LESSON NO 1&2 ON PLEADING, DRAFTING AND CONVEYENCING [LLB 6TH SEMESTER-2016]

PLEADINGS AN OVERVIEW

Drafting and Conveyancing:

In law as practiced in countries that follow the English models, a **pleading** is a formal written statement of a party's claims or defenses to another party's claims in a civil action. The parties' pleadings in a case define the issues to be adjudicated in the action.

Drafting may be defined as synthesis of law and facts in a language form. The essence of drafting is, therefore, crystallization and expression in definite form of legal right privileges function, duty or status. Drafting, in legal sense, means an act of preparing the legal documents like agreements, deeds etc. Pre-requisites of drafting of legal documents are the skills of draftsman, the knowledge of facts. A proper understanding of drafting cannot be realised unless the nexus between the law, the facts and the language is fully understood and accepted to give a correct presentation of legal status, privileges, rights and duties of parties, and obligations arising out of mutual understanding or prevalent customs or usages or social norms or business conventions, as the case may be, terms and conditions, breaches and remedies etc. in a self-contained and self-explanatory form without any patent or latent ambiguity or doubtful connotation. Thus, conveyance is an act of conveyancing or transferring any property whether movable or immovable from one person to another permitted by customs, conventions and law within the legal structure of the country.

In the United States, a *complaint* is the first pleading filed by a plaintiff which initiates a lawsuit. A complaint sets forth the relevant allegations of fact that give rise to one or more legal causes of action along with a prayer for relief and sometimes a statement of damages claimed (an ad quod damnum clause). In some situations, a complaint is called a*petition*, in which case the party filing it is called the petitioner and the other party is the respondent. In equity, sometimes called chancery, the initial pleading may be called either a *petition* or a *bill of complaint in chancery*.

In England and Wales, the first pleading is a Claim Form, issued under either Part 7 or Part 8 of the Civil Procedure Rules, which sets out the nature of the action and the relief sought, and may give brief particulars of the claim.

When used in civil proceedings in England and Wales, the term "complaint" refers to the mechanism by which civil proceedings are instituted in the magistrates' court [1] and may be either written or oral.

A *demurrer* is a pleading (usually filed by a defendant) which objects to the legal sufficiency of the opponent's pleading (usually a complaint) and demands that the court rule immediately about whether the pleading is legally adequate before the party must plead on the merits in response. Since demurrer procedure required an immediate ruling like a motion, many common law

jurisdictions therefore went to a narrower understanding of pleadings as framing the issues in a case but not being motions in and of themselves, and replaced the demurrer with the motion to dismiss for failure to state a cause of action or the application to strike out particulars of claim.

An *answer* is a pleading filed by a defendant which admits or denies the specific allegations set forth in a complaint and constitutes a general appearance by a defendant. In England and Wales, the equivalent pleading is called a Defence.[2]

A defendant may also file a cross-complaint against another defendant named by the plaintiff, and may also file a *third-party complaint* bring other parties into a case by the process of impleader.

A defendant may file a *counter-claim* to raise a cause of action to defend, reduce or set off the claim of the plaintiff.

Common law pleading was the system of civil procedure used in England, which early on developed a strong emphasis on the form of action rather than the cause of action (as a result of the Provisions of Oxford, which severely limited the evolution of the common law writ system). The emphasis was on procedure over substance.

PLEADINGS IN INDIA

The present day system of pleadings in our country is based on the provisions of the Civil Procedure Code, 1908 supplemented from time to time by rules in that behalf by High Courts of the States. There are rules of the Supreme Court and rules by special enactments as well.

For one, words 'plaints' and 'complaints' are nearly synonymous. In both, the expression of grievance is predominant. Verily, when a suitor files a statement of grievance he is the plaintiff and he files a 'complaint' containing allegations and claims remedy. As days passed, we have taken up the word 'Plaint' for the Civil Court and the word 'Complaint' for the Criminal Court.

Order 6, R. 1 of Civil Procedure Code (C.P.C.) defines 'pleading'.

It means either a plaint or a written statement.' With the passing of time written pleadings supplanted archaic oral pleadings. When reduced to writing the scope of confusion, for obvious reasons, was made narrower.

In this we find the object of a pleading which aims at ascertaining precisely the points for contention of the parties to a suit. The rules of pleading and other ancillary rules contained in the Code of Civil Procedure have one main object in view. It is to find out and narrow down the controversy between the parties. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take (Ganesh Trading v. Motiram, AIR 1970 SC 480). Necessarily, a pleading is accurate

only when stripped of verbosity it pinpoints succinctly the plaintiff's grievances giving him the right to sue for the desired relief, or when it briefly sets out the defendant's defence. When so done, there would be hardly any scope left to beat about the bush or to take the other party by surprise.

