adjudging the written instrument to be void or voidable against the vendee under Section 31 of the Specific Relief Act, the parties to the written instrument are naturally necessary parties. When the relief under Section 31 or Section 34 of the Specific Relief Act is well settled to be in judicial discretion of the Court, exercise of such judicial discretion without notice to and without hearing one of the parties to the document in question, will be illogical, irrational and unjust.

→ The suit for declaring the sale deed in favour of the subsequent purchaser as void being within limitation and the grant of any such declaration will obviate the necessity of making the subsequent purchaser a party to the suit for specific performance, cannot be sustained firstly aş even the suit for declaring the sale deed as void was imperfectly constituted in the absence of the executant of the document and secondly, no provision or principle has been brought to notice whereunder the presence of a party in one suit will constructively make him a party to the other suit. To construe the vendor to be a party to the suit for declaring the sale deed as void as the vendor is a party to the suit for specific performance and the subsequent purchaser as a party to the suit for specific performance as he is a party to the suit for declaring the sale deed as void, both the suits being respectively within the periods of limitation, appears to be seeking adoption of a procedure or interpretation not shown to have legal or judicial acceptance. The findings of fact in favour of the vendee as against the vendor and the subsequent purchaser, of course, became redundant and purposeless, but the vendee has to thank herself for not pursuing her legal remedies in accordance with law.

Technical and procedural constraints may not ordinarily defeat valuable rights of a party but equally, if not more, valuable rights accrued to the subsequent purchaser by his not being impleaded in the suit for specific performance within the period of limitation and the vendor by her not being made a party to the suit for declaring the sale deed in favour of the subsequent purchaser as void, cannot also be lightly interfered with. Any inherent power of the Civil Court also cannot be invoked in the face of specific provisions and principles of law and the vendee, therefore, has to be deprived of the property sold by the vendor to the subsequent purchaser.

The Law Lexicon, the expression ‘bona fide purchaser’ means the purchaser who purchases property without notice, actual or constructive of any adverse rights, claims, interest or equities of the other any and to the property sold.

At the stage of seeking impleadment of a subsequent purchaser there is no necessity to place any evidence on record to establish want of bona fides on the part of subsequent purchaser. Similarly, the so called ‘evidence’ produced by the subsequent purchaser by way of his affidavit-in-reply to oppose impleadment, is also irrelevant, at this stage. The denial of leave to implead subsequent purchaser, on the ground that mere denials by the plaintiffs were woefully insufficient in the context of positive evidence led by the subsequent purchaser, was clearly erroneous;

In the context of amendment, the plaintiffs have undoubtedly averred that the subsequent purchaser 'cannot be termed as a bona fide purchaser. Order 6 Rule 2 of CPC provides that pleadings must contain material facts and not evidence.

→ Section 81 of the T.P. Act which speaks about marshalling securities. The High Court after noting that the plaintiff had paid substantial amount as advance and secured decree for specific performance, came to the conclusion that the right of marshalling is available to the plaintiff. Section 56 deals with the right of subsequent purchaser to claim marshalling. It should be contrasted with Section 81 which refers to marshalling by a subsequent mortgage. The concept as in Section 56 applies to sales in a manner similar to Section 81 which applies to mortgages alone.

## PRELIMINARY DECREE & FINAL DECREE

### Introduction:

The most common terminology used concerning civil proceedings is the decree and which is commonly referred to as the verdict rendered by the judges during the case in a court of law. An official such as a judge in a court or other tribunal will issue an order. *Section 2(2)* of the Code Of Civil Procedure,1908 states that the formal expression the court makes about disputes to the parties may either be final or preliminary. Similarly, a preliminary decree refers to a decision the court makes before the parties' conclusive rights have been established when it is unable to grant them the

final decree. The court can pass a preliminary decree when the case is not entirely resolved and the remaining proceedings are still pending.

**Section 2(2) of civil procedure code defined 'Decree'**

"decree" means 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 and may be either preliminary or final. It shall be deemed to include the rejection

of a plaint and the determination of any question within 3*** section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit

can be completely disposed of. It is final when such adjudication completely disposes of the suit.

It may be partly preliminary and partly final;

# TYPES OF DECREES

The court may decide cases by decree or order. The court resolves conflicts formally by issuing a decree, which is essentially broken down into the following heads.

- Preliminary decree,
- Final decree,
- Partly preliminary and partly final decree.

**Preliminary decree**

The preliminary decree is brought up by the court prior to rendering a decision in order to put an end to disputes over the parties' rights and all

other issues. It is designed to be passed on by the court to rule on specific cases. This preliminary decree is issued in advance of the final decree. The preliminary decree is a court ruling that outlines the parties' legal rights and responsibilities but leaves the final result up for decision in the following proceedings. When the court is supposed to decide on the parties' rights first preliminary decree is passed. But a preliminary decree will not completely conclude the case.

### Example of preliminary decree

X, Y, and Z, the parties to the property, are asking the court to order its partition, but the court cannot do so until it has established the shares and rights of each party. The court could issue a preliminary decree in this case in order to accomplish this.

A's wife sues her husband for maintenance in this case, and the court must make sure that she receives maintenance throughout the trial to enforce that. The court may therefore issue a preliminary decree to ensure that she receives maintenance all through the trial.

## When can a preliminary decree be passed

The following circumstances are ensured by the Civil Procedure Code so that the preliminary decree may be issued:

**Order 20, Rule 12 – Suits for possession and mesne profit :- (1) Where a suit is for recovery of possession of immovable property and for rents or mesne profits, the parties shall, in addition to adducing evidence in the Court of first instance, as to their right to possession, adduce evidence also in regard to**

**the rents or mesne profits for the period prior to the institution.**

The court may issue a decree for possession of the property, for rents that have accrued during the period before the institution of a suit or for the directing an inquiry as to such rent, or for mesne profits, or for directing an inquiry as to such mesne profits when a suit is brought to recover possession of the immovable property and for rent or mesne profits.

## Case law – Smt. Subashini v. S. Sankaramma (2018)

The Telangana High Court in this case highlighted the priorities of awarding mesne profit, where it helps to compensate the original owner when the same property is in another person's unlawful possession and where it is granted to rectify the situation done to the lawful owner by way of compensating the original owner.

**Order 20, Rule 13 – Administration suit : Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.**

The court may make a preliminary decree and any other judgement that may be appropriate in a dispute involving property or concern about its administration that is before the court for a final decree.

**Case law – Bai Asmalbai v. Esmailji Abdulali (1963)**

In this case, the plaintiff was the widow of Mahmadalli Ibrahimji, who passed away on August 10, 1947. Following his passing, 5 people sued 8 other people to administer the deceased Mahmadalli Ibrahimji's property. The Court issued an order for administration and named a commissioner to divide the decedent's assets among his heirs. In the appeal, it was determined that the variation was that the administration should only apply to two-thirds of twenty tolas of gold rather than thirty tolas of gold and that the sale-deed of a house executed by the deceased Mahamadam in favour of his wife defendant was a fraudulent transaction and that the house was, therefore, eligible for administration.

**Order 20, Rule 14 – Suits of pre-emption : It provides that where the Court decrees a claim to pre-emption in respect of a particular sale of property, the Court shall specify a day on or before which the purchase money shall be paid (if not paid earlier) and direct that on payment into Court of such purchase money on or before the specified day, the defendant.**

When the court passes the decree to claim pre-emption regarding the sale or purchase of any property it can be on the day or before the purchase money shall be paid on paying the purchase money to the court and if there is any cost against the plaintiff in case the defendant should deliver the possession to the plaintiff, whose title thereto shall be deemed to have accused from the date of such payment and if the cost or the purchase money is in pending then the court may dismiss the suit.

## Case law – C K Gangadharan v. Kumaran (2019)

In this case, the court provided answers to a variety of questions relating to pre-emption rights, including the need for a mandatory injunction to enforce pre-emption, the requirement that the preemptor has the same rights as family members in order to protect family property from outsiders, and the constitutional inconsistency of the right of pre-emption based on consanguinity.

**Order 20, Rule 15 – Suits for dissolution of a partnership :Order XX Rule 15 CPC clearly postulates that where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree may pass a preliminary**

**decree declaring the appropriate shares of the parties, fixing the day on which the partnership shall stand dissolved ...**

When it comes to decisions involving the dissolution of a partnership or taking the partnership's account in compliance with the parties' respective share proportions, the court may issue a preliminary decree before issuing a final decree.

## Case law – M. Muthukrishnan v. Ethirajulu (2009)

The Court cited a case and ruled that it is not essential to declare the shares in the judgement it has issued in this matter. However, when it is proven through the pleadings and the evidence that the parties have equal shares, the decree must be created by stating the parties' respective shares. The court must also draft the decree in accordance with Order 20, Rule 15 C.P.C and Form No. 21.

**<u>Order 20, Rule 16</u> – Suits related to accounts between the principal and agent : Suits for accounts between a principal and an agent or in other suits where it is necessary to ascertain the amount of money due to or from any party by taking an account**

The Court shall issue a preliminary decree before issuing its final judgement directing that the accounts it deems appropriate to be taken in any suit for an account of financial transactions between a principal and an agent or in any other suit not previously provided for where it is necessary to take an account to determine the amount of money due to or from any party.

