DRAFTING RULES & SKILLS

Drafting in its general connotation means, putting one's own ideas in writing. Drafting of any matter is an art. Drafting of legal matters requires greater skills and efficiencies. It requires thorough knowledge of law, procedure, settled judicial principles, besides proficiency in English Language. A perfect drafting of matters in relation to Suits, Applications, Complaints, Writ petition, Appeals, Revision, Reviews and other such matters connected therewith shall obviously leads to good result in terms of money, time, energies and expectation of not only the learned members of the Bench, but also the Bar as well as the parties to the litigation. It creates a congenial atmosphere where the glory of the judiciary and the Law grows to sky-heights. So in the case with regard to the drafting of Deed of Conveyancing.

"Drafting, Pleadings and Conveyancing" (DPC) is made as a compulsory practical subject study forming part of the curriculum of the Law Course in India. It envisages, *inter alia,* drafting of Civil Pleadings; Criminal complaints and other proceeding; Writ Petition, Appeal-Civil, Criminal and Writ; Revisions-Civil and Criminal, Reviews, Writ Appeals-Civil and Criminal, and also Special Leave Petition; Contempt Petition, Interlocutory Applications, etc. A student who acquires the requisite knowledge, perfection and proficiency in drafting of these matters, shall undoubtedly become a perfect legal professional. He will be an asset in the legal world.

History of Pleadings

The method of arriving at an issue by alternate allegations has been practised in the civilized countries from earliest times. The art of pleadings apparently is as ancient as any portion of our procedural law. In ancient India it certainly existed but not in the present form. The art of pleading is also traceable in substantially the same in form in England in the days of Henry II. The "issue" is found in the year, i.e., in the first year of the reign of Edward II. It shows that the art of arriving at an issue was not only practised during the reign of Edward II but had been practised even before "for an issue had not been only the constant effect, but the professed aim and the object of pleading". At first the pleading were oral. The parties actually appeared in person in open Court and oral altercation took place in the presence of the judges. These oral pleading were conducted either by the party himself or by a person who was an eloquent orator and well versed in *Dharma Sastras* and *Koran* whom people generally called *Pandit* and *Maulvi* in ancient and medieval India respectively. In English countries such person was called *narrator* and *advocates* before the adoption of this present lawyers' institution. *The Pandits, Maulvis* and *narrators* helped Kings and Judges in the administration of justice in those days.

The duty of the King and the judge was to superindent of 'moderate' the oral contentions conducted before him. His aim was to arrive at some specific point or matter affirmed on the one side, and denied on the other, which they both agreed was the question requiring decision; on resulting this the parties were said to be 'at issue' and the pleading were over. The parties, then, were ready to go before a jury if it were an issue of England. In those days the judges were very strict and they never allowed more than one issue in respect of each cause of action.

When a defendant more than one defence to the plaintiff's claim he had to elect one out of the defences. Since the reign of Queen Victoria the parties were allowed to raise more than a single issue, either of law or fact.
During *Viva voce* altercation an officer of the court was busy writing on a parchment roll an official report of the allegation of the parties along with the act of Court which together was called record. As the suit proceeded similar entries were made from time to time and on the completion of the proceedings, the roll was preserved as perpetual judicial record. When each pleader in turn started borrowing parchment roll and entered his statement thereon himself, the oral pleading fell into disuse on thus obvious defect. Later, with the development of print machinery, paper etc. the method of drawing up the pleading on the plain paper and their interchange between parties started and this happened probably in the reign of Edward IV. The Judicature Act 1873 in England brought in many reforms in the realms of pleading like which with frequent changes are still in force. The modern Indian law of pleading like any other law is based on English system and the whole law civil pleading is governed by the Code of Civil Procedure which lawyer has to master over for the thorough knowledge of practice and procedure required in a civil litigation.

Meaning of Pleadings
Pleadings are the statement of facts in writing drawn up and filed in a Court by each party to am case stating therein what his contention shall be at the trial and giving all such details as his opponent will need to know in order to prepare his case in answer. In India there are only two pleading in a suit as defined under Order 6, rule 1 of the Code of Civil Procedure, it says that pleading means "Plaint or Written Statement". This definition is not very clear in itself. The plaint and written statement are defined in the following clauses:

(a)Plaint: A statement of claims, called the "plaint" in which the plaintiff sets out his cause of action with all necessary particulars; and

(b)**Written Statement:** A statement of defences, called the "written statement" **which** the defendant deals with every material fact alleged by the Plaintiff in the plaint and also sets any new facts which tells in his favour, adding such objection as he wishes to take to the claim.