Pleadings should be read not by the piecemeal but as a whole and should be liberally construed. Every venial defect should not be allowed to defeat a pleading, for a plaintiffs case should not be defeated merely on the ground of some technical defect in his pleadings provided he succeeds on the real issues of the case. It has been held: "Rigid construction of the law of pleadings was inappropriate and not calculated to serve the cause of justice for which the law of procedure was largely designed (AIR 1969 Del. 120). This should, of course, not be taken as an excuse for pleadings extremely lax and irrelevant, argumentative and inaccurate."

In construing the plaint, the court has to look at the substance of the plaint rather that its mere form. If, on the whole and in substance, the suitor appears to ask for some relief as stated, the court can look at the substance of the relief. "Pleadings have to be interpreted not with formalistic rigour but with latitude of awareness of low legal literacy of poor people."

Coming to construction of pleadings, Sarkaria, J held: "A pleading has to be read as a whole to ascertain its import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not mere the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and term of his pleading taken as a whole. (Udhav Singh v. Madhava Rao Scindia, AIR 1976 SC 744).

Fundamental rules of pleadings

The fundamental rule of pleadings is contained in provisions of O. 6, R. 2 of C.P.C. which enjoins:

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

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

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

To quote the Earl of Halsbury: "The sole object of it is that each may be fully alive to the questions that arc about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues."

The rules of pleading and other ancillary rules contained in the Code of Civil Procedure have one main object in view. It is to find out and narrow down controversy between the parties.

"The pleadings are not to be considered as constituting a game of skill between the advocates. The) ought to be so framed as not only to assist the party in the statement of his case but the court in its investigation of the truth between the litigants".

The pleading shall contain:

(i) facts only, then again, material facts;
(ii) not law;
(iii) not evidence; and
(iv) Immaterial facts to be discarded.
(v) Deficiency in pleading.

What are material facts? Facts which gave the plaintiff his cause of action or the defendant his defence are, briefly speaking, material facts which he must prove or fail. It, therefore, stands to reason that facts which are not required to support the plaintiffs or the defendant's case are not material. Whether a fact is material or not depends on the facts and circumstances of each case and can be held so or otherwise only in the context of relevant situation.

(i) Material facts:

A pleadings shall contain only material facts. Material facts are the entirety of facts which would be necessary to prove to succeed in the suit. Any fact which is not material should be avoided. Slackness in pleadings is unfair both to the court in which they are filed and also to the litigants. Material facts should be pleaded concisely. There is hardly any scope for showing literary genius in a pleading.

Order 6, R. 2, C.P.C. should be read with O. 6, R. 4(c). When commencing a suit, the plaintiff is required to state only material facts, but such facts must constitute his cause of action as well. Absence of material facts will put the party to discomfiture, for no amount of evidence can be taken into consideration or regarded as sufficient in proof of any fact if specific mention of it is not made in the pleadings. Therefore, if a party omits to state a material fact, he will not be allowed to give evidence of the fact at the trial unless the pleading is amended under O. 6, R. 17, C.P.C. The rule is based mainly on principles that no party should be prejudiced by change in the case introduced by this method. No relief can be granted on facts and documents not disclosed in the plaint.

It is often noticed that during the trial of a suit, some fact is sought to be introduced in evidence which does not find mention in the plaint or in the written statement, as the case may be. Then follows a heated parley when the court intervenes and rejects any attempt of introduction of any new fact. To avoid discomfiture, the pleading should be carefully drafted not to miss any

material fact which may subsequently be found to be so material as to decide the fate of the case this or that way.

(ii) Not law:

In a pleading, there is no scope of pleading a provision of law or conclusion of law. It is the intention 286 PP-DA&P of the framers of the Code that a pleading should state facts, and the position as in law shall be inferred if such facts are capable of raising any legal inference. The pleading should present facts in such a way that those would irresistibly and spontaneously draw a legal inference. Herein lies the art of pleading. To find out the law is the duty of the court. Legal effects are not to be stated by the party. In India, as in England, the duty of a pleader is to set out the facts upon which he relies and not the legal inference to be drawn from them. Likewise the conclusion of law or a mixed question of law and fact should not be pleaded.

(iii)Not evidence:

In like manner evidence has to be avoided in pleadings. We have noticed the wording of the rule of O. 6, R. 2 to wit, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which they are to be proved. A pleading should not contain facts which are merely evidence to prove the material facts.

