



Analysis of Section 9 of CPC and provision as to affidavit and verification of pleading

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Abstract

The fundamental principle of English Law that wherever there is a right, there is a remedy has been adopted by Indian Legal system also. In fact, right and remedy are two sides of the same coin, and they cannot be separated from each other. Accordingly, a litigant having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. Through this article we tried to answer some question which are as follows.

Keywords: Section 9, civil nature, CPC and provision

Introduction

- Meaning of the word 'Plaint' and 'Suit'.
- Meaning of Pleadings and requirements of pleadings.
- What if pleadings are not verified.
- Affidavit and effect of its additional requirement over verification.
- Section 9 of Code of Civil Procedure, 1908.
- Why the section 9 uses word 'suit of civil nature' and not civil suit?
- How to examine whether suit is of civil nature or not?
- Express and implied bar to section 9.

Plaint

1. **Section 26:** Institution of suits: Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.
2. **Such other manner:** means petition (in Hindu marriage act we institute suit by filing petition) or application (under Indian succession act we make application) etc.
3. A document which contains the (verification and) Cause of action (ii) prayer clause i.e., relief (iii) some technical pleading- pleading as to suit within limitation, not barred by res judicata, proper valuation of court fee and submission of court fee as per suit valuation, that the court has jurisdiction to try that matter etc.
4. O4 R1 read with section 26.
 - a. Every suit shall be instituted by presenting plaint in duplicate (2 original copies) to the Court or such officer (e.g., registry of court) as it appoints in this behalf.
 - b. Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.
 - c. The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2)].

Suit

Once the plaintiff filed the plaint after those whatever proceedings takes place until the final decree of the suit

(even appeal etc) will be called the suit. Suit is not a static thing rather suit is a set of proceeding initiated with the filing of the plaint.

Pleading: Order 6 Rule 1

"Pleading" shall mean plaint or written statement. Pleading includes

- **Plaint:** filed by plaintiff
- **Written Statement:** filed by defendant in reply to plaint.
- **Replication:** is a pleading by plaintiff in answer to defendant's plea (written statement).
- **Amendment of pleading:** any change in plaint or written statement.
- **Rejoinder:** reply by defendant on reply of plaintiff (replication).
- **Addition Written Statement:** court ask additional written statement if not satisfied with the old one.
- **Set off; counter claim:** amount's adjustment.
- **WS to set off and counter claim:** reply to set off and counter claim.

Requirement of verification of Plaint: Order 6 Rule 15

1. Who will verify either:
 1. every pleading shall be verified at the foot by the party or
 2. by one of the parties pleading or
 3. by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
2. The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.
3. The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.
4. The person verifying the pleading shall also furnish an affidavit in support of his pleadings: Ins. (inserted) by Act 46 of 1999 (w.e.f. (with effect from) 1-7-2002).

What if pleadings are not verified?

1. If the pleading is not verified initially then it can be verified later also, it is not a material defect and it can be verified even after expiry of period of limitation. Here, suit shall be deemed to be made at the time of filing of plaint even though the verification were laid down later.
2. In *Bhikhaji Keshav Joshi v Brijlal Nandlal* 1955 SC: It was held that the plaint will not be rejected merely on the ground that the pleadings were not verified. It is a curable irregularity under section 99 of CPC. The appellate court will not set aside the decree. In such cases normally, the court will order an amendment of pleading to add the verification.

Amendment Act of 1999 (w.e.f. 1-07-2002)

By amendment under section 26(2) and O6 R15(4) additional requirement of affidavit other than the verification.