## Case law – Rajendra Singh v. State of Rajasthan (1983)

The Court in this case held that the right to request a statement of accounts is an unusual form of relief that is only given in very specific circumstances and is only to be requested when the relationship between the parties is such that it is the only relief that will allow the claimant to adequately assert his legal rights. A reference to another case was made to reach this decision. The judge highlighted that an agent had a legal obligation to account for his principal under Section 213 of the Contract Act,1872 but that the principal had no equivalent legal duty toward the agent.

**Order 20, Rule 18 – Suit for partition and separate possession :(b) Order 20 Rule 18. - Similarly in a partition suit, at the stage of preliminary decree the quantum of share and the items of property**

**which are partable, are ascertained initially and under Order 20 Rule 18(2) a preliminary decree is passed together with a direction for accounts to be taken.**

If the decree is related to the estate property of the government to pay them revenue, then the decree shall declare the rights of the parties, and the partition may occur in the collector's presence. If the cases relate to movable or immovable property, then the court may pass the preliminary decree with further investigation based on the parties rights.

## Case law – Shasidhar v. Ashwini Uma Mathad (2015)

It was decided that in a lawsuit filed by a co-sharer, co-owner, or joint owner, or as the case may be, for partition and separate possession, it was necessary for the court to examine the nature and character of the properties in a suit, including who was the original owner of the suit properties, how and by what source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand. The Court must consider the grounds of each party's claim in its proper context before recording a decision about its extent.

**Order 34, Rule 2 – Suits related to the foreclosure of a mortgage : (ii) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is an anomalous mortgage, the Court may, at the instance of the plaintiff or of any other person interested either in the mortgage money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it.**

When a lawsuit involving foreclosure is filed, the court must order that any money owed to the plaintiff, the costs of his legal defence, and any outstanding principal and interest on the mortgage be deducted from the account if he succeeds. When the defendant fails to pay the sum of charges set by the court at the preliminary decree, the plaintiff may move for the final judgement.

## Case law- Narayan Deorao Javle v. Krishna (2015)

In this case, the Supreme Court ruled that even if the mortgagor had acquired a portion of the mortgaged property through the use of a registered sale deed, the decree of foreclosure issued in the lawsuit brought by the mortgagee would not have rendered the mortgagor's right to redeem land irrelevantly.

**Order 34, Rule 4 – Suits for the sale of the mortgaged property : Where, in a suit for sale or a suit for foreclosure in which sale is Ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective.**

If the plaintiff is successful in the sale lawsuit, the court may issue a preliminary decree, and if the defendant doesn't pay, the plaintiff may ask for a final decree. The time limit for paying the amount found or declared due under sub-rule (1) or the amount adjudged due in respect of additional costs, charges, expenses, and interest may be extended by the court from time to time, with good cause demonstrated and under conditions to be determined by the Court, at any time before a final decree for sale is issued.

## Caselaw – Kanti Ram v. Kutubuddin Mahomed (1894)

As it is to enforce the mortgage security, in this case, the judge's opinion to dismiss the plaintiff's lawsuit is incorrect, and the plaintiffs have the right to an order for the sale of the mortgaged property subject to the lien of the prior encumbrances and the formation of the new mortgage decree in accordance with the Transfer of Property Act, 1882.

**Order 34, Rule 7 – Suits for the redemption of a mortgage :It is apparent that the court in a redemption suit is required to pass a preliminary decree and after deposit of the mortgage amount or in compliance with other directions a final decree is required to be passed**

When the plaintiff submits the application and pays the defendant's other costs, the defendant is then expected to take all other actions that are necessary to support the plaintiff. If either party fails to comply with the court's instructions during the preliminary decree, the other may file for the final decree.

## Caselaw – L. K. Trust v. EDC Ltd. (2011)

The Apex Court stated in this decision that the mortgagor's rights are safeguarded in a claim for the redemption of a mortgage. Although the right to redemption is a legislative right in India, the existence of a right of redemption depends on the continued existence of the underlying mortgage. The right of redemption under a mortgage deed can only be terminated in a way that is permitted by law; this right cannot be eliminated except by an agreement between the parties or by a court order.

# Characteristics of a preliminary decree :

## Right of the parties :

It should be the plaintiffs and defendants who are parties to the rights in concern rather than a third party who has never been sued before. The rights of the parties concerning all or all of the issues in dispute in the lawsuit must have been decided.

## Adjudication:

The term ‘adjudication’ simply refers to the court’s decision, which should only be made by judges and other legal professionals after a thorough judicial review of the relevant facts.

## Suit :

A suit must have been filed to receive an adjudication, and a civil court case is started by filing a plaint. For instance, legal actions brought under the Land Acquisition Act,1894, the Hindu Marriage Act,1955 the Indian Succession Act,1925 etc. are called statutory suits, and the judgement rendered in accordance with such laws is regarded as a decree.

# Consequences of preliminary decree

A court may issue more than one preliminary decree in a case, and the Civil Procedure Code's provisions do not prohibit this. The only thing it specifies is that a court may issue a preliminary judgement in a case.

**Case law:**

## Phoolchand v. Gopal Lal (1967)

In this case, the trial court issued a preliminary decree regarding the shares of the parties after which two of the four parties passed away before the issuance of the final decree due to disagreements between the other parties. The Court then redistributed the shares as specified in the first preliminary decree, and later stated that the CPC does not forbid the issuance of more than one preliminary decree if the circumstances of the case enforce it.

# When the court passing of a second preliminary decree:

The preliminary decree should always be followed by the final decree, while changes to the preliminary decree are permitted prior to the final decree's approval as long as there has been a significant change in the circumstances. The court must evaluate the revised statute and issue a second preliminary decree as necessary.

**Illustration** – A filed a partition lawsuit against four defendants. The lower court issued a preliminary decree outlining the parties' respective shares. However, two parties passed away before the final decree could be issued, and a disagreement emerged regarding their respective portions. In order to resolve the conflict, the court had to redistribute the shares specified in the initial provisional decree. It was decided that nothing in the law prevents the

issuance of more than one preliminary decree if the situation calls for it. It was decided that a second preliminary decree was necessary.

## How is a preliminary decree executed

Execution of a preliminary decree just entails putting effort into the court's decision, thus a preliminary decree is not executable unless it is made a part of a final decree. A preliminary decree declares the rights of the parties, and a final decree satisfies that preliminary decree.

Example – A filed a partition lawsuit against B, and a preliminary decree was issued defining the shares of A and B in the lawsuit as property. B filed for the preliminary decree to be executed before the court issued the final judgement. The Supreme Court ruled that there is no executable decree because no final decree has been delivered in this case. The decree doesn't become enforceable until after the final version has been approved.

## Is the preliminary decree is appealable or not?

An appeal is possible for both preliminary and final decree. But it should be challenged earlier, thus, when the court issues the final decree, an appeal against the preliminary decree cannot be made; rather, the preliminary decree will become the final decree once the appeal period has elapsed for the preliminary decree.

## Execution & Non-execution of preliminary decree

Execution refers to the procedure for carrying out or giving effect to a court's decision. It's important to remember that only a final decree can be put into effect unless it also becomes a part of the final decree.

**Illustration** – A filed a partition lawsuit against B, and a preliminary decree was issued defining the shares of A and B in the lawsuit as property. B filed for the preliminary decree to be executed before the court issued the final

judgement. The Supreme Court ruled that there is no executable decree because no final decree has been delivered in this case. The decree doesn't become enforceable until after the final version has been approved.

**In partition suit, no need to file separate final decree proceeding in same suit:**

**The Supreme Court has directed the Trial Courts dealing with partition suits to proceed suo motu with the case soon after passing the preliminary decree."We direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without.**

In partition suit comes to an end only when a final decree is drawn there is no need to file separate final decree proceedings in same suit court should allow concern party to file appropriate application for drawing up final decree. The Hon'ble Supreme Court held in Shub Karan Bubna @ Shub Karan Prasad Bub vs Sita Saran Bubna.

**In Shub Karan Bubna @ Shub Karan Prasad Bub vs Sita Saran Bubna & Ors,2009 (9) SCC 689=2009 AIR SCW 6541, it was held as follows:**

In so far final decree proceedings are concerned, we see no reason for even legislative intervention. As the provisions of the Code stand at present, initiation of final decree proceedings does not depend upon an application for final decree for initiation (unless the local amendments require the same). As noticed above, the Code does not contemplate filing an application for final

decree. Therefore, when a preliminary decree is passed in a partition suit, the proceedings should be continued by fixing dates for further proceedings till a final decree is passed. It is the duty and function of the court. Performance of such function does not require a reminder or nudge from the litigant. The mindset should be to expedite the process of dispute resolution.'

## FINAL DECREE

A final decree is one in which the court of law resolves all legal concerns and issues the final order after the dispute in the lawsuit has been resolved, and the court will then entirely dispose of the lawsuit. Final decrees are granted in one of two situations:

1) when an appeal is not filed within the allotted time or when the high court decides on it, and
2) when the court completely settles the case.

### Example of final decree

To provide for a chance of reconciliation, interim divorce decrees are granted. A final decree is subsequently issued in the divorce suit.

**Case law**

Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande (1995)

The Court ruled in this case that until the final decree is issued, there cannot be a formal court order that definitively resolves all of the case's issues.