Beside the plaint and the written statement, order pleading that may be filed, may be classed under two heads: (i) subsequent pleadings, and (ii) additional pleadings.

(i)Subsequent Pleadings: The only subsequent pleading which is filed as a matter of right, without the leave of the court, is a written statement of a plaintiff by way of defence to a plea set-off set up by a defendant in the written statement of his defences. No other pleading subsequent to the written statement of a defendant other than that by way of defence to a plea of set off can be presented except with the leave of the court and upon such terms as the court may think proper. But the Court may at any time require a written statement or an additional written statement from any of

the parties and fix a time for presenting the same (O.8, r.9). Any ground of defence which has arisen after the institution of the suit or the presentation of the written statement, may be, raised by the plaintiff or the defendant as the case may be, in his written statement (O.8, r.9). This is also a subsequent pleading. The subsequent pleading, i.e., this written statement in some states is also termed as “replication”. This term was formerly used in England where plaintiff’s written statement is now called “reply”.

(ii)**Additional Pleading**: Although no pleading subsequent to the written statement of a defendant other than by way of defence to a plea of set-off can be presented without the leave of the court, yet the court may at any time require a written statement or additional written statement from any of the parties, i.e., plaintiff or defendant or both (O.8, r.8). The additional pleadings are not subsequent pleadings in the true sense of the term. They are pleading by way of further and better statement of the nature of the claim or defence or further and better particular of any matter or state in the pleadings. These pleading may be ordered under order 6, rule 5 of the Code of Civil Procedure.

Under the English Law, pleading has been defined as follows: “pleading includes any petition or summons and also include the statement in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of reply of the plaintiff to nay counter-claim of a defendant.”

Function and Object of Pleadings

The object of pleadings is to assist the Court and the parties to the dispute in its adjudication. Its function is of multi-dimension, and is in various ways. Stable j., *Pinston v. Loyds Bank Ltd., (1941) 2 K.B. 72,* has expressed the function of pleading in the following words:

> “The function of a pleading is not simply for the benefit of the parties but also and perhaps primarily for the assistance of a Court by defining with precision the area beyond which without the leave of the court, and consequential amendment of pleading, conflict must not be allow to extend”.

“The while object of pleading is to give a fair notice to each party of what the opponent’s case is to; ascertain with precision, the points on which the parties agree and those on which the they differ and thus to bring the parties to is also a definite issue. The purpose of pleading is also eradicate irrelevancy. The parties, thus themselves know what are the matters left in dispute and what facts whey have to prove at the trial. They are saved from the expense and trouble of calling evidence which may prove unnecessary in view of the admission of the opposite party. And further, by knowing before hand, what point the opposite party raise at the trial they are prepared to meet them and are not taken by surprise as they would have

been, had three been no rules pleadings to compel the parties to lay bare their cases before the opposite party prior to the commencement of the actual trial".

Truly speaking the object of the pleading is to narrow down the controversy of the parties to definite issue. The sole object of pleadings is that each side may be fully active to the question that are 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 Court has no power to disregard the pleading and reach conclusions that they think are just and proper.

A few year ago Hon'ble Mr. Justice Lord William of the Calcutta High Court in the case of, strongly emphasize the need of careful study of the art of pleading and condemned the obscure pleading which were shocking and were filed even in Calcutta High Court. It is, therefore, the duty of every advocate to take extreme care in drafting of his pleadings. There is no force in saying that the pleading in this country are not to be strictly construed. Has this been the object of the law of pleading the framers of the Code of Civil Procedure would not have laid down the rules of civil pleadings.

A select committee of eminent lawyers having knowledge of Indian conditions was appointed to frame the present Code of Civil Procedure which has been amended and redrafted in 1976. Order 6, 7 and 8 of the Code of Civil Procedure are very important from the point of view of drafting of pleading in the High Court and Mofussils Court. Appendix A to the Code of Civil Procedure contains some model form of pleadings which are useful. Unfortunately these forms are seldom consulted by the mofussil pleader the reason being that the pleadings are being drafted by their clerks who are not trained in this direction and do not have legal knowledge.

The pleading should always be drawn up and conducted in such manner so as to evolve some clear and definite issues i.e., some definite propositions of law and/or fact, asserted by one party and denied by the other. But both the parties must agree on the points sought to be adjudicated upon in action. When this has been fairy and properly ascertained then following advantages flow from pleadings:

(i) It is a benefit to the parties to know exactly what are the matters left in dispute. They may discover that they are fighting about nothing at all; e.g. when a plaintiff in an action of libel finds that the defendant does not assert that the words are true, he is often willing to accept an apology and costs, and so put an end to the action.