(iv) Immaterial facts to be discarded:

Unnecessary details are the facts which are not material and, therefore, should be discarded. (v) Deficiency in pleading: Parties are related to each other and know everything. No element of surprise has been caused to the other party. Parties understood the case and led evidence accordingly. Deficiency in pleading would not affect case of the plaintiff [Kailash Chandra v. Vinod, AIR 1994 NOC 267 (MP)].

PLAINT STRUCTURE

A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which he seeks the assistance of the court.

Order VII of the Civil Procedure Code,1908 deals with plaint. As per Order VII, R.1 CPC, every plaint must contain the following things:

(a) The name of the Court in which the suit is brought;

(b) The name, description and place of residence of the plaintiff;

(c) The name, description and place of residence of the defendant, so far as they can be ascertained;

(d) Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect; (e) the facts constituting the cause of action and when it arose;

(f) The facts showing that the Court has jurisdiction;

(g) The relief which the plaintiff claims;

(h) Where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) A statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

Where the plaintiff seeks the recovery of money, the plaint must state the precise amount claimed. But where the plaintiff sue for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for. [R.2]

If the subject-matter of the suit is immovable property, the plaint must contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint must specify such boundaries or numbers. [R.3]

When plaintiff sues as representative:

As per Rule 4 where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

***Defendant's interest and liability to be shown*:**

The plaint must show that the defendant is or claims to be interested in subject-matter, and that he is liable to be called upon to answer the plaintiffs demand. [R.5]

Grounds of exemption from limitation law:

In case the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint must show the ground upon which exemption from such law is claimed. The Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint. [R.6]

Relief to be specifically stated:

Rule 7 says that 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.

Relief founded on separate ground:

If the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and district grounds, they shall be stated as far as may be separately and distinctly. [R.8]

DESCRIPTION OF PARTIES

The description of parties in a plaint has had the only object of securing correct identification of the party suing and the party sued. There cannot be, for obvious reasons, any dogmatic rules as to what would constitute a proper description. It differs in varying circumstances.

Generally speaking, father's name, occupation and caste are sufficient description of an individual. It may include the age.

When the description is defective, it is a case of misdescription. Misdescription of parties can be corrected at any stage. In a suit by a joint family firm, the suit was instituted in the firm name. Amendment seeking addition of individual partners can be allowed as the case is one of misdescription. X suing as proprietor of 'Todi Financing Corporation'— amendment sought by describing 'X' as partner of the Corporation and by impleading the retired partner as defendant should be allowed. (AIR 1979 Cal. 10)

To sum up, if, however, imperfectly and incorrectly a party is designated in a plaint, the correction of the error is not the addition or substitution of the party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of the intention of the party and if the court is able to discover the person or persons intended to sue or to be sued a mere misdescription of such a party can always be corrected provided the mistake was bona fide.

WRITTEN STATEMENT

It is incumbent on the defendant to file his defence in writing. If the defendant fails to file written statement, the court may pronounce judgment against him or may under O. 8, R. 10, make such order in relation to the suit as it deems fit. If the defendant has omitted to avail of his right to file a written statement at or before the first hearing, the court can extend the time for filing it, in exercise of its discretion, if the circumstances so warrant. The rule has to be worked in a manner so as to advance justice (Mehar Chand v. Suraj Bhan, AIR 1971 Punj 435).

Requirement of Written Statement

When the defendant appears and files a written pleading by way of defence, his pleading should conform to all the general rules of pleading laid down in the preceding paras. A subsequent pleading filed by the plaintiff, either in reply to a defendant's claim of set off, or with leave of the court, in answer to defendant's pleas in defence, is also called a "written statement" (also called Replication or Rejoinder). All the rules relating to defendant's written statement apply, mutatis mutandis to such written statement of the plaintiff also.