## PARTLY PRELIMINARY AND PARTLY FINAL DECREE:

The Code of Civil Procedure permits a decree to be partly preliminary and partly final. This occurs because only a portion of the order is final, while the rest is a preliminary decree

### Example of partly preliminary and partly final decree

Think about two brothers who want to inherit their late father's property but the property is now rented. The succession of the property may be the final

decision, and the rent from the leased property may be both a preliminary and final decree.

**CASE LAW:**

**Lucky Kochuvareed v. P. Mariappa Gounder (1979)**

In this case, the Court concluded that there is a dispute between mesne profits and a claim for possession of the immovable property. Thus, the court must either decide who is the rightful owner of the property or order a mesne profits inquiry. The first component defining possession of the property is final, whereas the piece determining the mesne profit is preliminary.

## Difference between preliminary decree and final decree

| Preliminary decree | Final decree |
|---|---|
| The formal statement made by the court to determine the rights of the parties involved in the issues in the lawsuits is known as a preliminary decree | The final decree resolves the lawsuits entirely and leaves no issues for decisions in the future. |
| The court may determine the parties' rights and wait for the final decree to be rendered | There is nothing left to decide after the parties' rights and responsibilities are established by the final decree |
| The preliminary decree may be revised if the circumstances change. | The final decree must always comply with the preliminary decree. |
| A preliminary decree may be issued more than once. | There can be more than one final decree issued. |
| According to Phoolchand v. Gopal Lal , (1967) a preliminary decree may be issued more than once. | According to Sankar v. Chandrakant (1995), there may be more than one final decree |

## What is a deemed decree?

Deemed decrees are those that do not satisfy the requirements of a decree but are nonetheless specifically identified as decrees by the legislature. There are some orders that are regarded to be deemed decrees under the Civil Procedure Code, such as adjudication under Order 21 Rule 58, Rule 98, and Rule 100, while Section 2(2) of the Code of Civil Procedure, 1908 does not explicitly mention this form of decree.

# MESNE PROFITS

### INTRODUCTION:

Ownership and Possession of a Property are considered as one of the most important legal rights provided by the law. Moreover, there are many rights, powers, immunities, and liabilities included under the provisions related to the concept of ownership. Some of those rights are the right to possession and enjoyment, right to refuse others from using it, right to transmit, and right to destroy someone's things. And if there is any kind of unlawful action that violates the rights of a person in terms of ownership and possession, then that owner becomes entitled to seek justice in the Court. The court is bound to provide damages and compensation to the plaintiff and Mesne Profits is one fine example of them.

The concept of Mesne Profits originated during the medieval period when rich barons used to give lands in tenancy and collect rents from the tenant farmers. The provision for Mesne profits is provided in the Code of Civil Procedure, 1908.

### Mesne Profits Meaning

According to the Legal Dictionary," Mesne" means intermediate, i.e. middle between two extremes, a part between the start and the end of a time period. In other words, it can refer to the profits earned starting from the unlawful possession until the rightful owner gets back the possession.

Section 2 Clause 12 of the Code of Civil Procedure states that "*mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession".*

Whereas, in the words of Delhi High Court, Mesne Profits refers to *"when damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called mesne profits".*

From the above statements, it can be interpreted that Mesne Profits are profits or pecuniary benefits a person has earned or might have received from ordinary diligence by wrongfully possessing the property of another.

And the law gives the owner, the right to claim all the profits, only when the unlawful possession has caused him to be deprived of benefits and profits which he might have received otherwise.

The Madras High Court in a case has observed that the rights of profits generally arise in three situations

1. A suit for eviction and recovery of possession of the immovable property from an unauthorized possessor having no title on the property, along with a claim for past and future mesne profits.
2. When a suit for partition is instituted by a tenant or tenants in common against others with a claim for an account of past and future profits.
3. In the suits for partition by a member of Hindu Undivided family along with a claim for an account from the manager/head.

**Conditions Of Mesne Profits**

There are two conditions that need to be fulfilled in order to bring forth a claim for Mesne Profit. Those conditions are:

1. Possession of the property must be unlawful and unauthorized.
2. The person must have received some benefits or might have earned profits through such possession.

It is to be noted that Section 2(12) states any profits received via improvement in the property by the wrongful possessor are not included as mesne profits.

And the possessor is neither entitled to claim the expenses incurred due to the improvements, from the owner as he is legally a trespasser.

As per Order 2 Rule 4 of the Code, it is necessary that the claim for mesne profits has to be joined with a suit for recovery for possession of the property and no separate claim will be entertained.

**Against Whom Mesne Profits Can Be Claimed?**

An individual becomes liable for mesne profit when he or she possess and enjoy the benefits derived from an immovable property that doesn't belong to him or her legally. They could be:

**Tenants-** If the tenant refuses to leave even after a service of notice to vacate the property.

**Trespassers**

**Mortgagor-** If the mortgagor continues to possess the mortgaged property after a decree for foreclosure was passed against them.

**Mortgagee-** If the mortgagee is still in possession of the property after a decree of redemption.

Any other person against whom a decree of possession has been passed.

However, in a case where the plaintiff is dispossessed by several persons, then every single one of them will be held liable to pay mesne profits to the plaintiff, irrespective of whether they are in actual possession or have received any kind of benefits through the property.

The court may hold the trespassers jointly liable and have their respective rights plead in a separate suit for contribution and ascertain the liability of each of them.

**For example,** 'A' owns a farmhouse. 'B', 'C', 'D' & 'E' wrongfully claimed the possession of that farmhouse and makes some profits with only 'C' actually living on the premises. This has deprived 'A' of his right to enjoy the said property, so 'A' is entitled to bring forth a suit for recovery of possession and a claim for mesne profits against all four of them.

**Another example,** 'K' owns a house and 'M' claims the possession of the said house and starts collecting rents. This will be considered as Mesne

Profits. After some time, ‘M’ builds more rooms and rent them out to be converted into a guest house. The profits that will arise from this improvement are not Mesne Profits.

**How Mesne Profits Is Measured?**

The Civil Procedure Code doesn’t provide any specific criteria as to how the mesne profits should be assessed. The provision only states that the interest on such profits is included and any profits derived because of improvement are ruled out. Also according to the law of equity, Mesne profits must be in net profits.

As Mesne Profits are a form of damages, the government can’t lay down an invariable rule for its assessment.

So, it’s upon the discretion of the court to determine the quantum of mesne profits based on the following things:

1. Nature and Condition of the property;
2. Location of the property;
3. Value of the property;
4. The actual profit gained by the possessor or reasonably might have received with the use of the said property.

The court also measures the mesne profits based on what the defendant has gained or reasonably might have gained with ordinary diligence by wrongfully possessing the property and not what the plaintiff has lost because of being deprived of possession.

**Principles In Awarding Mesne Profits :**

There are some principles that the Court is obliged to follow when awarding mesne profits to the plaintiff. They are:-

1. The profit taken the account is made by the person in wrongful possession;

2. The restoration of status before the dispossession of the Decree-holder;
3. The uses to which the decree-holder could have put the property in if he was the possessor.

**Interest And Deductions Of Mesne Profits :**

The Civil Procedure Code has specified in Section 2 Clause 12, that mesne profits must include interests received during the wrongful possession. As there is no fixed rate of interest, it solely depends upon the court to determine the rate after taking all necessary information into account. However, there is a limitation that says it should not exceed 6% per annum.

While computing mesne profits, some deductions have to be made from the gross profit of the defendant in wrongful possession of the property, these deductions are:-

1. Costs of cultivation and reaping the crops,
2. Government revenue, Ceases.
3. Charges for collecting rent, etc.

**Burden of Proof :**

According to the law, in a suit for Mesne Profits, the burden of proof lies upon the claimant. The plaintiff is required to prove that he is the lawful owner of the property and he is being deprived of his right to enjoy it by the wrongful possession of the defendant.

Only after the ownership and deprivation of rights of the plaintiff are established, he can claim for mesne profits. And the plaintiff also has to prove what profits he might have received with ordinary diligence.

**Power Of Court In Suit Relating Mesne Profits**

According to Order 20 Rule 12, whenever there is a suit for the recovery of possession, the court has the discretion of passing a decree

1. For Possession of immovable property.
2. For Collection of mesne profits or directing an inquiry for the same.
3. A preliminary decree directing inquiry about mesne profits acquired before the suit was instituted; or
4. Directing an inquiry as to mesne profits acquired until the possession is returned, or relinquished, and before 3 years from the decree.

## Can the right to mesne profits be transferred?

Yes. the right to mesne profit can be transferred where the claim has been decided by the decree to the claimant, this was held in case of Venkatarama Aiyar v. Ramasami Aiyar by the Madras High Court.

## Is Mesne profit is an actionable claim?

No. Mesne profit is not an actionable claim. This was decided in the case of Jai Narayan v. Kishun Dutta.

**CONCLUSION:**

Mesne Profits was introduced with the intent to protect the interests of the lawful owner of the property and at the same time to hold the wrongful possessor accountable by compensating the owner. However, a court cannot pass a decree for mesne profits unless the claim is for immovable property

only and the plaintiff has placed an explicit demand for it. It should also be noted that as mesne profits are a form of damages, the right to sue for mesne profit is a right to sue for damages. This right cannot be attached or sold in execution of a decree against the person entitled to the decree under Section 60 of the Code of Civil Procedure.