(ii)It is also a boon to the parties to know precisely what facts they must prove at the trial; otherwise, they may go to great trouble and expense in procuring evidence of facts which their opponent does not dispute. On the other hand, if they assume that their opponent will not raise such and such a point, they may be taken suddenly by surprise at the trial.

(iii)Moreover, it is necessary to ascertain the nature of the controversy in order to determine the most appropriate mode of trial. It may turn out to be a pure point of law, which should be decided by judge.

(iv)It is desirable to place on record the precise question raised in the action so that the parties or their successor may not fight the same battle over and again.

Fundamental Rules of Pleadings

The English law of pleading has got four fundamental rules of pleading upon which Order 6 of the Code of Civil Procedure is based which are set out as under:

1.Every pleading must state facts and not law.

2.It must state all material facts and material facts only.

3.It must state only the facts on which the party's pleading relies and not the evidence by which they are to be proved; and

4.It must state such facts concisely, but with precision and certainty.

(1) Facts, not law

The first fundamental rule pleading is that neither provisions of law nor conclusion of mixed law and facts, should be alleged in a pleading. The pleading should be confined to facts only and it is for the judge to draw such interference from those facts as are permissible under the law of which he is bound to take judicial notice.

Illustration

It will not be sufficient to state that 'Abu Mohammad made a gift of his property' to the plaintiff. The plaintiff should allege here the gift was made, how it was accepted and how possession was delivered; because these are the facts which constitute a valid gift under Muhammedan Law. To allege that 'Abu Mohammad made a gift' will be a conclusion of law from the facts which are not to be state directly in the pleading. Secondly, in a suit for damages for negligence, it is not enough for the plaintiff to state that the defendant has been guilty of negligence' without showing how and in what respect he was negligence and how he became bound to use due care to prevent an injury to other. Thirdly, when then defendant has to reply to the claim of the plaintiff in a money suit, it is not sufficient for him to state that 'the defendant does not owe to the plaintiff'. But he must allege such factwhich go to prove that in the circumstances the defendant does not owe to the plaintiff. The defendant should state that he never borrowed from the plaintiff, or good were never ordered, or were never delivered, or that they were not equal to the sample.

It is not sufficient in a suit upon a contract for the defendant to, merely, plead the 'the contract is rescinded', The defendant must plead in what manner and by what means he contends that is was rescinded.

The fundamental rule of pleading is that a pleading shall affirmatively contain only a material fact on which the party relies and it shall not contain facts which are only evidence by which such material facts are to be proved. The reason for not mentioning the law in the pleading is that it is the duty of the court to find out and examine all plea of Law that may be applicable to the facts of the case. However, the parties can make their submission about law any time. For example, the non maintainability of the suit which is a point of law, can be urged

although no specific plea has been raised in the pleading. The rule that every pleading must state facts and not law or an interference of law has got following exceptions.

(a) Foreign Laws: The court do not take any judicial notice of foreign laws and hence they must be pleaded as facts. The status of the foreign country intended to be relied upon should be set-forth as substantially as any other facts. .

(b)Mixed question of Laws an facts: Where a questions is one of mixed law and fact, it is permissible and proper to plead both the facts and the legal conclusion. For instance, the defendant may say that the suit is barred by the law of limitation, or he may say he is entitled to set off after narrating the facts on which he bases his conclusions.

(c)Condition precedent: The Code of Civil Procedure provides that any condition precedent the performance of which is intended to be contested shall be distinctly specified in the pleading of the plaintiff or defendant (Order 6 r.6 of C.P.C.), as for instance, the legality of the notice under section 80, C.P.C.

(d)**Custom and Usage of Trades*:*** Custom and usage of any trade and business shall be pleaded like any other facts, if a party wants to rely on them. But a custom repeatedly brought before Court and recognised by them regularly is deemed to have acquired the force of law and need not be pleaded. For example, an occupancy tenant is entitled by local custom and usage to cut trees growing upon his holding it is not necessary for the occupancy tenant to plead this custom, if he wishes to rely on this right to cut the trees. Similarly, a party who wishes to rely on the usage of a particular trade and business and if it is at variance with any provision of the Contract Act, he must not plead the usage of such trade and business with its detailed incident. If it is not pleaded, no evidence to prove it shall be admitted.

(e) The facts of negligence, right or liability, unlawful or wrongful act should be specifically pleaded. Every plea of fact should be specifically raised and proved.

