

Where the rulings are conflicting and cannot be reconciled, the precedent later in time will prevail⁽ⁿ⁾. According to Section 3 of the Law Reports Act of 1875, no court is bound to treat as authority any unauthorized report quoted before it^(o). But this does not apply to the judgments of the Supreme Court^(p).

2. Definitions.-- In this Act, unless there is anything repugnant in the subject or context,--

Notes. Ordinarily the meanings given in the definition clauses determines the meanings of the words, yet the rule can be departed where the context so demands keeping in view the legislative intent the objects of the law. See P 2016 SC 492; P 2016 SC 514; P 2011 SC 260; 1991 SCMR 1699; P 1988 SC 53; A 1981 SC 1; A 1920 PC 114.

Sindh Amendment Act. 2018: In section 2, the following additions and amendments shall be made:-

Before sub-section (1), the following shall be inserted:

"(A). "Alternative Dispute Resolution" means procedure for setting disputes without court trial, namely arbitration, mediation, conciliation or negotiation." (25-2-2019)

(1) "Code" includes rules:

Code. Prior to Act V of 1908 the law governing civil procedure was enacted entirely in the form of sections. A departure has been made in the Act of 1908 which draws a distinction between provisions enacting fundamental principles of procedural law and those which lay down the procedure to be followed by courts in the application of those principles ^(a). The former have been enacted as sections whilst the latter have taken the form of rules. The sections create jurisdiction whilst the rules indicate the mode in which it is to be exercised^(b). The rules and the sections have to be read in conjunction which each other^(c). The rules are made for the advancement of justice and should not be allowed to defeat the ends of justice, and are more in the nature of enabling provisions and substantial compliance with them is enough ^(d).

The sections can be altered or amended only by the legislature whilst the rules being in the nature of subordinate legislation have been made alterable by the High Courts by virtue of powers delegated to them under Part X of Civil Procedure Code^(e). In accordance with the Statement of Objects and Reasons, this division was introduced, "to enable variations to be introduced in procedure, to meet the requirements of different localities as well as enable defects to be remedied as they are discovered without resort to the tardy process of legislation."

By virtue of Section 121, the rules are to have effect as if enacted in the body of the Code^(f). However, this special status is not available to rules as amended or added by the High Court, and in the event of conflict between the sections and such rules the sections must prevail^(g). As the rules as originally enacted were framed by the same legislature which enacted the sections, they can be used for purposes of interpreting and understanding the sections. See Section 121.

(n) P 1959 L 715; A 1946 B 361; 9 IC 173 FB.

(o) A 1934 R 39; A 1932 N 137; See 1999 SCMR 2690; P 1964 D 671; P 1957 L 689.

(p) P 1961 SC 215; P 1968 L 148; P 1958 L 31; A 1926 M 20.

Section 2(1).

(a) P 1957 L 689; A 1917 C 44 FB; A 1917 C 657; A 1942 A 387.

(b) A 1917 C 44.

(c) A 1917 C 44; A 1917 C 657; A 1914 C 163.

(d) P 1971 SC 9; 2004 CLC 1266; 2000 YLR 1; P 1976 K 723; P 1973 K 147.

(e) A 1917 C 44.

(f) A 1961 SC 751; A 1954 TC 526 FB; See P 1988 SC 124.

(g) P 1973 N 54; A 1961 SC 751; A 1939 N 186 FB; A 1942 L 201; A 1942 A 387; A 1926 M 676; 22 IC 690; See P 1988 SC 124; P 1972 K 145; P 1962 K 349; P 1962 P 51.

S. 2(1)

Sindh Amendment Act, 2018: After sub-section (1), the following shall be inserted:-

(1A) "Conciliation" means a process which is conducted confidentially in which a neutral person (conciliator) actively assists parties in working towards a negotiated agreement of a dispute or difference, putting forward proposals for the settlement with the parties in ultimate control of the decision to settle the terms of resolution, the conciliator having no decision-making power or authority to impose solutions on the parties or force settlement between the parties."(25-2-2019)

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint¹ [the determination of any question within section 144, and an order under rule 60, 98, 99, 101 or 103 of Order XXI] but shall not include--

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation.-- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final:

Leg. Am. 1. Substituted by Law Reforms Ordinance (XII) of 1972 for the words 'Section 47'.