# WORK SHOP-I

TO BE HELD ON 23-03-2024

AT THE HON'BLE DISTRICT
COURT PREMISES,
VIZIANAGARAM

ON

SESSION-III - STATUS OF THIRD
PARTY PURCHASER

&

PRELIMINARY, FINAL DECREE &
MESNE PROFITS

SUBMITTED BY

SMT. M.SAROJANAMMA,

PRINCIPAL JUNIOR CIVIL JUDGE
-CUM-
JUDL.MAGISTRATE OF FIRST CLASS, BOBBILI

# DECLARATION AND INJUNCTION SUITS

**FOR THE WORKSHOP-I**

DATED: 23-03-2024

**ON SESSION – IV**

Submitted By

**T. VASU DEVAN**
**SENIOR CIVIL JUDGE, BOBBILI,**
**VIZIANAGARAM D.T.**

# DECLARATION AND INJUNCTION SUITS

**PARTIES ELIGIBLE TO SEEK**
AND
**LAW OF LIMITATION FOR DECLARATORY & INJUNCTIVE RELIEF**

**Presented by: T. VASUDEVAN,**
**CIVIL JUDGE ( SENIOR DIVISION ),**
**BOBBILI, VIZIANAGARAM D.T. A.P.**

## DECLARATORY RELIEF

### A. INTRODUCTION

Reliefs under Law as to declaration and injunctions are **COMMON LAW OR EQUITABLE REMEDIES** and discretionary reliefs . The general rule is that grant of these reliefs is a matter of discretion of the Court and it cannot be claimed as of right. However, the discretion has to be exercised in a judicious manner and in accordance with the provisions relating to these reliefs.

### B. PRINCIPLES EQUITABLE REMEDIES:

i. Ubi jus ibi remedium (For every wrong the law provides a remedy)

ii. One who seeks equity must come with clean hands

iii. One who seeks equity must do equity

iv. Where equities are equal, the law will prevail

v. Equity follows the law Etc..

## C. OBJECT OF EQUITABLE REMEDIES:

The object of such decrees is that where a person's status or legal character has been denied or could has been cast upon the plaintiff and the plaintiff can sue to get the declaration. So that he can get the declaration as to the status of legal character or legal right of him. The objects of granting permanent injunction include preventing continuous injury and violation of legal right of Plaintiff, Curtailing multiplicity of Judicial proceedings due to continuous violation, Providing equitable and complete relief to Plaintiff where damages do not solely suffice, Preventing breach of an express or implied legal obligation existing in favour of Defendant etc.

## D. ORIGIN OF EQUITABLE REMEDIES

It can be seen that with regard to the award of injunction, the starting point for the merger was the Common Law Procedure Act of 1854 which empowered the Common Law Courts in England to grant injunction in certain cases; and common injunctions were granted to restrain proceedings opposed to equity and finally the Judicature Acts, 1873-75 which abolished the old system of courts and in its place, created the Supreme Court of Judicature with power to administer law and equity.

By the provisions of section 16 of the Act of 1873 the Supreme Court of Judicature was vested with all the jurisdiction hitherto exercised by both the common law and the Chancery Courts. Section 25(8) of the Act specifically provides that 'the High Court may grant… an injunction … by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do …

either unconditionally or on such terms and conditions as the court thinks just.

## E. EVOLUTION OF EQUITABLE REMEDIES IN INDIA

In India the courts of justice are courts of both law and equity . The **specific relief act 1877** codifies those English rules of equity and good conscience by which our courts in India have been bound to govern themselves. In India, the common law doctrine of equity had traditionally been followed even after it became independent in 1947. However it was in 1963 that the **"Specific Relief Act 1963"** was passed by the Parliament of India following the recommendation of the Law Commission of India in its ninth report on the act, the Specific Relief Bill 1962 was introduced in Lok Sabha in June 1962 and repealing the earlier **"Specific Relief Act" of 1877.**

Under the 1963 Act, most equitable concepts were codified and made statutory rights, thereby ending the discretionary role of the courts to grant equitable reliefs. With this codification, the nature and tenure of the equitable reliefs available earlier have been modified to make them statutory rights and are also required to be pleaded specifically to be enforced.

Further to the extent that these equitable reliefs have been codified into rights, they are no longer discretionary upon the courts or as the English law has it, "Chancellor's foot" but instead are enforceable rights subject to the conditions under the 1963 Act being satisfied. Nonetheless, in the event of situations not covered under the 1963 Act, the courts in India continue to exercise their

inherent powers in terms of **Section 151** of the **Code of Civil Procedure**, 1908, which applies to all civil courts in India.

## F. EQUITABLE REMEDIES IN INDIA

The **Specific Relief Act 1963** as revised deals only with certain kinds of equitable remedies. The rights codified under the 1963 Act were as under;

1. Recovery of possession of immovable property (ss. 5 – 8)
2. Specific performance of contracts (ss. 9 – 25)
3. Rectification of Instruments (s. 26)
4. Recession of Contracts (ss. 27 – 30)
5. Cancellation of Instruments (ss. 31 – 33)
6. **Declaratory Decrees (ss. 34 – 35)**
7. **Injunctions (ss. 36 – 42)**

## DECLARATORY DECREES

The declaratory decree is the edict which declares the rights of the plaintiff. It is a binding declaration under which the court declares some existing rights in favour of the plaintiff and declaratory decree exists only when the plaintiff is denied of his right which the plaintiff is entitled to. After that specific relief is obtained by the plaintiff against the defendant who denied the plaintiff from his right.

According to Section 34, of the ***Special Relief Act, 1963***, any Person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or

interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

## G. ESSENTIALS OF A DECLARATORY SUIT

There are a total of four essential elements considered for a declaratory Suitor for the valid suit for Declaration and all the four elements are mentioned below.

- The plaintiff at the time of suit was entitled to any legal character or any right to any Property.
- The defendant had denied or was planning or interested in denying the rights of the plaintiff.
- The declaration asked for should be the same as the declaration that the plaintiff was entitled to a right.
- The plaintiff was not in a position to claim a further relief than a mere declaration of his rights which have been denied by the defendant.

## H. PARTIES ELIGIBLE ( occasions)TO SEEK DECLARATORY RELIEF

In the following cases, parties eligible to seek declaration reliefs:

Any person who has any legal character or any legal rights as to any property by virtue of title deeds or otherwise may file a suit for declaration of those rights and for injunction against any person denying or interested to deny his title to such character or right.

This section is not exhaustive and the Courts have power to grant the relief declaration independent of this section. In **VEMA REDDY RAGHAVA REDDY VS. KONDURU SESHU REDDY** reported in AIR 1967 S.C. 436, Their Lordship of the Hon'ble Supreme Court held on this aspect:

> ***"In our opinion section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section.*** *It follows therefore, in the present case that the suit of the plaintiff for declaration that a compromise decree is not binding on the deity is maintainable as falling outside the purview of section 42 of11 Specific Relief Act".*
>
> ***The power of the Court to grant declaratory decrees is not limited to this section and they can/will be made by the Courts under the general provisions of the Civil Procedure Code as Section 9 or Order 7 Rule 7 C.P.C.***

**1. DECLARATION AS TO ADOPTIONS:**

A suit for declaration that the plaintiff is the adopted son of the defendant or the defendant is not the adopted son of the plaintiff is maintainable. A declaratory decree that the deeds of adoption are null and void can be prayed for, but in case a consequential relief is necessary, it should also be prayed for since without such a relief the suit is not maintainable ( AIR 1933 Nag 292 Bansilal Vs. Rampal)

**2. DECLARATION AS TO LEGITIMACY OR ILLEGITIMACY:**

A suit for the relief of declaration regarding the legitimacy of a person is maintainable. A suit for declaration that the plaintiff is the legitimate son of the defendant or a suit for such relief that the plaintiff is not the father of the defendant can be maintained.

## 3. DECLARATION AS TO MARRIAGE:

A suit for a declaration that the defendants are not wife and son of the plaintiff is perfectly maintainable. A suit for a declaration that the plaintiff is the legally wedded wife of the defendant or the plaintiff had not married the defendant or defendant is not the wife of a deceased person can be entertained by a Civil Court. (AIR 1958 Supreme Court 886 Cf Raziya Vs. Sahebzadi)

## 4. DECLARATION BY CO-OWNERS

A Co-owner can maintain a suit for declaration of his title as joint owner and for an injunction restraining the other co-owners from interfering with the enjoyment of his right. A suit for declaration by certain co-shares in an undivided Mahal that they are entitled to receive the proportionate share of rent is maintainable under this section.

## 5. DECLARATION TO OFFICIATE AS PRIEST

A suit for a declaration that the plaintiff is entitled to officiate as priest in alternate years is maintainable. A hereditary right to be appointed as a swamyyar 2 or a priest of a temple may

come within the meaning of “legal character” and a suit for declaration as such can be maintained. A declaratory suit for the office and also to the offerings and emoluments can be sustained.

## 6. DECLARATORY SUIT BY WORSHIPERS/DEVOTEES

The worshipers of a temple can sue for declaration that a permanent lease of temple property is invalid. The worshippers in a representative capacity, can sue the Devasthanam Committee for a declaration that the perpetual alienation of money offerings is invalid even without the sanction of the Advocate-General of the Court under Religious Endowment Act.