Considerations before Drafting a Written Statement

Before proceeding to draft a written statement, it is always necessary for a pleader to examine the plaint very carefully and to see whether all the particulars are given in it and whether the whole information that he requires for fully understanding the claim and drawing up the defence is available. If any particulars are wanting, he should apply that the plaintiff be required to furnish them before the defendant files his written statement. If he cannot make a proper defence without going through such particulars and/or such documents referred to in the plaint, and that the defendant is not in possession of such copies, or the copies do not serve the required purpose, the defendant should call upon the plaintiff to grant him inspection of them and to permit him to take copies, if necessary, or, if he thinks necessary, he may apply for discovery of documents. If he thinks any allegation/allegations in the plaint is embarrassing or scandalous, he should apply to have it struck out, so that he may not be required to plead those allegations. If there are several defendants, they may file a joint defence, if they have the same defence to the claim. If their defences are different, they should file separate written statements, and if the defences are not only different but also conflicting, it is not proper for the same pleader to file the different written statements. For instance, if two defendants, executants of a bond, are sued on the bond, and their plea is one of satisfaction, they can file a joint written statement. If the plaintiff claims limitation from the date of certain acknowledgement made by one defendant and contends that the acknowledgement saves limitation against the other also, the defendants may file separate written statements. In a suit on a mortagagedeed executed by a Hindu father, to which the sons are also made parties on the ground that the mortgage was for a legal necessity, if the sons want to deny the alleged legal necessity, they should not only file a separate defence from their father's but should also preferably engage a separate pleader.

(1) Formal Portion of Written Statement:

A written statement should have the same heading and title as the plaint, except that, if there are several plaintiffs or several defendants, the name of only one may be written with the addition of "and another" or "and others", as the case may be. The number of the suit should also be mentioned after the name of the court. After the name of the parties and before the actual statement, there should be added some words to indicate whose statement it is, e.g., "written statement on behalf of all the defendants" or "written statement on behalf of defendant No. 1", or

"written statement on behalf of the plaintiff in reply to defendant's claim for a set off" or "written statement (or replication) on behalf of the plaintiff filed under the order of the court, dated……." or "written statement on behalf of the plaintiff, filed with the leave of the court". The words "The defendant states……." or "The defendant states as follows" may be used before the commencement of the various paragraph of the written statement but this is optional.

No relief should be claimed in the written statement, and even statements such as that the claim is liable to be dismissed should be avoided. But when a set off is pleaded or the defendant prefers a counter-claim for any excess amount due to him, a prayer for judgment for that amount in defendant's favour should be made.

(2) Body of the Written Statement:

The rest of the written statement should be confined to the defence.

Forms of Defence: A defence may take the form of (i) a "traverse", as where a defendant totally and categorically denies the plaint allegation, or that of (ii) "a confession and avoidance" or "special defence", where he admits the allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own, as where he admits the bond in suit but pleads that it has been paid up, or that the claim is barred by limitation, or that of (iii) "an objection in point of law" (which was formerly called in England "a demurrer"), e.g., that the plaint allegations do not disclose a cause of action, or that the special damages claimed are too remote. Another plea may sometimes be taken which merely delays the trial of a suit on merits, e.g., a plea that the hearing should be stayed under Section 10, C.P.C., or that the suit has not been properly framed, there being some defect in the joinder of parties or cause of action and the case cannot be decided until those defects are removed. These pleas are called (a) "dilatory pleas" in contradistinction to the other pleas which go to the root of the case and which are therefore known as (b) "peremptory pleas" or "pleas in bar". Some dilatory pleas are not permitted in pleadings, but must be taken by separate proceedings. Others may either be taken in the written statement under the heading "Preliminary Objections", or by a separate application filed at the earliest opportunity, as some pleas, such as that of a mis-joinder and non-joinder, cannot be permitted unless taken at the earliest opportunity (O. 1, R. 7 and 13).

A defendant may adopt one or more of the above forms of defence, and in fact he can take any number of different defences to the same action. For example, in a suit on a bond he can deny its execution, he can plead that the claim is barred by limitation, he can plead that, as no consideration of the bond is mentioned in the plaint, the plaint does not disclose any cause of action, he can plead that the bond being stated to be in favour of two persons the plaintiff alone cannot maintain the suit. He can as well plead one form of defence to one part of the claim, and another defence to another part of it.

He can take such different defences either jointly or alternatively, even if such defenses are inconsistent. But certain inconsistent pleas such as those which depend for their proof, on entirely contradictory facts, are generally not tenable. A ground of defence, which has arisen to the defendant even after the institution of the suit, but before the filing of his written statement, may also be raised (O.8, R.8). All defences which are permissible should be taken in the first instance, for, if the defendant does not take any plea, he may not be allowed to advance it at a later stage, particularly when it involves a question of fact.

How to Draft a Written Statement

When the defendant relies on several distinct grounds of defence or set off, founded upon separate and distinct facts, they should be stated in separate paragraphs (O.8, R.7), and when a ground is applicable, not to the whole claim but only to a part of it, its statement should be prefaced by words showing distinctly that it is pleaded only to that part of the claim, thus: "As to the mesne profits claimed by the plaintiff, the defendant contends that, etc." or "As to the price of cloth said to have been purchased by the defendant, the defendant contends that, etc."