Amendments. By amendment introduced by the Law Reforms Ordinance, XII of 1972, determinations under Section 47, which were previously included in the definition of a decree, are no longer decrees. However, orders under rules 60,98,99,101 or 103 of Order 21 have been included in the definition of a decree. As a result of this amendment a fundamental change has been brought about in the law relating to execution of decrees. Previously all orders in execution finally determining the rights of the parties, (passed under Section 47), were on account of their being decrees, subject to the incidence of first and second appeal. Now however, orders passed under Section 47 have by virtue of the newly introduced Section 104 (1) (ff), been made appealable orders and by virtue of Section 2 (2) (a), cannot be classed as decrees. Orders passed under Section 47 are now appealable orders and are not subject to second appeal. A revision may lie against them in appropriate cases. However, orders under rules 60,98,99,101 or 103 of Order 21 being decrees are subject to second appeal. The total effect of the amendment is that henceforth orders made under Section 47 are not open to second appeal. See notes under Sections 47 and 104.

Decree and order. A decree means an order by one in authority, a judicial decision, an edict in law (a). Decisions given by courts of law can either be decrees or orders (b). Both must be formally expressed and be in precise and deliberate language so as to facilitate execution. The importance of a decree lies in the fact that ordinarily an appeal lies from every decree(c). Orders on the other hand are appealable only if so provided by Section 104 read with Order 43 of the Code (ca). Another difference between a decree and an order is that whilst a second appeal may lie against a decree, a second appeal shall not lie against an order passed in appeal(d). A third difference is that a decree ordinarily conclusively determines the rights of the parties(da), whilst an order does not necessarily do so(e). The mere fact that an adjudication purports only to be an order is not conclusive of its character, which has to be determined with reference to its true nature(f).

Section 2(2).

- (a) P 1975 SC 15; 2011 CLC 820; 2004 MLD 510.
- (b) P 1990 SCAJK 23; 2004 MLD 510; 1983 CLC 1165; A 1915 PC 116.
- (c) 1991 SCMR 2457; 2004 MLD 510; A 1974 SC 1126; A 1941 O 590.
- (ca) 1991 SCMR 2457; 2004 MLD 510; P 1994 P 228.
- (d) 1991 SCMR 2457
- (da) 2017 CLC 347.
- (e) See P 1974 SC 15; 2017 CLC 347; 1983 CLC 1165; A 1945 268 FB.
- (f) A 1939 M 897; A 1937 Pat 349.

B. The definition does not constitute an inter-meddler as the owner of the estate of the deceased(*n*). He is given the status of a legal representative only for the purpose of continuity of proceedings under the Code(*o*), and cannot be preferred to the true legal representative(*p*).

C. The third part of the definition covers cases of parties who sue or are sued in a representative character. In such cases the person upon whom such office devolves on the death of the party is the legal representative(*q*). For instance a *Mutawalli* filing or defending a suit does so in a representative character on behalf of all the beneficiaries and in the event of the death of the *Mutawalli* the representative of such a *Mutawalli*, for purposes of continuing the suit, will be the person on whom the office devolves by operation of law(*r*). Only a person on whom the office devolves upon the death of the last representative, is covered by the definition of the term 'legal representative'. A person newly constituted as the holder of an office is not a legal representative but is there in his own right(*s*).

Section 2 (11) is merely a defining section and does not impose any liability as legal representative upon persons coming within the definition(*t*). A decree cannot be passed against a dead man except in the circumstances enumerated in Order 22, rule 6(*u*). If the legal representatives of a deceased party are not impleaded in his stead the suit will now not abate under the provisions of Order 22. By virtue of Sections 50 and 52 a decree may be passed and executed against the legal representative. See notes under Section 50, 52 and 146 and Order 22.

Sindh Amendment Act. 2018: After sub-section (11), the following shall be inserted:-

"(11A). "Mediation" means a process which is conducted confidentially in which a neutral person (mediator) actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle the terms of resolution, the mediator having no decision-making power or authority to impose solutions on the parties or force settlement between the parties." (25-2-2019)

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession:

Mesne profits. See notes under Order 20 rule 12. Persons wrongfully deprived of the *corpus* or *usufruct* of property are entitled to claim compensation for such deprivation (*a*). Such compensation which is awarded against persons in wrongful possession of property(*b*), is known as *mesne profit*(*c*), and is claimable only by a person entitled to actual possession of such property(*d*).

- (n) A 1939 L 321.
 (o) A 1939 L 321; A 1924 A 717.
 (p) A 1939 L 321.
 (q) P 1975 L 1205; A 1948 PC 1; A 1930 A 348; A 1917 M 578.
 (r) A 1941 L 36.
 (s) A 1932 C 783; A 1924 L 251
 (t) P 1947 PC 259.
 (u) P 1962 P 105 See P 1978 L 62.