## 7. DECLARATION AS TO THE CUSTOMARY RIGHTS:

A declaratory suit regarding customary right is maintainable provided it is not against public policy or public morals.

## 8. DECLARATION AS TO TENANCY RIGHTS:

A declaratory suit in respect of the right of the plaintiff as a tenant is maintainable (AIR 1924 Patna 560 – Haranarayana Vs. Darshan Dev)

## 9. DECLARATION REGARDING ENTRIES IN RECORD OF RIGHTS:

A suit for declaration that the entries in record of rights were not currently made and hence such entries are to be corrected is maintainable under this section since such wrong entries will

affect the rights of the plaintiff. But such suit may not lie if it is barred by a special statute.

## 10. DECLARATION AGAINST DECREES

A person, who was not a party to the prior suit, can maintain a declaratory suit that the decree is void or fraudulent even without claiming any consequential relief. But in a case where he was a party to the prior suit he must pray for further relief too. Where a decree was passed against a minor without proper representation, such a minor can sue for a declaration that such a decree is a nullity. A minor has a right to sue to avoid a decree obtained against him because of the gross negligence of the guardian but a suit for a mere declaration that a decree is void as against the minor is maintainable in a case where the property concerned with the decree is not in possession of the plaintiff without a prayer for further relief (AIR 1938 Bombay 206 – Suresh Chandra Vs. Bai Iswari) . In the case of avoiding a decree the particulars of fraud must be alleged and established.

## 11. DECLARATION ON TRADE-MARK

A person seeking for a declaration that he has a right to use the trade- mark must establish his right to use such a trade-mark as his “exclusive right of property” and that he has acquired it to the exclusive of everyone else and if he fails to establish the same, he cannot get such a relief (AIR 1933 Allahabad 495 – Ganesh Lal Vs. AKM and company) .

## 12. DECLARATION REGARDING DATE OF BIRTH :

The civil Court has jurisdiction to make a declaration regarding the date of birth or alteration of age of the Government servant in matters not relating to his conditions of service. That being so, either on principle or an authority, the jurisdiction of the Civil Court cannot be questioned in the case of non- governmental employees or persons. Even in the case of Government servants, a suit for declaration of age or date of birth could be maintained, if the relief claimed does not relate to his conditions of his service. ( State Vs. T.Srinivas, reported in AIR 1988 Karnataka 67.)

## 13. DECLARATION BY THIRD PARTY TO DOCUMENT :

Even a Third party wants to file a suit for declaration to question any sale deed, he can maintain a suit to declare that the alleged sale deed is null and void.

## I.. WHEN SUIT FOR DECLARATION IS NOT MAINTAINABLE

A suit for the declaration will not be maintainable under some circumstances which are to be mentioned below.

- In the case of a declaration that the Plaintiff did not infringe the defendant’s trademark.
- For a declaration that during the lifetime of the testator, the will is invalid.
- No one can ask for a declaration of a non-existent right of succession.
- A suit by a student against a university for a declaration that he has passed an examination.

If any person is seeking for a mere injunction without seeking for any declaration of title to which the Plaintiff is entitled so, then the suit will not be maintainable and will not be laid down within its ambit. The Hon'ble Supreme Court has in the matter of **ANATHULA SUDHAKAR VS. P BUCHI REDDY & ORS [AIR 2008 SC 2033],** clarified the general principles as to when a mere suit for permanent injunction will lie and when it is necessary to file a suit for declaration and or possession with injunction as consequential relief, which is reproduced as under:

> *Para 11.1- When a Plaintiff is in lawful or peaceful possession of a property and such possession is disturbed or threatened by the defendant, a suit for injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.*
>
> *Para 11.2- Where the title of the Plaintiff is not disputed, but he is not in possession his remedy is to file a suit for possession and seek in addition, if necessary an injunction. A person out of his possession cannot seek the relief of injunction simpliciter, without claiming the relief for possession.*
>
> *Para 11.3- Where the plaintiff is in possession but his title to the property is dispute, or under a cloud, or where the defendant asserts title thereto and there is also threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and consequential relief of injunction. Where the title of the Plaintiffs is under cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.*

## J..CONSEQUENTIAL RELIEF:

There may be real dispute as to the plaintiffs legal character or right to property, and the parties to be arrayed, yet the Court will refuse to make any declaration in favour of the plaintiff, where able to seek further relief than a mere declaration, he omits to do so.

The object of the proviso is to avoid multiplicity of suits. What the legislature aims at is that, if the plaintiff at the date of the suit is entitled to claim, as against the defendant to the cause some relief other than and consequential upon a bare declaration of right, he must not vex the defendant twice; he is bound to have the matter settled once and for all in one suit.

## Q...EFFECT OF DECLARATION

Section 35 makes it clear that the declaration made under the section does not operate a judgment in rem. Section 35 says " A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees". Thus, **a declaratory decree binds**

(a) The parties to the suit,

(b) The persons claiming through the parties.

(c) Where any of the parties are trustees, on the persons for whom, if he in existence but the date of declaration, such parties would be trustees.

## R...NEGATIVE DECLARATIONS:

A suit for a negative declaration may be maintained in a proper case, e.g., where it relates to a relationship. Thus, a suit for a declaration that a person was not, or is not, the plaintiff's wife, and the defendant not her son through him, may be maintainable. Similarly, a suit lies for obtaining a negative declaration that there is no relationship of landlord and tenant between the plaintiff and defendant. But where the rights of the plaintiff are not affected or likely to be affected, suit simpliciter for a negative declaration is not maintainable. Such a suit would be regarding the status of the defendant which, in no way, affects the civil rights of the plaintiff.

## S...DISCRETION OF COURT

As in the Section 34 of Special Relief Act, 1963 the condition mentioned for the declaration of status or right i.e. (1) the plaintiff at the time of suit was entitled to any legal character or any right to any Property (2) the defendant had denied or was planning or interested in denying the rights of the plaintiff (3) the declaration asked for should be same as the declaration that the plaintiff was entitled to a right (4) the plaintiff was not in a position to claim a further relief than a mere declaration of his rights which have been denied by the defendant. But, it is not compulsory that even after the fulfillment of all the four essential conditions required for declaration, the specific relief will be provided through a declaration to the plaintiff. It is totally on the discretion of the court whether to grant the relief or not to the plaintiff. The relief of Declaration or specific relief cannot be asked as a matter of right, it is a total discretionary power which is in the hands of the court.

## T....BURDEN OF PROOF

It is a settled law that in a suit for declaration of title, the burden is heavily lies on the plaintiff, the plaintiff is not supposed to depend upon the weakness in the case set up by defendant. It was held by the Hon'ble Apex Court in the decision in between Moran mar Basselious Catholicos Vs. The Most Rev. Mar Poulose Athanasius and Others reported in AIR 1958 SC 31 and another Judgment in between Union of India Vs. Vasavi Cooperation Housing Society Limited reported in **AIR 2014 SC 937** and also in between A.Panjurangam since8 deceased per L.Rs., and others Vs. Darshanala Swamy since deceased per L.Rs., and others, reported in **2011 Law Suit (A.P.) 643.**

> *"In a suit for declaration, **heavy burden rests upon the plaintiff to prove the title,** particularly when it is in respect of an item of immovable property. There are certain known sources of acquisition of title, such as by way of succession, purchase, assignment from the Government, or even by perfecting the title by adverse possession. To prove the title, what becomes essential is to identify the erstwhile owner of the property and then to explain the manner in which it has accrued to the plaintiff. Even if there exists certain missing links in the chain of events that connect the original owner and plaintiff, the title can be said to have been established, in the absence of any stronger claim by the defendant".*

It was held by the Hon'ble Supreme Court in Maran Mar Basselios tholicos Vs. Thukalan Paulo Avira, reported in **AIR 1959 SC 31**."In a suit for declaration if the plaintiffs are to succeed, they must do so on the strength of their own title." **IN NAGAR PALIKA,**

**JIND V. JAGAT SINGH, ADVOCATE (1995) 3 SCC 426,** this Court held as under:

> *"the onus to prove title to the property in question was on the plaintiff. In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit."*
>
> *"The legal position, therefore, is clear that the* ***plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title*** *and that could be done only by adducing sufficient evidence to discharge the onus on it,* ***irrespective of the question whether the defendants have proved their case or not.*** *We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."*

## U...CASE LAWS ON DECLARATION

**1.** The pros and cons of a case should be weighed by the Court before granting or refusing declaration/injunction and exercise discretion with circumspection to further the ends of justice, **AIR 2003 SC 2508, RAMESH CHAND VS. ANIL PANJWANI.**

**2.** Section 34 of Specific Relief Act, 1963 is not exhaustive in nature as to declarations suits. The Civil Court has power to grant such a decree independently of the requirements of section 34 in suits outside the purview of section 34 of S.R. Act, **RATNAMALA DASI VS. RATAN SINGH BAWA, 1989 (1) CIVIL LJ 547.**

**3**. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff." **IN UNION OF INDIA & ORS VS. VASAVI CO-OP. HOUSING SOCIETY, [AIR 2014 SC 937 = (2014) 2 SCC 269],**

**4.** The purpose of the proviso to Section 34 of the Act is to avoid the multiplicity of the proceedings. A mere declaratory decree remains as non-executable in most cases and since the plaintiff did not amend the pleadings despite the objections in the written statement; it also defeated the purpose of Order 2 Rule 2 of CPC and hence was not found maintainable**.** **VENKATARAJA & ORS. V. VIDYANE DOURERADJA PERUMAL (2014) 14 SCC 502 ,**