When it is intended to take several defences in the same written statement, the different kinds of defences should be separately written. It is convenient to adopt the following order for the several pleas:

(i) Denials.
(ii) Dilatory pleas.
(iii)Objections in point of law.
(iv) Special defence (pleas in confession and avoidance).
(v) Set off.

All admissions and denials of facts alleged in the plaint should be recorded in the first part of the written statement and before any other pleas are written. If a defendant wishes to add an affirmative statement of his own version to the denial of a plaint allegation, or to add anything in order to explain his admission or denial, it is better and more convenient to allege the additional facts along with the admissions or denial, than to reserve them until after the admissions or denials have been recorded. If there are some defences which are applicable to the whole case and others which apply only to a part of the claim, the former should preferably be pleaded before the latter.

Drafting of Reply/Written Statement – Important Considerations

At the time of drafting the reply or written statement, one has to keep the following points in mind:-

(i) One has to deny the averment of the plaint/petition which are incorrect, perverse or false. In case, averment contained in any para of the plaint are not denied specifically, it is

presumed to have been admitted by the other party by virtue of the provisions of Order 8, Rule 5 of the Code of Civil Procedure.

It must be borne in mind that the denial has to be specific and not evasive (Order 8, Rule 3 & 4 CPC) [1986 Rajdhani Law Reporter 213; AIR 1964 Patna 348 (DB), AIR 1962 MP 348 (DB); Dalvir Singh Dhilowal v. Kanwaljit Singh 2002 (1) Civil LJ 245 (P&H); Badat & Co v. East India Trading Co. AIR 1964 SC 538]. However, general allegation in the plaint cannot be said to be admitted because of general denial in written statement. [Union v. A. Pandurang, AIR 1962 SC 630.]

(ii) If the plaint has raised a point/issue which is otherwise not admitted by the opposite party in the correspondence exchanged, it is generally advisable to deny such point/issue and let the onus to prove that point be upon the complainant. In reply, one has to submit the facts which are in the nature of defence and to be presented in a concise manner. [Syed Dastagir v. T.R. Gopalakrishnan Setty, 1999 (6) SCC 337.]

(iii) Attach relevant correspondence, invoice, challan, documents, extracts of books of accounts or relevant papers as annexures while reply is drafted to a particular para of the plaint;

(iv) The reply to each of the paras of the plaint be drafted and given in such a manner that no para of the plaint is left unattended. The pleadings are foundations of a case. [Vinod Kumar v. Surjit Kumar, AIR 1987 SC 2179.]

(v) After reply, the same is to be signed by the constituted attorney of the opposite party. If the opposite party is an individual, it could be signed by him or his constituted attorney or if the opposite party is a partnership firm, the same should be signed by a partner who is duly authorised under the Partnership Deed, because no partner has an implied authority to sign pleadings on behalf of the partnership firm by virtue of Section 22 of the Indian Partnership Act, 1932. In case of a body corporate, the same could be signed by any Director, Company Secretary, Vice-President, General Manger or Manager who is duly authorised by the Board of Directors of the company because any of the aforesaid persons per se are not entitled to sign pleadings on behalf of the body corporate. [Order 29 of Code of Civil Procedure.] It may be noted that if the plaint or reply is not filed by a duly authorised person, the petition would be liable to be dismissed [Nibro Ltd . v. National Insurance Co. Ltd., AIR 1991 Delhi 25; Raghuvir Paper Mills Ltd. v. India Securities Ltd. 2000 Corporate Law Cases 1436]. However, at the time of filing of petition, if the pleadings are signed by a person not authorised, the same could be ratified subsequently. [United Bank of India v. Naresh Kumar, AIR 1997 SC 2.]

(vi) The reply/written statement is to be supported by an Affidavit of the opposite party. Likewise, the Affidavit will be sworn by any of the persons aforesaid and duly notorised by an Oath Commissioner. The Affidavit has to be properly drawn and if the affidavit is not properly drawn or attested, the same cannot be read and the

petition could be dismissed summarily. [Order 6, Rule 15 CPC]. The court is bound to see in every case that the pleadings are verified in the manner prescribed and that verifications are not mere formalities.

(vii) The reply alongwith all annexures should be duly page numbered and be filed alongwith authority letter if not previously filed.

(viii) At the time of filing of reply, attach all the supporting papers, documents, documentary evidence, copies of annual accounts or its relevant extracts, invoices, extracts of registers, documents and other relevant papers.