Affidavit and effect of its additional requirement over verification

1. It is declaration on oath either before court or oath commissioner, in which one declares that whatever he is stated is correct i.e., true to his knowledge or believed it to be true to the information received.
2. **O6 R 15 (4)** The person verifying the pleading shall also furnish an affidavit in support of his pleadings: Ins. (inserted) by Act 46 of 1999 (w.e.f. (with effect from) 1-7-2002).
3. **Section 26 (2)** In every plaint, facts shall be proved by affidavit.
4. **Affidavits in support of pleading (S26(2) and O6 R15(4)):** Normally if a false affidavit has been filed then the person (deponent) shall be liable under 193 IPC for perjury. But in actual practice if false affidavit has been filed in support of pleading, then the deponent is not made liable under s 193 of IPC. Filing of false affidavit therefore, has become just a routine and same reforms have been suggested by some jurist and lawyers that such affidavit of pleading shall be accompanied by lawyers' certificate that he has examined the overed facts and the documents and that he finds them to be file for submission before the court. Also, there should be a declaration by the deponent that if his averments are found to be false then he will be liable for criminal prosecution. However, the suggestion has not yet been added.
5. **Evidence Act:** Affidavit is not evidence for the purpose of IEA. That means if one has to prove some fact, he has to being or produce evidences i.e., through witnesses or documents.
6. **But O19 R1:** Court has discretion that the court may require a fact to be proved by affidavit. But normally court doesn't exercise its discretion because court also knows that a person can file a false affidavit as well.

7. **Conflict in Indian Evidence Act, 1872 and Order 19:** As on this point cpc is special law therefore it will prevail.

8. **By 2002 amendment O 18 R4:** that every examination in chief to be filed in the form of an affidavit. Copy of such affidavit to be given to opposite party. Here it is not that such witness filed an affidavit and the fact is proved. The opposite party has always the right to cross examination. But cross examination will be done before the court only or before the commission so appointed. Purpose of O19 R4 is to save the time of court.

9. **Sudha Devi v M.P. Narayana 1988 SC:** Affidavit are not evidence for the purpose of the term evidence for the purpose of the term evidence under IEA. Thus, a fact cannot be proved merely on the basis of an affidavit rather the party has to produce oral or documentary evidence to prove a fact. However, the court has discretion under O19 R1 to require a fact to be proved by an affidavit with recorded reason.

10. **O18 R4 and O19 R1:** if affidavit filed is false then such deponent will be liable for perjury i.e., for giving false evidence under s 193 of IPC because affidavit is on oath.

11. **Salem Advocate Bar Association, Tamil Nadu v UOI 2005 SC, 3 Judges bench, by Justice Y.K. Sabharwal:** Issue- It is not illegal and unnecessary to require affidavit in addition to verification? The court held that the requirement of affidavit above the requirement of verification is not illegal and unnecessary. Additional requirement of affidavit helps in avoiding frivolous litigation and false pleading. It has the effect of putting additional burden on the deponent as to the truth of the facts stated in the pleading. It has been made clear that such an affidavit would not be used as evidence for trial. It has also been stated that on amendment of the pleading a fresh affidavit shall have to be filed in consonance thereof.

Section 9 of Code of Civil Procedure, 1908

Section 9 of **Code of Civil Procedure, 1908** (hereinafter referred as 'CPC') structured on the basic principle of civilized jurisprudence that absence of machinery for enforcement of right renders the right nullity. Section 9 is gateway to CPC, and it complements the maxim "ubi jus ibi remedium" which means where there is a right there is a remedy.

Every court has jurisdiction to try any suit of civil nature and it is implicit that every individual has inherent right to file any suit of civil nature in any court. But subject to-

1. Restrictions provided under CPC itself for example under O2R2, RJ, O22R9, O23R3-A, other provision as to pecuniary or territorial jurisdiction.
2. Or where cognizance of suit expressly or impliedly barred under other laws.

Unichem Laboratories Ltd vs Rani Devi and Another (2017 SC)

Abdul Gaffur and Another vs State of UK and Another (2008 SC)

Ganga Bai vs Vijay Kumar (1974 SC)

In these cases, the Supreme Court held the following points

- Section 9 actually serves the purpose of ubi jus ibi remedium.
- Section 9 declares the inherent jurisdiction of every court upon all suits of civil nature and therefore every individual has inherent right to file a suit of civil nature.
- The courts have a plenary (wide) jurisdiction upon all suits of civil nature. There cannot be any unreasonable restriction upon the jurisdiction of civil courts. Nevertheless, the above is subject to the provisions of CPC and any express or implied bars in any other law.
- the burden of proving a lack of jurisdiction lies upon the party who claims the lack of jurisdiction otherwise the court always starts with the presumption that it has jurisdiction.
- Narrow interpretation should be given to restrictions.