Section 2(12).

- (a) 27 C 951 PC; 2018 CLC 459; 2007 CLC 621; 2007 YLR 2067; 2007 YLR 2212; P 2004 L 103; 2002 MLD 1397; 1994 CLC 1703; A 1935 L 379; A 1916 M 328; 23 A 252; 21 C 244.
 (b) 2007 CLC 621; P 2004 L 103; P 1993 CLC 21; 1991 CLCN 269; A 1979 SC 1214; A 1946 C 357; A 1941 P 87; A 1940 M 913; A 1939 A 529; A 1939 N 23; A 1934 L 322; A 1933 M 825; A 1927 C 182; A 1922 O 91.
 (c) A 1935 L 379; A 1935 Pat. 80; 21 C 244.
 (d) 2007 YLR 2607; P 2004 L 103; A 1935 L 379.

PART V

SPECIAL PROCEEDINGS

89. [Arbitration]

Omitted by the Arbitration Act, 1940, (X of 1940) S. 49 and Third Schedule.

89-A. Alternate dispute resolution.-The court may, where it considers necessary having regard to the facts and circumstances of the case, with the object of securing expeditionjs disposal of a case, in or in relation to a suit, adopt with the consent of the parties alternate dispute resolution method, including mediation and conciliation.]”

Leg.Am: Added by Ordinance XXXIV of 2002 (27.7.2002)

Sindh Amendment Act, 2018:

In the said Act, for section 89-A, the following shall be substituted, namely:

“89-A. Alternative Dispute Resolution: (1) Notwithstanding any other laws for the time being in force, the court may use Alternative Dispute Resolution (ADR) methods to resolve cases of civil or commercial matters:

Provided that for the purposes of this section, ADR refers to mediation, conciliation and negotiation.

Provided that in all cases of arbitration, the Arbitration Act 1940 shall apply.

(2) That by submitting to the jurisdiction of the Court, the court shall presume that parties by mutual consent agree to refer the dispute for ADR if so ordered by the Court for securing expeditious disposal.

(3) That a case may be forwarded for ADR by referral of the cases to a mediator/conciliator as identified under Order X, Rule 1C of this Code, in the following circumstances:-

(i) Upon presentation of a plaint, the court shall at the first instance, examine and assess the possibility of resolving the case in a way which is to the advantage of all parties under one of the methods of ADR;

(ii) If at any stage of the case, before or after the recording of admissions and denials, the court considers there is a possibility of resolving the case in a way which is to the advantage of all parties under one of the methods of ADR;

(iii) Upon consent of all the parties.

(4) The court shall employ the following process in the circumstances identified under sub-section (3)(i) and (ii):-

(i) Upon the conclusion of the court to refer the case to ADR, the court shall issue notice to the parties to make submissions upon the next date of hearing as to why their case should not be referred to ADR;

(ii) Where no sufficient cause is shown, the Court shall refer the case for ADR to a mediator/conciliator identified in Order X Rule 1C; and

(iii) If any of the parties fails to make submission as under sub-section 4(i), the court shall proceed to refer the case to ADR.”

Provided, that the entire process as stated in sub-section (4) shall be completed within fifteen days by the Court.

In the said Act, after section 89-A, the following shall be inserted:-

“89-B. Reference by Parties: Parties who have resolved any dispute of civil or commercial nature through the use of an ADR method before initiating any legal proceeding may file an application alongwith settlement duly signed by the parties and other relevant documents in the court having jurisdiction which shall be registered as a “Judicial Miscellaneous” matter. The Court after hearing of the parties shall pass judgment and decree as under this Code.”

Note: See rule 1A added in Order 10.

SPECIAL CASE

90. Power to state case for opinion of Court.- Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Comp. Ref: 1882, S.527; 1887, S.527, 528; 1859, S.328.

Cross Ref: 0.36.

ORDER X

EXAMINATION OF PARTIES BY THE COURT

1. Ascertainment whether allegations in pleadings are admitted or denied.--At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite-party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Comp. Ref.: 1882, S. 117; 1877, S. 114.

Cross Ref.: LVI-146, 147.