(2) Material facts

The second fundamental rule of pleading is that every pleading shall contain only a statement of material facts ion which the party pleading relies for his claim or defence. This rule has been enunciated in Order 6, ruke2 of the Code of Civil Procedure. The rule that the material facts should be not a technically and that an omission to observe it may increase the difficulty in the Court's task of ascertaining the rights of the parties. Further, every pleading must state facts which are material at the present stage of the suit. Now, the question arises what is material fact? The fact which is essential to the Plaintiff's cause of action or to the defendant's defence which each prove or fail is material fact.

Now, the question that what facts are material, is not very easy to answer. However, it can be said that fact is material for the pleading of a party which he is bound to prove at the trial unless admitted by the other party before he can succeed in his claim or defence. If one is in reasonable doubt about a particular fact as a material fact it is better for him to plead that fact rather than omit it because unless a fact is pleaded he shall not be allowed to prove it at the hearing of the suit. A plea of fraud and misrepresentation in a suit must set forth full particulars of fraud and misrepresentation, because these particulars constitute material facts unless raised by the plaintiff or the defendant in his pleading, he will not be allowed to prove at the trial.

Of course, a material fact can be inserted in the pleading by amendment which is the right of the plaintiff and defendant; but when a pleading is amended one is likely to be saddled with the cost of other side. When suit is brought under a particular statute, all facts which are necessary to bring the suit under the statue must be alleged. When a rule of law applicable to a case has an exception to a case has an exception to it, all facts are material which tend to take the case out of the rule or out of exception. For instance:

(1)If a childless Mohammedan widow claims one-fourth share in the property of her husband as allowed by Shia law, she must allege that her husband was a Shia.

(2)Where Plaintiff claims right of pre-emption u/s 15(2)(b) of Punjab pre-emption Act, he must plead the necessary facts in respect of his claim.

(3)Where a plaintiff claims an alternative relief, he must plead facts entitling him, for such relief.

(4)Where the question of age or time affects the right of the parties, the facts should be specifically pleaded.

(5)Every plea of facts must be specifically pleaded, and proved. Court cannot allow party to the suit to lead evidence inconsistent whit his plea inspite of object of objection by the other party is allowed to lead evidence in rebuttal does not cure the legal defect.

(6)Where a plaintiff sues on the basis of a title he must state the nature of the deed from which he has derived title.

(7)The plea that a woman claiming maintenance has lost her right due to continuous desertion or living in adultery should be specifically raised.

*(8)*Where the plea is based on custom, it must be stated in the precise form what the custom is. For instance, if a childless Mohammedan widow claims one-fourth share in the property of her husband as allowed by Shia Law, she must allege that her husband was a Shia. The following are exception to this fundamental rule of pleading.

(a)*Content of documents:* Whenever the content of document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible without setting out whole or any part thereof unless any precise words thereof are material.

Foe instance, if plaintiff's claim is based on a sale-deed, it is sufficient to state that "defendant has sold the property to the property to the plaintiff by a sale-deed dated......"

(b)*Matters of Inducement:* it means introductory or prefatory facts which should be stated in the first and second paras in the body of the plaint or written statement. Though it is not necessary yet sometimes it is desirable to commence a plaint with some introductory allegations stating who the parties are, what business they carry on how they are related and connected and other surrounding circumstances leading up to the dispute. Though these are not material facts yet these are allowed in England and hence in India too. But the matter of inducement should be reduced to the minimum need.

(3) Facts, Not Evidence

The third fundamental rule of pleading has been laid down by Order 6, rule 2 of the Code of Civil Procedure. It says that every pleading must contain a statement of material facts but not the evidence by which they are to be proved. The material facts on which a party relies are called *Facta Prabantia,* i.e. the facts to be proved , and they should be stated in the pleadings. The evidence or facts by which *Facta Probantia* are to be proved are called *Facts Probantia,* and they are not to be stated in the pleadings. *Facta Probantia* are not the facts in issue but only relevant facts which will be proved at the trial in order to established facts in issue. For instance, in a suit of damages for malicious prosecution the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He must not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge. The plaintiff is by all means entitled to tender evidence to prove this fact. Secondly, in a policy of life insurance, the condition that the policy shall be void, if the holder dies of his own hand, in the defence it is not necessary to state that the assured brought the pistol a few days before his death and made all preparation to kill himself. It is sufficient to state in defence that the assured died of his own hand. In some cases where the facts in issue and relevant facts are so mixed up that it is very difficult to separate them and if it is so the relevant facts may be stated. For example, where custom is based on village administration paper, which is the basis of claim and its sole proof. In such cases the record has to be pleaded. In the Punjab *Rewaje Aam* (customs)are contained by the Manual of Customary Law which records customs, are only evidence and it is nor necessary to refer to them in plaints.

