

CPC: As Understood and Practiced in Our Civil Courts

Amit Das Gupta*

Prologue:

The Code of Civil Procedure, 1908 (CPC) is the marvelous codification, innovation and creation of the common law in our legal arena by which people's rights of civil nature are being implemented. The courts of our civil judicatures are absolutely dependant upon CPC. CPC is deemed as the most exhaustive piece of law in contemplation of legal minds. The beauty of CPC lies on the feature that it covers the procedures of the civil courts as the procedural law on the other hand creates civil rights through some innovative substantive remedies.

Background:

In 1859, for the 1st time the procedural law regarding civil litigation was enacted by the committee headed by Mr. John Romily QC, who was a lawyer and later a Judge and the committee considered the native laws and also applied the common laws in a pragmatic manner to consolidate and amend the then prevailing laws relating to the procedures of the courts of civil judicature. CPC later went through many changes and amendments to take the current form of 1908. Till today, the CPC of 1908, with minor changes, very efficiently is catering the whole administration of civil litigation.

Suits of Civil Nature:

The fundamental principle of law is that where there is a right, there is a remedy and the litigant having some grievance of a civil nature has independently of any statute, a right to institute a suit. A civil court, by following the hundreds of provisions of CPC, shall try and adjudicate all the litigations which are 'suits of civil nature' excepting suits of which their cognizance is either expressly or impliedly barred by any law. The term 'suits of civil nature' has been defined in section 9 of the CPC and it broadly indicates two things: 1) Right to property, and 2) Right to office.

Presentation of Suit:

A litigant must present his case before the Court of lowest grade, competent to try, upon presenting a plaint (section 26 of CPC), considering the local and pecuniary jurisdiction of the Code which has been enunciated in sections 6 and section 15 to section 21. Order III of the CPC recognized the agents and pleaders of the litigants, and as such lawyers have a heavy duty in conducting the cases on behalf of the litigants. A plaintiff must present his plaint in accordance with the provisions of Order-VII as well as Order-VI of CPC. To give proper remedy to the litigants it is the sacred duty of a lawyer to prepare a plaint perfectly following the rules:

1. To include the necessary and proper parties (Order-I).
2. Framing the suit including the cause of action and claims properly (Order-II)
3. Pleadings of the parties which include plaints and written statements must be formed according to Order-VI.

* LL.B. (Hons.), LL.M. (University of Dhaka), Advocate, Supreme Court of Bangladesh, Former Member, Executive Committee, Supreme Court Bar Association, Head of Chamber, Amit & Associates. Email: adv.amitdasgupta@gmail.com. This paper was presented before the SCLS 4th Monthly Seminar held in Old Law Faculty Building at Chittagong University on March 11, 2017

4. The particulars of the plaint must maintain the provision of Order VII.
5. A suit will be instituted as per the provisions of Order-IV.

Return of Plaint:

Under Order VII Rule 10 the Code, Court has the power of returning the plaint to the plaintiff at any stage of the suit to be presented to the Court where the suit should have been instituted because of want of pecuniary or territorial jurisdiction or for any other cause.

Rejection of plaint:

Order VII Rule 11 denotes that the plaint shall be rejected in the following cases:-

1. where it does not disclose a cause of action;
2. where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
3. where the relief claimed is properly valued, but the plaint is written upon a paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
4. where the suit appears from the statement in the plaint to be barred by any law;

Amendment of Pleadings and Proceedings:

The question of amendment arises in five different situations. Section 152 permits amendment to rectify any clerical or arithmetical mistakes in the Judgment. Section 153 deals with amendment of proceedings in a suit by the court, whether prayed by the parties thereto or not, for the purpose of determining the real question or issue between the parties. Order I Rule 10(2) deals with amendment by striking out or adding parties. Order VI Rule 16 enables the court to order amendment in specified situations, of pleadings of a party *suomotu* or at the instance of the other party.

Order VI Rule 17 enables a party to seek amendment of his pleadings i.e. plaint or written statements at any stage of the proceedings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Rule 18 of the Order VI stipulates that if a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

Service of Summons:

After a plaint has been instituted, the question of service of summons comes. The issue and service of process is very important and the court is to be satisfied about the service of process on the defendant before proceeding further in the suit. Section 27 to 29 and Order-V deals with the issue and service of the summons.

Appearance of Defendants:

If the defendant is willing to contest a suit, he has to appear before the court and present his defence by presenting a 'written-statement' and the written statement must be prepared in accordance with the rules stipulated in Order-VIII.

Appearance and consequence of non-appearance:

It is an accepted rule of judicial procedure that the court shall decide a civil action in presence of the parties concerned. However, if a party fails to be present before the court, the court shall decide the case in his absence. Yet there is another rule of judicial procedure that the party in whose absence the case has been disposed, may order the disposals be recalled of and get his case restored to file on satisfying the court that his absence was neither willful nor negligent that he was prevented by certain circumstances from being present in the court for which he cannot be held to be responsible. The provisions of Order IX have been enacted to give effect to these rules of judicial procedures. Under Order IX Rule 13 decrees passed in *Ex parte* may be set aside, and under Rule 9 of the said order dismissal order for default may be set aside.