Admissions and denials. Under this rule the court can record admissions and denials of the parties. This will necessarily be restricted to such allegations as are neither admitted nor denied, expressly or by necessary implication. This rule permits the court to examine the parties for the purpose of clarifying the pleadings (a) and not as a means of trial of the suit (aa). Accordingly the court may record such admissions and denials as are not made in the pleadings (b). This rule should not be resorted to where the pleadings are clear (c). The questions that the court may put under Order 10 can only be with regard to matters directly involved in the suit (d). The answers should be recorded (e), and a decree can be passed on the basis of admissions (f). An admission made by a party is binding upon it (g). By resort to the provisions of this rule admissions may be obtained, irrelevant issues and evidence eliminated, and the trial shortened (h). The trial courts should resort to the provisions of this rule in order to eliminate false and bogus litigation (ha). A court can pronounce judgment on such admissions. See Order 12 rule 6. For the effect of admission made by the pleaders, see notes under Order 3 rule 4.

¹1A. The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to

- (i) conduct preliminary proceedings and issue orders for expediting processing of the case;
- (ii) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purposes of trial;
- (iii) adopt, with the consent of parties, any alternative method of dispute resolution including mediation, conciliation or any such other means".

Leg. Am.—1. Added by Ordinance XXXIV of 2002. (27.7.02)

Order 10.

- (a) P 1983 Q 114; A 1953 SC 225; A 1922 O 178.
- (aa) 2012 CLC 704; 2004 CLD 821; 2004 CLD 1471. See P 2005 P 269.
- (b) 1980 CLC 121; P 1963 D 175; A 1952 A 355.
- (c) PLJ 1979 AJK SC 80; A 1941 S 41.
- (d) A 1930 L 229.
- (e) A 1922 O 178.
- (f) A 1934 L 540 See 10 IA 74.
- (g) A 1930 L 947; A 1926 A 710.
- (h) A 1952 A 355; 15 C 533.
- (ha) A 1977 SC 2421.

Sindh Amendment Act, 2018: In the said Act, for Order X, Rule 1A, the following shall be substituted:
 "1A.- The Court may adopt any lawful procedure not inconsistent with the provisions of this Code and adopt any method of Alternative Dispute Resolution (hereinafter referred to as "ADR") under Section 89A of this Code."
 (25-02-2019)

In the Code of Civil Procedure Act (Act No. V of 1908), the following shall be inserted after Order X Rule 1A(III):-

"1B.- When a court refers a plaint or case to ADR under Section 89-A of this Code, the following process shall be employed:-

(i) *Appointment of Mediator/Conciliator.*- The Court shall nominate a mediator/conciliator as identified under Order X Rule 1C.

(ii) *Fixing of Date and Time.*- Upon referring the case for ADR, the court shall direct the parties to appear before the appointed mediator/conciliator on the date and time fixed by the court and shall set a time for returning of the reference which shall not be more than sixty (60) days from the date of reference. The mediator/conciliator may submit a written request for extension of time period which may be extended for no longer than thirty (30) days by the Court, on showing good cause which shall be noted in a court order.

(iii) *Determination of fee.*- The Court, upon deciding to refer a case to ADR, may determine the amount of fee, if any, to be paid to the mediator/conciliator by the party or parties.

(iv) *Appearance of Parties.*- The parties to the case shall take part in the ADR proceedings in person or through an authorized representative empowered to settle the matter.

(v) *Procedure of ADR.*- In dealing with the case referred to him, the mediator/conciliator may follow such a procedure, as may be appropriate in the circumstances of the case.

(vi) *Settlement.*- If a settlement is reached between the parties, the mediator/conciliator shall prepare a deed of settlement containing terms of such settlement, signed by the parties and submit it to the Court on the day fixed by the Court together with a certificate that the settlement between the parties was voluntary.

(vii) *Preparation of Decree.*- Upon the receipt of the deed of settlement and after hearing the parties the court may pass judgment and decree in terms of the settlement.

(viii) *Failure of Settlement.*- If no settlement is reached between the parties, including if any of the parties refuses to participate in the process, the mediator/conciliator shall record the statement of the fact and submit it to the Court on or before the date fixed.

(ix) *Commencement of trial.*- If no settlement is reached within the allocated time period, the case shall proceed in Court without delay on a day to day basis.

Exclusion of Qanun-e-Shahadat 1984 and Code of Civil Procedure (Act V of 1908).- Save as otherwise provided, this Code and Qanun-e-Shahadat, 1984 shall not apply to ADR proceedings under Section 89A of this Code.