(4) Concise Form with Precision and Certainty

The material facts must be stated in a summary form, succinctly and in a strict chronological order. All unnecessary allegations and their details should be omitted in order to attain brevity

in pleadings. Pleading is not a place for fine writing but only assertion of hard facts. It is desirable to go straight to the point and state fact, boldly, clearly and concisely and to avoid all paraphrasing and all circumlocutions. As far as possible an active voice should be preferred to passive in pleading. The same person or thing should be called by the same name throughout the pleading. The pleading shall be divided into paragraph numbered consecutively. Dates sums and numbers shall be expressed in figures, even though the pleading should be concise, it should never be obscure. It should be both concise , as well as precise. The parties cannot change the case and get the relief.

As already discussed the unnecessary facts should be omitted from the pleadings. Let us summarise them.

(1)Matters of law, (2)Matters of evidence, (3)Matters not alleged in the opponent's pleading, (4)Matters presumed by law, (5)The performance of condition precedent, (6)The words of documents, (7)Matters affecting cost only, (8)Matters not material to the case, (9)The defendant need not plead to the prayer of the plaintiff, (10)The defendant need not plead to the damages claimed or their amount. The above details should not be pleaded in a pleading.

A good pleader should bear in mind the following points in relation to a pleading:

(1) Describe the names and places accurately and spell them correctly and adopt the same spelling throughout.

(2) One should always avoid the use of pronoun as 'He', 'She', 'This', or 'That'. the plaintiff or the defendant should not be addressed by their names at some place and at some place by the word 'Plaintiff' and ' defendant', call them throughout your pleading by the expression 'the plaintiff' and 'the defendant' as the case may be. Where one has to distinguish between two or more plaintiff or defendant, call in your pleading, 'the plaintiff Ramashankar' or 'the defendant-Hariharan' as the case may be.

(3) A lawyers should allege all facts boldly and plainly. he should use the language of the document or the act itself; and he should not invent his own language however correct it may be, e.g. of a policy becomes void in case, "the assured shall die of his own hand." Now, inthis case while drafting the pleading instead " the assured killed himself" or he committed suicide," plead that "the assured died of his own hand."

(4) A lawyer should allege all facts boldly and plainly. He should avoid ifs and buts. As far as possible complex sentences should also be avoided. Facts should not be repeated. Pleading should be divided into separate paragraphs and as far as possible only one fact should be contained by one paragraph embodying all necessary particulars in the pleading.

(5) Every pleading shall be signed by the party and his advocate and, if the party is unable to sign the pleading it may be signed by this agent.

(6) Every pleading shall be verified by the party or the parties. A verification can also be made by any other person if acquainted with the facts of pleadings. False verification is an offence punishable by the Indian Penal Code.

(7) In cases where a corporation is a party, pleading may be verified by Secretary or by the director or by any other principal officer of that corporation who is able to depose the facts of the case. in verification clause one should denote according to the numbers of paragraph o his own knowledge and what he verified upon the information received and verified to be true.

Alternative Pleas:

Law does not prohibit a plaintiff from relying on several distinct and different rights in the alternative or a defendant from raising as many distinct and separate defences as he like. For example, a plaintiff may sue for possession of a house belonging to A, as an adopted son of A, and in the alternative under a will executed by A in the plaintiff's favour. A plaintiff may claim proprietary right in a land, or, in the alternative easementary right In an action for pre-emption the defendant is not prohibited from setting up a plea of estoppels in addition to a plea of denial of custom of pre-emption. A Hindu person claiming under a sale deed from a Hindu widow may support his claim by pleading that the widow separated during the life time of her husband and hence she was the owner of the property which she had sold to him, or in the alternative the widow was in possession for ever 12 years and thus became owner by adverse possession.

A defendant in money suit due on promissory note against him may plead that he did not execute the promissory note, and in the alternative the plaintiff claim is barred by the law of limitation. But it must be carefully borne in mind by the draftsman and separately be stated in the pleading. The Court will not allow any such pleas on the ground covered by implication unless specifically set out. Thus, in a suit by a son to set aside certain transfers made by his mother on the ground of unsoundness of mind of his mother at the time or the transfer and further averred that the donee was residing with his mother and was completely under his dominion and control and the donee knew the mental condition of the donor.

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