Additional points in Ganga Bai case

- There is no need for the plaintiff to prove a separate law which confers a right to sue upon him. Rather it is implicit in section 9 itself that he has the per se right to file a civil suit in a civil court.
- There is different between right to file suit (i.e., inherent right) and right to appeal (i.e., statutory right).

What is civil suit?

In Layman's term civil means which is not criminal i.e., we see it in contradiction with criminal. i.e., suit filed for enforcement of any civil legal right is known as civil suit.

Why the section 9 uses word 'suit of civil nature' and not civil suit?

Assume at some point of time religious or social issues are also involved with civil legal right. For example, in Ayodhya ram Janam Bhumi matter there was one question as to who owns the property: i.e., who has the legal right to that property. But it also involves some religious matter like whether Ayodhya is Ram Janam Bhumi or not. Whether Namaj can be read only in Mosque? Is it compulsory to read namaj only in Mosques? But along with these religious issues there is one main issue was also involved i.e. question as to who is entitled to that property and does that Akhada has right to construct temple there? Thus, this also involves question as to civil legal right.

Another example on this point is in Bhoori Nath v State of Jammu and Kashmir (1997 SC) case which is popularly known as Vaishno Devi Shrine Case. Where the main issue is as to large scale mismanagement of funds and lack of any kind of safety measures for protection of devotee and other tourists and as to lack of infrastructure. In this case State interfered in this matter and appoints chief priest. On that the issue arises and it involves mainly two kinds of issues. That are.

- Legal Issue: Does the state have the power to take over management and to appoint head priest?

- And also, some religious issues i.e. how to perform pooja, who will do pooja, whether existing priest have hereditary right to be priest (chief priest), whether goddess Durga visited their house and directed to construct the temple?

One more example on this point is in Shayara Bano and Other v UOI and Other 2017 SC- case which is popularly known as Triple talaq case. Where the main issues are

- as to constitutionality of triple talaq.
- Husband's right to give triple talaq (question involving legal right)
- Wife's right not to give talaq in such a way (question involving legal right)
- Wife's right to dignity, right to equality, right against cruelty, natural justice's right- (question involving legal right)

but answer to this question dependent upon some pure religious question i.e., does holy Quran allow divorce of this kind or not? Whether Prophet Mohd. had prohibited this form of talaq and whether other Islamic country also follow such kind of practices or whether they have banned triple talaq.

How to examine whether suit is of civil nature or not?

The approach in such cases will be firstly to examine the cause of action of the suit and then also to examine matters in issue and the relief claimed. Thereupon the various issues involved in the suit must be carved out and it must be seen as to which issues are the main issues and whether such main issues are related to civil legal rights or not. If yes then even if such issues are dependent upon some purely social or religious rights, the suit will be called a suit of civil nature.

Thus, civil suit means a suit in which the violation of some pure civil right is contested. However, there may be a suit in which the main issue is the enforcement of a civil legal right only but at the same time there are some social or religious issues involved and thus the suit does not remain to be a pure civil suit. Nevertheless, as the main issue to be determined is that of a civil legal right only it will be considered to be a suit of civil nature and it will be allowed under section 9.

Section 9 uses the words 'suit of civil nature' instead of 'civil suit'. By using the word civil nature section 9 positively expands the scope of the jurisdiction of a civil court. However, at the same time it is negative also as it imposes restrictions upon the jurisdiction of the court.

Some examples to examine whether they are suit of civil nature or not.

1. Suit for contribution of funds for holding religious festivals

No one has a legal right to obtain money from someone else for religious festivals and therefore it may be a social issue but not a legal issue. However, if the opposite party had made a promise to give the subscription and on the faith of that promise the said party has altered his position to his

own detriment then under the law of contract it becomes a legal right to obtain the money and hence the suit will be a suit of civil nature.