"[1C].- Subject to any standard prescribed by special law, the following organizations and persons shall be eligible to be Mediators/Conciliators under Section 89-A and Order X:-

(a) Organizations/institutions/Court-annexed mediations centers established or recognized by the Sindh High Court that specialize in ADR methods and maintain a list of mediators or conciliators with training as required under sub-clause(b);

(b) Persons, who have undergone a minimum 40 hours' skill-based training in mediation and/or conciliation and have been accredited as mediators or conciliators by a reputable organization or institution;

(c) A judge nominated by the Court to conduct ADR who has been certified as a mediator/conciliator by the Sindh Judicial Academy or is accredited as under sub-clause (b);

(d) Salis appointed under the Small Claims and Minor Offences Ordinance 2002;

(e) Any other person agreed to by the parties and upon approval of the Court in accordance with the law.

"1D.- *Prohibitions.*

(i) *Prohibition of mediator/conciliator appearing in proceedings or as witness.*- The mediator/conciliator shall not act in any capacity on behalf of any of the parties in connection with the case in other proceedings nor shall he be called as a witness in such proceedings except to attest to the authenticity of the settlement agreement.

(ii) *Prohibition of making record.*- Any information, statement, document and anything disclosed to the mediator/conciliator during ADR proceedings shall be kept confidential and no document including any transcript, formal record or audio-visual recording shall be made of the proceedings except with written approval of the mediator/conciliator and consent of the parties.

(iii) *Prohibition of production of document in any proceedings.*- No communication or any kind of documentation made during the ADR process can be produced in court with regards to the case or any other related proceedings.

(iv) *Prohibition of using information.*- No communication made in the ADR proceedings including information disclosed and views expressed shall be used in any other related proceedings whatsoever." (25-02-2019)

Cross Ref: S. 89 A.

Notes: Section 89-A allows the court to adopt alternate dispute resolution methods (*hab*). Commission to examine witnesses can also be issued under Order 26 rule 4 (*hac*).

2. Oral examination of the party or companion of party.--At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material question relating to the suit by whom such party or his pleader is accompanied, ¹[shall] be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

Leg. Am 1. Subs. by Act of 1994

Comp. Ref.: 1882; S. 118; 1877, S. 118, 119; 1859, S. 125.

Cross Ref.: LVI-148, 149.

Oral examination. Under this rule the court is empowered to examine the parties, or persons accompanying the pleaders, on any date of hearing with regard to any material question. Cross examination of a defendant should only be allowed in case of any ambiguity or contradiction (*hb*). An Appellate Court cannot summon a party under this rule (*hc*) See Order 41 rule 27.

Rule 1 is restricted to recording of admissions and denials. See also Order 15 rule 7 and Order 18 rule 17. The oral examination of the parties is for purposes of ascertaining the real matter in controversy (*i*), and is not to be used as a means of trial (*j*). The examination is not required to be on oath (*k*), but the statements made are binding upon the parties (*l*). The statement is not admissible against the other parties, unless they have had an opportunity of cross-examination (*m*). A party's pleader can be examined under rule 1 and not under this rule (*n*). See also Order 14 rule 4. In pre-emption cases the plaintiff pre-emptor should personally appear to establish having made the *Talab-i-Muwathibat* (*na*). See notes under Order 7 rule 2 and Order 20 rule 14.

3. Substance of the examination to be written.--The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Comp. Ref.: 1882, S. 119; 1877, S. 119; 1859, S. 125.

Cross Ref.: LVI-148.

4. Consequence of refusal or inability of pleader to answer.--(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the

(*hab*) 2012 SCMR 900; P 2012 S 388; P 2007 L 581; 2006 CLC 1736; P 2005 L 742. See 2011 SCMR 1743; 2011 CLC 758; P 2005 P 269; P 2011 Jr. 59.

(*hac*) 2009 CLC 459; 2006 CLC 1736. See 2011 CLC 207; 2006 YLR 2689.

(*hb*) 1996 CLC 1758.

(*hc*) P 2013 L 78.

(*i*) 2012 MLD 643; 2007 CLC 386; 2005 YLR 355; 2004 CLD 821; 15 C 533 PC; A 1926 A 411.

(*j*) P 2011 L 225; 2007 CLC 386; P 2005 Q 77; 2005 YLR 355; A 1931 PC 175; A 1941 S 41.

(*k*) A 1949 M 707.

(*l*) A 1962 A 111; A 1930 L 947; A 1926 A 411.

(*m*) 2007 CLC 386; 2005 YLR 355; A 1930 L 947.

(*n*) A 1941 S 41.

(*na*) 2007 CLC 819.