(ix) It may be noted that if any of the important points is omitted from being given in the reply, it would be suicidal as there is a limited provision for amendment of pleadings as provided in Order 6, Rule 17 CPC, and also the same cannot be raised in the Affidavit-in-Evidence at the time of leading of evidence. Because if any point has not been pleaded in the pleadings, no evidence could be led on that point. General rule is that no pleadings, no evidence. [Mrs. Om Prabha Jain v. Abnash Chand Jain, AIR 1968 SC 1083; 1968 (3) SCR 111.]

(x) If a party is alleging fraud, undue influence or mis-representation, general allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice, however, strong the language in which they are couched may be, and the same applies to undue influence or coercion. [Afsar Shaikh v. Soleman Bibi, AIR 1976, SC 163; 1976 (2) SCC 142]. While pleading against fraud or mis-representation, party must state the requisite particulars in the pleadings. [K Kanakarathnam v. P Perumal, AIR 1994 Madras 247.]

(xi) It is well settled that neither party need in any pleadings allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied. [Order 6, Rule 13 CPC; Sections 79 and 90 of Indian Evidence Act.]

(xii) In every pleading, one must state specifically the relief which the party is claiming from the court or tribunal or forum. While framing the prayer clause, one should claim all possible relief as would be permissible under the pleadings and the law [Order 7, Rule 7 CPC]. The general principle is that the relief if not prayed for, will not be allowed. [R Tiwary v. B Prasad, AIR 2002 SC 136.]

INTERLOCUTORY APPLICATION

"Interlocutory" means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient.

The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarises general powers of a civil court in regard to different types of Interlocutory orders.

The detailed procedure has been set out in the Schedule I of the C.P.C which deals with Orders and Rules.

Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit e.g., Applications for appointment of Commissioner, Temporary Injunctions, Receivers, payment into court, security for cause etc.

Original Petition

Suits are filed to lodge money claims in civil courts working under District Courts while petitions are filed in High Courts which are above District Courts seeking some directions against the opposite party; mostly the Government.

There is no legal term like original suit or original petition. The suit which is initially filed in the first court for the first time is referred as original suit. Petitions are Writ Petitions, Arbitration Petitions, Miscellaneous Petitions etc. & not the original petition.

After judgment in suit or petition, if any aggrieved party challenges it then it is by filing appeal in the higher court which is ordinarily called as Appeal but often in some court it is termed as Letters Patent Appeal (LPA) & as Special Leave Petition (SLP) in Supreme Court.

Affidavit

An affidavit being a statement or declaration on oath by the deponent is an important document and the consequences of a false affidavit are serious. Therefore, great care is required in drafting it.

A Court may, at any time, for sufficient reason order that any particular fact or facts may be proved by affidavit or that the affidavit of any particular witness may be read at the hearing, provided that the Court may order the deponent to appear in person in Court for cross-examination.

Affidavits to be produced in a Court must strictly conform to the provisions of order XIX, Rule 1 of the Code of Civil Procedure, 1908 and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which, on the basis of information received and believed to be true. In the latter case, the source of information must also be disclosed.

The following rules should be remembered when drawing up an affidavit:

(1) Only an allegation absolutely necessary should be inserted;

(2) The person making the affidavit should be fully described in the affidavit;

(3) An affidavit should be drawn up in the first person;

(4) An affidavit should be divided into paragraphs, numbered consecutively, and as far as possible, each paragraph should be confined to a distinct portion of the subject;

(5) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified;

(6) When the declarant speaks of any fact within his knowledge he must do so directly and positively using the words "I affirm" or "I make oath and say";

(7) Affidavit should generally be confined to matters within the personal knowledge of the declarant, and if any fact is within the personal knowledge any other person and the petitioner can secure his affidavit about it, he should have it filed. But in interlocutory proceedings, he is also permitted to verify facts on information received, using the words "I am informed by so and so" before every allegation which is so verified. If the declarant believes the information to be true, he must add "and I believe it to be true".

(8) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents;

(9) The affidavit should have the following oath or affirmation written out at the end:

"I swear that this declaration is true, that it conceals nothing, and that no part of it is false". Or

"I solemnly affirm that this declaration is true, that it conceals nothing and that no part of it is false".

Any alterations in the affidavit must be authenticated by the officer before whom it is sworn.

An affidavit has to be drawn on a non-judicial Stamp Paper as applicable in the State where it is drawn and sworn. An affidavit shall be authenticated by the deponent in the presence of an Oath Commissioner, Notary Public, Magistrate or any other authority appointed by the Government for the purpose.