2. Suit by wife to obtain an injunction against her husband to prevent him from getting into a bigamous marriage.

In such cases practically the court doesn't grant the relief of perpetual injunction as other equally efficacious reliefs are available for instance, she can obtain divorce from the husband or can get him criminally prosecuted him for bigamy. However here the issue is not whether she will get relief or not, rather the issue is whether she has legal right or not. And if he has, then it is a suit of civil nature. Actually, in such cases the legal right involved is section 38 (1) of Specific Relief Act, 1963 and her right to preserve her marriage and therefore it will be a suit of civil nature.

Most reverend PMA Metropolitan and others v Morem Mai Mahatma, (1995 SC)

- Section 9 has both positive and negative dimension.
- The word 'shall' used in section 9 clearly makes it mandatory for the court to exercise its jurisdiction subject to the restrictions.
- The word civil nature means the civil courts have jurisdiction upon not only pure civil suits rather also these suits in which apart from the civil legal rights some socio-religious issues are also involved.

Express and implied bar

These may be a special law on the matter which may exhaustively deal with that particular subject matter and it may create a special court regarding which it is expressly provided that all disputes related to that law shall be tried by that special court only. In such cases it will be said that exclusive jurisdiction upon those matters has been given to that special courts and therefore it amounts to an express bar upon the ordinary civil courts to try matter pertaining to that particular subject matter. Such a clause in any special law is called as the finality clause.

Special courts or tribunals made by certain Act.

These maybe some special laws which do create a special court to try the matters pertaining to that law, but it may not expressly declare the exclusive jurisdiction as the word only or alone has not been used. In such cases the overall purpose and the various provisions have to be examined and also the terms of reference of that special court have to be examined and from there it has to be inferred whether the intention is to create an exclusive jurisdiction. If such intention is manifest, then it will be said to be an implied bar upon the jurisdiction of the ordinary civil court.

Example: matters reserved for special courts are.

- Insolvency matter, company law tribunal
- Probate matter, rent controller
- Labour matter, admiralty court
- Income tax matter, family court
- For motor accident claims – MACT etc

As to subject matter jurisdiction

The concept of subject matter jurisdiction is implicit. Any special court will have jurisdiction upon the subject matter pertaining to that special law but an ordinary civil court will

have subject matter jurisdiction upon all subject matter excluding those subject matter which are expressly or impliedly reserved for the special courts.

United India Insurance Co. Ltd v Ajay Sinha, 2008 SC

It was held that any principle of exclusion of jurisdiction of a civil court shall be given a strict interpretation. As the general rule is that a civil court have jurisdiction on all suits. Subject matter jurisdiction has not been expressly provided for in the CPC i.e., there is no provision in the CPC which expressly provides as to which court will have subject matter jurisdiction. It is from other laws that it has to be derived as to which court will have exclusive jurisdiction upon what subject matter and accordingly the subject matter jurisdiction of ordinary civil court can be found out.

A lack of subject matter jurisdiction is called on inherent lack of jurisdiction which means that the said court never had jurisdiction to try that particular suit. If a decree has been passed by a court not having the subject matter jurisdiction, then the decree will be void and can be per se set aside in appeal. Also, a fresh suit on the same matter can be filed.

Implied Bar

If statute is silent as word 'only' or 'alone' is not used for jurisdiction. However, created a special court or tribunal. Their intention has to be inferred form the statute.

In Dhula bhai v State of MP (1968 SC) Supreme Court speaking in a five Judges Bench, speaking through Mohd. Hidayatullah J. held that despite the express or implied bar the ordinary civil courts may still have jurisdiction to try the suits pertaining to that law in the following situations-

1. The statute itself is ultra vires (i.e., unconstitutional) and therefore the tribunal also becomes ultra vires.
2. The statute and the tribunal are not ultra vires, but the tribunal has acted in violation of the express provisions of statute.
3. No specific provision of the statute has been violated but the tribunal has grossly violated the principles of natural justice.
4. The act does not provide for adequate remedies and therefore the tribunal also refuses to grant the relief.

In all above cases the relief can be obtained from the ordinary civil courts.

Section 9 explanation 2

If a person claims a right to hold an office, then the suit will be of a civil nature irrespective of the fact that such office involves some salary or whether the office is located at any fixed place. The main issue is whether the office involve some legal right or not. If yes, then the suit will be of a civil nature.

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