**5.** Mere continuous possession howsoever long it may have been qua its true owner is not13 enough to sustain the plea of adverse possession unless it is further proved that such possession was open, hostile, exclusive and with the assertion of ownership right over the property to the knowledge of its true owner". **MALLIKARJUNAIAH VS. NANJAIAH AND OTHERS, [2019 (3) ALT 277 (SC)]**

**6.** Mere holding a land for long time does not perfect title by way of adverse possession**, MURALI VISHANDAS LUND VS. RAJDHANI FILMS PRIVATE LTD., AIR 1985 NOC (CAL.) 139.**

**7.** Relief of declaration as to right or status and injunction relating to commercial transaction has to be exercised with circumspection ex debito justitiae having regard to pros and cons in the facts and circumstances of each case**, AMERICAN EXPRESS BANK LTD. V. CALCUTTA STEEL CO., (1993) 2 SCC 199.**

**8.** Grant of declaratory relief under the Specific Relief Act is discretionary in nature. A civil court can and may in appropriate cases refuse a declaratory decree for good and valid reasons which dissuade the court from exercising its discretionary jurisdiction**, KANDLA PORT V.HARGOVIND JASRAJ, (2013) 3 SCC 182.**

**9.** Suit seeking declaration of title of ownership of property, without seeking possession, when plaintiff not in possession, is not maintainable, **UNION OF INDIA V. IBRAHIM UDDIN, (2012) 8 SC 148.**

**10.** Court while declaring title of plaintiff, held, could not decline to adjudicate consequential questions, **PHANIDHAR KALITA V. SARASWATI DEVI, (2015) 5 SCC 661.**

**11.** In suit for declaration of title and possession, burden of proof is on plaintiff to establish its case, irrespective of whether defendants prove their case or not, **JAGDISH PRASAD PATEL V. SHIVNATH, (2019) 6 SCC 82.**

**12.** Where bare injunction suit has been filed to restrain State Authorities from acting in a particular manner without seeking declaratory relief as to illegality of orders/actions of State Authorities based on which State Authorities were seeking to act, said bare injunction suit was not maintainable, as no government order can be ignored altogether unless a finding is recorded that it was illegal, void or not in consonance with law, **RATNAGIRI NAGAR PARISHAD V. GANGARAM NARAYAN AMBEKAR, (2020) 7 SCC 275.**

**13.** There is no need to claim a declaration of title where there is no cloud of doubt over title, **K.M.KRISHNA REDDY V. VINOD REDDY, (2023) 10 SCC 248.**

**13.** Mere a declaratory decree cannot be passed by a court where plaintiff is neither in actual nor in constructive possession over the suit schedule property and the defendant is in hostile and adverse possession against whom plaintiff would be bound to claim further relief for possession, **. NATHAI VS. JOINT DIRECTOR OF CONSOLIDATION, ALLAHABAD, 1984 (1) CIVIL LJ 507.**

**14.** If the plaintiff is not in possession, the suit for mere declaration would not be maintainable, **SHINDER PAL SINGH VS. KARAN SINGH, AIR 2009 P&H 152.**

**15.** Mere denial of the title of the plaintiff by the defendant does not entitle him to get an injunction in his favour despite it may be sufficient for him to get a declaration in his favour. To get injunction, plaintiff must further establish that the defendant is trying to distrub his possession and enjoyment. Mere assertion of title would not

entitle him to get an injunction, **PARAMATNA VS. SAMPATTI, AIR 1968 ALL 184.**

**16.** When the suit for declaration is filed and during the pendency of the same, when plaintiff ought for discretionary relief of temporary injunction to protect his rights, it is for the plaintiff to prove his possession, **YEDAMAKANTI LAXMA REDDY VS. NIZAM SUGARS LIMITED (NSL), 2023 (2) ALT 635.**

## V...LIMITATION GOVERNING DECLARATORY RELIEF:

The **Limitation Act, 1963** in its Schedule at FIRST DIVISION - SUITS under Articles 56, 57, 58 and 65 deals with these limitation periods as follows:

| **Description of suit** | **Period of Limitation** | **Time from which period begins to run** |
|---|---|---|
| 56. To declare the forgery of an instrument issued or registered. | **Three Years** | When the issue or registration becomes known to the plaintiff.. |
| 57. To obtain a **declaration** that an alleged adoption is invalid, or never in fact, took place. | Three Years | When the alleged adoption becomes known to the plaintiff. |
| 58. To obtain any other declaration. | Three Years | When the right to sue first accrues |

| | | |
|---|---|---|
| 65 . Suit for **declaration and possession** | **Twelve (12) years** | The date from which the possession of the defendant become adverse to the plaintiff. |

**W..CONCLUSION**

Declaratory decree is a provision which focuses on the rights of the Plaintiff and gives immense power to the Plaintiff to deal effectively against the defendant. How the court uses their discretionary power under what circumstances and other aspects analysis helps the reader also to analyse and understand the Declaratory decree concept in the simplest way. According to my opinion and analysis, Declaratory decree is a concept which is to be wider and covers more aspects than it currently does and the main thing according to my opinion should be amended in a long-term is that there should be a limitation on the use of discretionary power by the different courts and fixation should be done in which cases or in which type of cases, the discretion of court can be used.

## PARTIES ELIGIBLE TO SEEK
AND
## LAW OF LIMITATION FOR INJUNCTIVE RELIEF

The law of injunction in our country is having its origin in the Equity Jurisprudence of England from which we have inherited the present administration of law. In our country, the Specific Relief Act, 1963 provides a large number of remedial aspects of Law. This Act came in force in the replacement of earlier Act of 1877.

An Injunction is a Judicial process, whereby, a party is required to do, or to refrain from doing, any particular act. It is a remedy in the form of an Order of the Court addressed to a particular person that either prohibits him from doing a continuing to do a particular act (Prohibitory injunction); or orders him to carry out a certain act (Mandatory Injunction.)

The remedy of injunction is provided as a statutory relief in the Specific Relief Act, 1963 and the Civil Procedure Code, 1908. They are broadly categorized as temporary or permanent Injunctions. Interim injunctions are ancillary to the main relief which the Plaintiff will be entitled to if he is successful in establishing a prima facie case and balance of convenience, and also if the Court finds that the Plaintiff will suffer irreparable loss and injury.

**1..PRINCIPLES GOVERNING FOR GRANT OF INJUNCTION:**

i. Ubi jus ibi remedium (For every wrong the law provides a remedy)

ii. One who seeks equity must come with clean hands

iii. One who seeks equity must do equity

iv. Where equities are equal, the law will prevail

v. Equity follows the law

vi. Grant of injunction order is in the nature of an equitable relief, and the court has undoubtedly power to impose such terms and conditions as it thinks fit. Such conditions, however, must be reasonable so as not to make it impossible for the party seeking injunction order to comply with the same and there by virtually denying the relief which the party would otherwise ordinarily be entitled to.

The nature of a temporary injunction is protective with the objective of preventing any future possible injury and to maintain status quo until final adjudication. A permanent injunction, as the name suggests, continues forever under which the Defendant is perpetually enjoined from the assertion of a right or from committing an act injurious to the rights of the Plaintiff. It can be granted only after deciding the case on merits at the conclusion of the trial after hearing both the parties to the suit.
Once a permanent injunction is granted, the temporary injunction ceases to exist separately and may merge into the decree of permanent injunction.

**2..THE OBJECTS OF INJUNCTION INCLUDE:**

- Preventing continuous injury and violation of legal right of Plaintiff;
- Curtailing multiplicity of Judicial proceedings due to continuous violation;
- Providing equitable and complete relief to Plaintiff where damages do not solely suffice;
- Preventing breach of an express or implied legal obligation existing in favour of Defendant.

From the aforesaid it is clear that there can be permanent injunction which is granted as a final relief in the suit and there can be temporary injunction which may be passed at any situation of the suit or proceedings for preservation of the property.

## 3..KINDS OF INJUNCTIONS

As stated above Injunctions are of three kinds:-
(I) temporary,
(ii)Permanent and
(iii) Mandatory.

## 4. AGAINST WHOM INJUNCTION CAN BE GRANTED:

An injunction can be issued only against party to the suit and not against a stranger or against a Court. In a proper case an injunction may be issued even against a person outside the jurisdiction of the Court. No injunction will ordinarily be issued against government officer's bonafide exercising rights or alleged rights in the course of their duty, or against public bodies under similar circumstances.

## 5..AGAINST WHOM INJUNCTION IS BINDING:

Ordinarily, an order of injunction binds the parties to the suit. It is also binding on the agent or servant of the defendant. Persons who were not party to the suit nor were named in the injunction order cannot be proceeded against for violation of the order of injunction. But a person who is aware of an order of injunction is bound to obey even though he was not a party to the suit when it affects the result of the earlier order.

## 6.. TEMPORARY OR INTERIM INJUNCTION

A temporary or interim injunction on the other hand restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the further order of

the Court. Regulated by the provision of the Order 39 of the Code of Civil Procedure, 1908 and may be granted at any stage of the suit.