Mediation and Arbitration:

The civil courts are over burdened with suits and cases and for curbing this problem, new provision of mediation and arbitration has been introduced in section 89 A-E. However, litigants are not much interested in mediation and arbitration rather they prefer to continue the suit.

Framing of Issues:

It is the duty of the courts to frame proper issues for effective adjudication of the suits. However, the lawyer on behalf of their parties can suggest issues and Order-XIV deals with the settlement of issues and determination of suit on issues of law.

Steps under section 30 procedure laid down in Order-XI

A party desiring to examine the documents in possession of the opposite party has to take steps under section 30 for the purpose of discovery and inspection of such kind of documents. The procedure is laid down in Order-XI. As per Rule 21 of this order where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall if a plaintiff, be liable to have his suit dismissed for want of prosecution and, if a defendant, to have his defence, if any struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

Admission under Order-XII:

Although provisions were made for admission of facts and documents under Order-XII, these provisions are not in practice in our courts generally.

Disposal of the suit at the 1st hearing:

Though there is provision of disposing the suit at the 1st hearing as per Order-XV, these provisions are not in practice in our courts normally.

Hearing of the Suit and Examining of Witnesses:

Witness to be examined in open Court; summons for attendance of witnesses is given under Order XVI. At the time of hearing, adjournments may be given under Order XVII and hearing proceeds under Order XVIII of CPC following the procedure laid down in Evidence Act-1872 as well. After conclusion of hearing the pleaders of the parties participates in arguments, which may be both legal and factual but in the code there is no provision of argument.

Judgment and decree:

The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow as per provision of section 33 which follows the procedure of Order XX of the Code.

Res Judicata:

Section 11 of the Code prohibits adjudication of the same issue between the same parties more than once in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent issue or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The provision of this section is mandatory.

Res Sub-Judice:

Section 10 of the Code prevents the Courts of concurrent jurisdiction from simultaneously adjudicating two parallel litigations in respect of the same subject-matter and thus the possibility of conflicting decisions is avoided.

Transfer of Suits:

Under sections 24 of the Code the District Judge and the High Court Division have the powers to transfer suits at any stage from one court to another.

Costs:

Under section 35 of the Code the Court has jurisdiction to impose costs upon the parties.

Incidental Proceedings**Commissions:**

Under section 75 of the Code provision had been laid down for commission subject to such conditions and limitations as prescribed in Order XXVI of the Code. Commission may be issued

1. to examine any person
2. to make a local investigation
3. to examine or adjust accounts
4. to make a partition

Supplemental Proceedings:

Section 94 of the Code made supplemental proceedings in order to prevent the ends of justice from being defeated and if it is so prescribed the Court may-

- a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security, commit him to the Civil Prison; (relevant rules Order XXXVIII regarding arrest before Judgment).
- b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property; (relevant rules Order XXXVIII regarding attachment before Judgment).
- c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold; (relevant rules Order XXXIX regarding Temporary Injunction and Interlocutory orders including Local Inspection).

- d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property; (relevant rules Order XL regarding Appointment of Receivers).
- e) make such other interlocutory orders as may appear to the Court to be just and convenient.
- f) It may be mentioned here that under Section 95 of the Code provision has been made for compensation for obtaining arrest, attachment or injunction on insufficient ground.

Miscellaneous Proceedings:

Under section 141 of the Code the procedure provided in the Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction.

Enlargement of Time:

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired (section 148 of the Code).

Inherent Powers of the Court:

Peacock CJ observed that “Since the laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen.....: “Hence, in order to do that real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the court the court has the inherent powers to make such order as may be necessary for the ends of justice under section 151 of the Code. When there is specific provision this power should not be exercised by the Courts although this power is very wide and residuary in nature and not controlled by any other provision of the Code, it should be exercised judicially.

Death, Marriage and Insolvency of Parties: Order XXII-

Order XXII deals with the creation, assignment or devolution of interest during the pendency of suits brought about by the death of a party (r 1 to 6), his marriage (r 7) his insolvency (r. 8) or other circumstances, such as transfer inter vivos, etc (r 10). The provision of the Order cannot be applied before the institution of the suit nor after the suit has been disposed of. By virtue of Rule 11 the provision of this order applies to appeals.

Withdrawal and Adjustment of Suits:

Order XXIII deals with the provision of withdrawal and Adjustment (usually known as compromise) of Suits at any time after institution of the suit.