(10) Affidavits are chargeable with stamp duty under Article 4, Schedule I, Stamp Act, 1899. But no stamp duty is charged on affidavits filed or used in Courts. Such affidavits are liable to payment of Court fee prescribed for the various Courts.

Introduction to drafting

Drafting may be defined as the synthesis of law and fact in a language form. Perfection cannot be achieved in drafting unless the nexus between law, facts and language is fully understood.

The old style of drafting of documents of the Eighteenth Century has given way for comprehensiveness, exactitude and clarity of expressions.

“ The particular qualities that distinguish the modern style of drafting – the use of definitions, division into numbered paragraphs and sub-paragraphs with marginal notes, the growing disuse of the form ‘shall’ in stating circumstances and conditions, the use of one word (as ‘convey’ or ‘assign’) for the jumble (grant, bargain, sell, alienate, release, confirm and enforce or bargain, sell, assign, transfer, set-off and confirm) that had often previously been necessary or thought to be so are to be found in any current set of precedents.”- E.L Piesse & Gilchrist Smith: The Elements of Drafting.

Drafting will be done of documents. Therefore it is essential to first elaborate the meaning of documents and the provisions in India relating to registration and stamping of documents.

II**. Documents**

Ordinarily the word "document" denotes a textual record. Increasingly sophisticated attempts to provide access to the rapidly growing quantity of available documents raised questions about which should be considered a "document".

Meaning of Document

The term "Document" has not been defined under the Registration Act, 1908. The object clause of the Registration Act, 1908 merely states that the Act was promulgated to consolidate the enactments relating to the registration of documents.

Two Acts refer to the word "Document" in very similar terms:

1. Section 3 of the Indian Evidence Act, 1872 states that a "Document" means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter. Writing is a document; Words printed, lithographed or photographed are document; A map or plan is a document; An inscription on a metal plate or stone is a document; A caricature is a document.

2. Section 3 (18) of the General Clauses Act, 1897, states that a "Document" shall include any matter written, expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, which is intended to be used or which may be used for the purpose of recording that matter.

Thus the word "Document” has been used in a wide sense, and it includes instruments, deeds, agreements etc.

Documents will also include Electronic records. As per Section 3 of the Indian Evidence Act, 1872, - “Evidence" means and includes - (1) All statements which the Court permits or requires

to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.

(2) All documents produced for the inspection of the Court; such documents are called documentary evidence.

Documentary Evidence is an important piece of evidence of which the Court, Jury and Tribunal take judicial cognizance. It is therefore imperative that the document is drafted with utmost precision and application of mind.

As per section 2(r) of the Information Technology Act,2000 - "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. As per section 92 of the Information Technology Act, 2000, the Indian Evidence Act, 1872 shall be amended in the manner specified in the Second Schedule to this Act. As per the Second Schedule to the Information Technology Act,2000, (a) in the definition of "Evidence", for the words "all documents produced for the inspection of the Court", the words "all documents including electronic records produced for the inspection of the Court" shall be substituted;

Distinction between drafting and conveyancing:

Both the terms "drafting and conveyancing" provide the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with the transfer of property from one person to another, whereas "drafting" gives a general meaning synonymous to preparation or drafting of documents, Documents may include document relating to transfer of property as well as other "documents" in a sense as per definition given in Section 3 (18) of the General Clauses Act, 1897 which include any matter written, expressed or described upon any substance by means of letters figures or mark, which is intended to be used for the purpose of recording that matter. For example, for a banker the document would mean loan agreement, deed of mortgage, charge pledge, guarantee, etc. For a businessman document would mean something as demanded under Section 2(4) of the Indian Sale of Goods Act, 1930 so as to include a document of title to goods i.e. "Bill of lading, dock warrant, warehouse-[Chapter # 1] General Principles of Drafting-I Q&A-2.17 keepers certificate, wharfingers certificate, railway receipt multi model transport document warrant or order for the delivery of goods and any other document used in ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented". The Companies Act, 1956 defines vide Section 2(15) the term "document" in still wider concept so as to include "summons, requisitions order, other legal process, and registers, whether issued, sent or kept in pursuance of this or any other Act, or otherwise". Thus, drafting may cover all types of documents in business usages. In India, the commercial houses banks and financial institutions have been using the term "documentation". In substitution of the words "drafting and

conveyancing". Documentation refers to the activity which symbolises preparation of documents including finalization and execution thereof.