The Trial Courts mainly come across with Interlocutory Applications filed under Order 39 Rule 1 and 2 CPC seeking temporary injunctions. Perpetual injunction is granted as regulated under Sections 38 to 42 of Specific Relief Act whereas temporary injunction is ordained under the Code of Civil Procedure.

Granting of exparte temporary injunction is not a matter of right, but the petitioner has to satisfy the essential ingredients as required Under Order 39 Rule 1 CPC. The temporary injunction orders shall not be mechanically granted which is likely to effect the rights of the parties who are legally entitled to continue in the property.

An application for temporary injunction pending suit for permanent injunction or suit for declaration of title and permanent injunction or of such a nature has to be supported by an affidavit with essential requirements that the property in dispute is in danger of being vested, damaged or going to be changed. Further requirement is that defendant threatens to dispossess the plaintiff or cause injury and he is likely to cause irreparable loss. For preventing wasting, damage, alienating sale or removal, by assigning proper reasons appreciating the supported documents filed along with the suit, the Court may pass appropriate orders. The court shall invariably record reasons for dispensing with notice by clearly stating that the object of granting injunction would be defeated by delay by mere issuance of notice. This order is again subject to

compliance of Order 39 Rule 3(a) C.P.C., complying the condition of sending the copy of application of injunction together with affidavit, copies of plaint and documents.

**A..PRINCIPLES TO CONSIDER FOR TEMPORARY INJUNCTION**

In **M.GURUDAS AND OTHERS VRS RASARANJAN AND OTHERS 2006 (6) ALT 53** (Supreme Court) the Apex Court held that while considering an application for injunction, it is well-settled, the Courts would pass an order thereupon having regard to:

***a) Prima facie case***
***b) Balance of convenience***
***c) Irreparable injury/Loss***

It also held that a finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the Court not only must arrive at a conclusion that a case for trail has been made out but also other factors requisite for grant of injunction exist. It also held that while considering the question of granting an order of injunction one way or the other, evidently, the Court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiff if the prayer for injunction is to be refused. What is required for consideration to grant an injunction, be it temporary or perpetual in nature is that whether the plaintiff has established prima facie case or not. In case of temporary injunction, it is the vital aspect that needs for consideration. That apart the Court should consider the probable balance of convenience and the irreparable loss and injury that the plaintiff would suffer on account of not granting the relief.

## 7. PERMANENT INJUNCTION

A permanent injunction restrain a party forever from doing the specified act and can be granted only on merits at the conclusion of the trial after hearing the both party to the suit. It is governed by the Sections 52 to 57 of the Specific Relief Act, 1877.

### A. PERPETUAL INJUNCTION WHEN GRANTED:-

As per Sec.38 of Specific Relief Act-

(1) Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall follow the procedure as per Chapter-II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:-

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent multiplicity of judicial proceedings.

**B. PARTIES ELIGIBLE TO SEEK INJUNCTION RELIEFS**

These are some of the cases, where party is eligible to seek injunction reliefs;

1. **A LESSOR:**

A tenant must keep the property in as good condition as he found it and he must yield up the property in the same condition subject only to fair wear and tear and irresistible force. A tenant can can not make structural additions and alterations without the consent of the land-lord and the alterations that are not authorized would amount to breach of the implied covenant. When a legal duty is imposed on a person in respect of another, that other is invested with a corresponding legal right. Hence an injunction can be granted to the plaintiff-landlord to prevent the breach of an obligation existing in his favour under the tenancy when the defendant-tenant invades or threatens to invade to plaintiff right by using the demised premises in a way not consistent with covenants of the lease or when he alters the structure of the building by making excavations or unauthorized constructions etc., on the leased premises AIR 1981 Delhi 77 – Parameswari Das Kanna Vs. Bhonath Parihar .

2. **A LESSEE:**

The possession of a statutory tenant is protected by Courts of law AIR 1961 SC 106 – Gangadutt Vs. Karthik Chandra das . Persons are not permitted to take forcible possession. They must obtain such possession as they are entitled to through a Court AIR 1924 PC 144 – Midnapur Zamindari company limited Vs. Naresh Narayan Roy . A tenant by sufferance also is entitled to an injunction

1980 (1) Andhra Weekly Reporter 28 – Sri Balaji Trading company Vs. Veera Swami Srinivasan

3. **CO-OWNERS:**

Where a co-owner intends to carry on with a material change in the user of joint property without the consent of the other co-owner, he may restrain the other from carrying on with such operations. A Co-owner can maintain an action for injunction for removal of obstruction put up by the other co-owner on the joint property.

4. **VICTIMS OF NUISANCE:**

A person has a right to enjoy his property in any way he pleased provided he does not create nuisance or interfere with the rights of others. A relief of injunction can be claimed to stop nuisance if in a noisy locality there is substantial addition to such noise by the introduction of some machine or instrument or some performance at the premises of the defendant which materially effect the physical comforts of the members or occupants of the plaintiff's house AIR 1978 Allahabad 86 – Radeshyam Vs. Guru Prasad

5. **EASEMENT RIGHT HOLDERS:**

Where an invasion of a right to light acquired as easement is complained of section 28, 33 and 35 of the Indian Easements Act, 1882 have to be kept in view before granting an injunction and these sections have to be read together and so read,

interference with light and air which is not substantial, does not give a cause of action to a person claiming such right. An injunction can be granted when the threatened disturbance materially interferes with the comfort of the owner.

6. **BY BENEFICIARIES TO PREVENT WASTE:**

Waste means, in general, such damage to houses or land as tends to the permanent and lasting loss of the person entitled to the inheritance where a widow a limited owner had invested the money in stocks or shares without any need changing investment and also exposing the capital to depreciation, injunction restraining such waste was held to be a proper remedy. While granting an injunction on the ground of waste, this Court has to consider thenature and also the extent of waste and whether granting injunction is necessary to prevent such a waste AIR 1952 Madras 181 – Govinda Swami Naidu Vs. Pushpalamma.

7. **POSSESSORS TO PREVENT TRESPASS:**

Where the trespass is in violation of an obligation, the trespass can be prevented by means of an injunction. The threatened trespass must not be a mere vague apprehension where there is a real threat of dispossession disturbing lawful possession of the plaintiff he can maintain an action for injunction. Thus the possession of statutory tenant or tenant by sufferance is protected by law.

8. **COPY RIGHT HOLDERS:**

Copying does not constitute an infringement of copy right unless a substantial part of the work is copies and the question whether the part taken is substantial is one of fact. In Judging this question, the value and the quantity taken must be considered, for if a vital part of a book has been taken for use in another publication although such part constitutes but a small proportion of the entire text, the sale of the author's original work may be prejudiced and the Court will not look merely at isolated passages but will consider the two works as a whole to see whether there has been any such prejudicial infringement.

9. **PUBLIC AGAINST GOVERNMENT:**

A suit to obtain an urgent or immediate relief against the Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity may be instituted with the leave of the Court without serving any notice but Court shall not grant relief in the suit, interim or otherwise except after giving to the Government or public officer a reasonable opportunity of showing cause in respect of such relief prayed for in the suit. Even the state is subject to the jurisdiction of the Court in the matter of injunction and its officers can be penalized for the violation of the order.

**C..SUIT BY A PERSON IN POSSESSION WITHOUT TITLE:**

A person in possession can be evicted only by due process of law and hence even a rightful owner cannot eject him by force.

## D..RELEVANT CASE LAWS ON PERMANENT INJUNCTION

1). **PRIMARY CONSIDERATION FOR RELIEF:**

In a suit for injunction what is material, is only the aspect of possession. **M.K.SETTY VS. M.V.L.RAO, AIR 1972 SC 2299**..In Ramevath Hasala Naik Vs. Sabahavath Gomli Bai, 2011 (1) L.S. 32, it was held that: "Suit is filed for injunction, validity of gift deed not a germane consideration and court to have decided suit only on the basis of proof of possession by plaintiff on date of suit. In a suit for injunction, courts should concentrate on aspect of possession rather than issue of title."

**In SUDHAKAR REDDY VS. LAKSHMAMMA** reported in **2014 (4) ALT 647,** it was held that: "In a suit for perpetual injunction, the court has to consider who is in possession of the suit schedule property as on the date of filing of the suit. However, the court can incidentally look into the title of the parties in an injunction suit if the circumstances so warranted."

2) **INJUNCTION AGAINST TRUE OWNER:**

It is equally settled law that injunction would not be issued against true owner. Therefore, the courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession,

as against the owner. Pretext of dispute of identity of the land should not be an excuse to claim injunction against true owner". **PREMJI RATANSEY SHAH – VS - UNION OF INDIA, AIR 1994 SC 376**

3) **PERSON NOT HAVING ANY LEGAL RIGHT:**

In K.ANKAIAH VS TIRUMALA TIRUPATHI DEVASTHANAMS, 2002(2) A.P.L.J. 29 (SN), it was held that;

> *"Person not having any legal right over disputed property, even if he is in possession of the disputed property, when such a person is not lawfully entitled to continue in possession of the disputed property and any person whose possession is to be treated as illegal or unlawful possession,* ***will not be entitled to seek the relief of injunction against the true owner."***

4) **EVIDENTIAL VALUE OF TAX RECEIPTS:**

In Zarif Ahamad (D) Thr. Lrs and another V.Mohd Farooq, AIR 2015 SC 1236, it was held that:

> *“(c) Specific Relief Act (47 of 1963) S.38 - Suit for permanent injunction - For several years plaintiff was paying house tax as was found by Trial Court on basis of house tax receipts and extracts of house tax register.* ***Evidence is sufficient to prove that plaintiff was in possession on plot in question.****. Advocate Commissioner's report that*

*defendants were found in possession of disputed property cannot be accepted being contrary to evidence on record in oral and documentary evidence on record which is sufficiently proves that plaintiff was in possession over suit schedule property."*

However, In Dolla Subba Rao and another Vs. Eeda Amrutha Rao and others, **2017(5) ALT 245,** it was held that tax receipts are not evidence of possession.