Execution of decree and order:

Part II of CPC containing section 32 to 74 deals with execution of decrees and the procedure laid down in Order XXI which has the highest numbers of Rules. Usually the court which passed the judgment and decree (Court of First Instance) or order execute the same and in the execution process the court cannot go beyond the decree. By execution the court enables the decree holder to realize the fruits of the decree. The numerous Rules of this Order take care of different situation providing effective remedies not only to the decree holder but to the judgment debtors and also the claimant objectors.

Appeals:

Appeal has not been defined in the Code; but it is meant to be an application by an aggrieved party asking the Appellate Court to set aside, modify or revise a decision of the sub-ordinate court. An appeal is a creation of statutes. Sections 96 to 112 of the Code enumerate the provisions of Appeal as substantive law and the procedure have been laid down in order XLI to XLIII of the CPC.

As per Section of 107 of the Code the Court of Appeal has all the powers of the Trial Court including the power of:

- a) to determine a case finally,
- b) to remand a case,
- c) to frame issues and refer them for trial,
- d) to take additional evidence or to require such evidence to be taken.

Order XLI deals with appeal from original decree and Order XLIII deals with appeals from orders.

Revision:

The power is supervisory and discretionary and can be exercised by both District Judge and High Court Division under section 115 of the CPC. Section 115(1) of the Code confers power upon the High Court Division to call for record and to interfere with the Judgment and decree or order passed by a Court of District Judge or Additional District Judge, or a decree has been passed by a Court of Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeal lies; and if such Court appears to have committed any error of law resulting in an error in such decree or order occasioning failure of justice, the High Court Division may, revise such decree or order and, make such order in the suit or proceeding, as it thinks fit.

On the other hand, section 115(2) of the Code enunciated that District Judge may call for record of any suit or proceedings in which an order has been passed by a court of a Joint District Judge, Senior Assistant Judge or Assistant Judge, from which no appeal lies; and if such Court appears to have committed any error of law resulting in an error in such decree or order occasioning failure of justice, the Court of District Judge may, revise such order and make such order as it thinks fit.

Under section 115(4) High Court Division may grant leave to examine and pass necessary orders against an order passed by the District Judge under section 115 (2) of the Code. The Code does not prescribe any specific procedure to be followed in revision and it has been left to the discretion of the revisional court, the power which has to be exercised judicially.

Review:

Under section 114 of the Code against a decree or order from which an appeal is allowed by the Code, but no appeal preferred and by a decree or order from which no appeal is allowed by this code review is maintainable in the court which passed the decree or made the order. Order XLVII deals with the rules of Review.

Reference:

Section 113 of the Code states that subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court Division, and the High Court Division may make such order thereon as it thinks fit. The relevant Rules are in Order XLVI.

Suits in Particular Cases:

Suits against Government: Section 79 to 88 deals with the suits against particular cases i.e. against the government aliens, foreign states etc. Under section 80 before institution of suit against the government in respect of any act purporting to be done by such public officer in his official capacity, a two months notice have to be served. Concerned Rules are in Order XXVII. If any suit is filed involving any substantial question as to the interpretation of Constitutional laws as per provision of order XXVII A notice have to be given to the Attorney General and Court may add Government as party in such a suit.

Suits by or against Military or Naval Men or Airmen: Order XXVIII of the Code

Suits by or Against Corporations: Order XXIX of the Code.

Suits by or against Firms and Persons carrying on business in names other than their own: Order XXX of the Code.

Suits by or against Trustees, Executors and Administrators: Order XXXI of the Code.

Suits by or against Minors and Persons of Unsound Mind: Order XXXII of the Code.

Suit by Paupers: Order XXXIII.

Suits Relating to Mortgages of Immovable Property: Order XXXIV.

Summary Procedure on Negotiable Instruments: Order XXXVII

Interpleader Suit:

Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself. Under section 88 of the Code provision of Interpleader Suit had been codified and the related Rules are in Order XXXV.

Representative Suits:

The general Rule is that all persons interested in a suit are to be joined as parties so that the matter in dispute may be finally adjudicated. Rule 8 of Order I of the Code provides an exception to the general rule to facilitate decision of questions in which large number of persons is interested without recourse to the ordinary procedure. In case where the common right or interest of a community or members of an association or large sections are involved, there may be insuperable difficulty in institution of the suit under the ordinary procedure. The Rule may be availed of and a representative suit can be filed where many people have the same interest in the subject matter of the suit.

Conclusion:

Civil Courts are dealt by the Code of Civil Procedure. In short span of time it is difficult to discuss and explain the Code. The numerous provisions of the CPC covering so many aspects of the Civil Litigations are still so novel that when I go through it I find new explanations. It is important to know where the provision of what lies within periphery of the Code. In preparing my note I went through the Code itself and the most welcomed book on the Code namely “The law of Civil Procedure” by Mahmudul Islam and Pobir Neogi. I am grateful to the Young Lawyers at Chittagong University (YLCU) [Currently Society for Critical Legal Studies (SCLS)- The Editorial Board], and specially to Mr. M. Jashim Ali Chowdhury for inviting me in this great occasion. Thanks to All.