Deed :

The term deed connects all the instruments by which two or more persons agree to effect any right or liability. A deed may be defined as a formal writing of a non-testamentary character, which purports and operates to create, declare, confirm, assign, limit or extinguish some right, title or interest. A deed is a present grant rather than a mere promise to be performed in the future. Deeds are in writing, signed, sealed and delivered. Deeds are instruments , but all instruments are not deeds. All deeds are documents. But it is not always that all documents are deeds. A document under seal may not be a deed if it remains undelivered e.g., a will, an award, a certificate of admission to a learned society, a certificate of shares or stocks, and share warrant to bearer, an agreement signed by directors and sealed with the company's seal, license to use a patented article or letters of coordination.

Explain in detail the general principles of drafting and conveyancing and other writings.

Drafting of legal documents requires skill, At the very first instance, the names, description and the addresses of the parties to the instrument must be ascertained by a draftsman. He must obtain particulars about all necessary matters which are required to form part of the instrument. He must also note down with provision any particular directions or stipulations which are to be kept in view and to be incorporated in the instrument. The duty of a draftsman is to express the intention of the parties clearly and concisely in technical language. With this end in view , he should first form a clear idea of what these intentions are. A corporate executive, therefore, must note down the most important requirements of law which must be fulfilled while drafting complete instrument on the subject. Knowledge of law of the land in general and knowledge of the special enactments applicable in a particular situation is an essential requirement for a draftsman to ensure that the provisions of the applicable law are not violated or avoided. A limited company can do only that much which it is authorised by its memorandum. Further, a company being a legal entity, must necessarily act through its authorised agents. A deed, therefore, should be executed by a person duly authorised by the directors by their resolution or by their power of attorney. It is also to be ensured that the format of documents adopted adheres to the customs and conventions in vogue in the business community or in the ordinary course of legal transactions. For any change in the form of such document, use of juridical and technical language should invariably be followed. The statements of negatives should generally be avoided. The order of the draft should be strictly logical. Legal language should be, to the utmost possible extent, precise and accurate. The draft must be readily intelligible to layman. Document should be supported by the schedules enclosures or annexure in case any reference to such material has been made in that.

Books and references

1. G.M. Kothari and : Drafting, Conveyancing and Pleadings (1982); 2nd Ed., N.M. Tripathi (P.) Arvind G. Kothari Ltd., Bombay.

2. P.C. Mogha : The Indian Conveyancer (1987); 10th Ed. Rev. by Justice K.N. Goyal, etc. Eastern Law House, Calcutta.

3. Hargopal : The Indian Draftsman; Guide to Legal Drafting (1995); 10th Ed. Rev. by Nitin Khanna & A.C. Moitra, the University Book Agency, Allahabad. Vol. I & II.

4. N.S. Bindra : Conveyancing Drafting & Interpretation of Deeds (1985); 7th Silver Jublee Ed. Rev. by S.K. Verma, etc.; Volumes 1 to 5, Law Publishers, Allahabad.

5. Dr. J.C. Verma : Commerical Drafting & Conveyancing, 1988 Ed.; Bharat Law House, New Delhi.

6. P.C. Mogha : The Law of Pleadings in India (1987); 14th Ed. Rev. by Justice K.N. Goyal, etc. Eastern Law House, Calcutta.

7. DeSouza : Forms and Precedents of Conveyancing (1999): 13th Ed. Rev. by C.R. Datta and M.N. Das.

8. Rodney D. Ryder : Drafting Corporate & Commercial Agreements (2005); 1st Ed., Universal Law Publishing Co., Delhi.

9. Maxwell : The Interpretation of Statutes (1976); 12th Ed., second impression Rev. by P. St. J. Langan, N.M. Tripathi (P) Ltd., Bombay.

10. Stanley Robinson : Drafting - Its Application to Conveyancing and Commercial Documents (1980); Ist Ed., Chapters 1 to 11, Butterworths, London.

11. Kelly : Draftsman (1979); 14th Ed. Rev. by R.W. Ramage, pp. 2 to 161, 228 to 235, 476 to 509, Butterworths, London.

12. Shiv Gopal : Conveyancing Precedents and Forms (1975); 4th Ed., Eastern Book Company, Lucknow.

13. G.M. Kothari : Principles & Precedents of the Law of Conveyancing, Draftsman and Interpretation of Deeds & Documents (1995); Law Book Company, Allahabad.

14. M.G. Gurha : A Guide to the Deeds (1981); 2nd Ed., Modern Law House, Allahabad.

…..End……..