5) **EVIDENTIAL VALUE OF RATION CARD, BANK PASSBOOK ETC..:**

In Dolla Subba Rao and another Vs. Eeda Amrutha Rao and others, **2017(5) ALT 245,**in para 14 that:"Bank pass books, pension pass book and ration card also **cannot be treated as evidence of possession** of the plaint schedule property. The appellants had not examined any neighbours or revenue officials or marked any revenue record which establishes their possession of the plaint schedule site."

6) **PLEA OF NON-JOINDER IN INJUNCTION SUIT:**

In ASHISH ASHOK KUCHEWAR VS VITTHAL MAHADEO RAO KUCHEWAR, AND OTHERS**, AIR -2017 (NOV) 969 (BOM),** it was held that:

*"Suit for grant of injunction restraining defendants from interfering with possession of plaintiff claimed on basis of Will. Proof of Will, not matter in issue.*

*Legal heirs of testator of Will, are not necessary parties.* ***Dismissal of suit for their non-joinder, not proper."***

7) **INJUNCTION IN SPECIFIC PERFORMANCE SUIT:**

In BALKRISHNA DATTATREYA GALANDE VS GUPTA AND ANOTHER, 2019 Law Suit (SC) 140 and in Balkrishna Rambharose 2019 (2) ALT 7 (SC,) it was held by the Hon'ble Supreme Court that:

*"In a suit filed under Sec. 38 of the Specific Relief Act, Permanent* ***Injunction can be granted only to a person who is in actual possession of the Property****. The Plaintiff has to prove actual possession for grant of Permanent Injunction."*

**E..PERPETUAL INJUNCTION - WHEN REFUSED**

Section 41 of the Specific Relief Act, 1963, provides various contingencies in sub section (a) to (j) in which the injunction cannot be granted. This section lays down the defences that can be raised against the prayer for grant of an injunction. It provides:

a) **To restrain any person from prosecuting a judicial proceedings** unless such a restrain is necessary to prevent a multiplicity of the proceedings,

b) **To restrain any person from instituting or prosecuting any proceeding** in a Court not subordinate to that from which the injunction is sought,

c) **To restrain any person from applying to any legislative body,**

d) To restrain any person from instituting or prosecuting any proceedings in criminal matter,

e) **To prevent the breach of a contract the performance** of which would not be specifically enforced,

f) To prevent on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance,

g) **To prevent a continuing breach in which the plaintiff has acquiesced,**

h) when equally efficacious relief can certainly be obtained by any other mutual mode of proceedings except in case of breach of trust,

(a) "if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project".

i) **When the conduct of the plaintiff or his agent has been such as to disentitle him to the assistant to the Court,**

j) **when the plaintiff has no personal interest in the matter.**

In **AC MUTHAIAH - VS BOARD OF CONTROL OF CRICKET IN INDIA AND ANOTHER,** 2011 (6) SCC 617 the Hon'ble Supreme Court held that Section 41(1) of the Specific Relief Act provides that an injunction claimed should be refused when the plaintiff has no personal interest in the matter. The record does not indicate that any personal right of the appellant is infringed. Prima facie the appellant, who is claiming declaratory decrees against the respondents, would not be entitled to the same because no personal right of the appellant is infringed.

## F..MANDATORY INJUNCTION

A Mandatory injunction is an injunction which orders a party or requires them to do an affirmative act or mandates a specified course of conduct it is an extraordinary remedial process which is granted not as a matter of right, but in the excess of sound judicial discretion. One must keep in mind that mandatory injunction are quite in practice.

## 1..MANDATORY INJUNCTION ON AN INTERLOCUTORY APPLICATION:

Mandatory injunction is defined as an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him or otherwise in fulfillment of his legal obligations. Consequences of disobedience or breach of injunction:

In such case, the Court 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 three months, unless in the meantime the Court directs his release. 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 think fit to the injured party and shall pay the balance if any to the party entitled thereto. The penalty prescribed in Order 39 Rule 2-A and (2) CPC by way of detention in civil prison of the person committable a breach of an injunction applies to cases of injunctions issued under Order 39 Rule 1 also though there is no specific provision to that effect in that Rule.

2..**WHEN MANDATORY INJUNCTION CAN BE SOUGHT:**

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

**3..PARTIES ELIGIBLE TO SEEK MANDATORY INJUNCTION**

These are some of the cases, where party is eligible to seek mandatory injunction reliefs;

1. **VICTIMS OF TRESPASS:**

Where a stranger constructs building on the land of another no doubt believing it to be his own, the real owner has a right to recover such land unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to any acquiescence in building on the land.

2. **BENEFICIARIES FROM HIGHWAYS:**

A suit for removal of obstruction to a pathway was held to be maintainable without proof of special damage whether the pathway was highway or a village pathway which could not be raised to a dignity of a public high way (AIR 1949 Madras 634 Subbamma Vs. Narayana Murthy ). Where the plaintiff's right had been affected by the encroachment as a member of the public, the plaintiff is entitled to the use of full width of the passage way and hence the plaintiff can maintain an action for the removal of such encroachment even without proof of any special damage (AIR 1925 PC 36 – Manzur Hasan Vs. Mahammad Zaman.)

3. **CO-OWNERS:**

Since one co-owner has no right in law to appropriate land to himself out of a joint land against the consent of his co-owners, high handed action by one co-owner cannot be encouraged by Courts of law unless some special equity is shown in favour of the defendant in a suit for demolition of constructions which are in the process of being made by him without the consent of the co-owners

and hence a decree for demolition should not be refused especially when the co-owners have come to Court at the earliest (AIR 1978 Allahabad 178 – Prabhoo Vs. Doodnath).

4. **VICTIMS FROM OVERHANGING BRANCHES:**

Where the overhanging branches cause a reasonable apprehension of damage of crops, the appropriate remedy is the relief of mandatory injunction to compel the owner to cut away such overhanging branches (AIR 1935 Madras 31 – Putrayar Vs. Krishna) .

**G..CONSEQUENCES OF DISOBEDIENCE OR BREACH OF INJUNCTION:**

In such case, the Court 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 three months, unless in the meantime the Court directs his release. 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 think fit to the injured party and shall pay the balance if any to the party entitled thereto. The penalty prescribed in Order 39 Rule 2-A and (2) CPC by way of **detention in civil prison of the person for breach of an injunction applies to cases of injunctions issued under Order 39 Rule 1** also though there is no specific provision to that effect in that Rule.

## H..WHEN A SUIT FOR INJUNCTION AND DECLARATION WOULD LIE?

The Hon'ble Supreme Court has in the matter of **ANATHULA SUDHAKAR VS. P BUCHI REDDY & ORS [AIR 2008 SC 2033],** clarified the general principles as to when a mere suit for permanent injunction will lie and when it is necessary to file a suit for declaration and or possession with injunction as consequential relief, which is reproduced as under:

> *Para 11.1- When a Plaintiff is in lawful or peaceful possession of a property and such possession is disturbed or threatened by the defendant, a suit for injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.*
>
> *Para 11.2- Where the title of the Plaintiff is not disputed, but he is not in possession his remedy is to file a suit for possession and seek in addition, if necessary an injunction. A person out of his possession cannot seek the relief of injunction simpliciter, without claiming the relief for possession.*
>
> *Para 11.3- Where the plaintiff is in possession but his title to the property is dispute, or under a cloud, or where the defendant asserts title thereto and there is also threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and consequential relief of injunction. Where the title of the Plaintiffs is under cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.*

**I..LAW OF LIMITATION TO SEEK INJUNCTIVE RELIEF:**

As per Article 113 of Limitation Act, the limitation to file suit for injunction is three years from the date when the right to sue accrues.

| **Description of suit** | **Period of Limitation** | **Time from which period begins to run** |
|---|---|---|
| Injunction | **Three Years** | from the date when right to sue accrues |

**J..CONCLUSION**

An injunction and declaration are being an equitable remedies and as such attracts the application of the maxim that he who seeks equity must do equity. Granting of injunction is entirely in the discretion of the Court, though the discretion is to be sound and reasonably guided by Judicial Principles. The power to grant a temporary injunction is at the discretion of the Court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles.

The Courts must exercise their discretion while granting a declaratory decree and only in proper and fit cases this legal remedy should be granted so as to avoid multiplicity of suits and to remove clouds over legal rights of a rightful person. Regarding suit for mere injunction already it is mentioned above case law of **ANATHULA SUDHAKAR VS. P. BUCHI REDDY & ORS REPORTED IN 2008 (4) SCC 594,** wherein the Hon'ble Apex Court held that unless there is serious cloud over the title of the plaintiff, there is no need to file suit for declaration of title and suit for mere possession by way of injunction is maintainable.