West Bengal Judicial Service (Mains) 2022: Civil Procedure Code (CPC) — Solution

Model answers to the Civil Procedure Code paper. Time: 3 hours · Full marks: 100. Group B asks for any five questions; all six are solved here.

Group A: answer all questions

1. (a) The Code of Civil Procedure is an adjective law "to facilitate justice and further its ends". — Elucidate.
(b) Distinguish between Adjective law and Substantive law with examples. (5+5)

(a)

The Code is a body of procedure. It is a means to reach justice, never an end in itself, so it is read liberally and technical objections must not defeat substantial justice.

- The Code of 1908 consolidates and amends the procedure of civil courts. It is a complete code: it covers the whole path from filing a suit to the final judgment and its execution.
- Procedure is only machinery. It exists to help, not to obstruct, the administration of justice.
- The Code is not a penal statute. It is construed so as to do justice where reasonably possible.
- A civil suit must be decided by the Code and not by the whim of the court.
- No one has a vested right in a course of procedure, only a right to proceed in the manner prescribed. A change in procedure applies to pending cases, but a step validly completed under the old law is not reopened.

> **Indrajit Pratap v Amar Singh:** procedure is machinery meant to facilitate justice. **Chinnammal v Arumugham:** the Code is general law for facilitating justice and must be construed liberally. **Alka Gupta v Narendra Kumar Gupta:** a suit cannot be thrown out without trial merely because the court dislikes the plaintiff's conduct.

(b) Adjective law and substantive law

Point	Substantive law	Adjective (procedural) law
Function	Creates, defines and limits rights and duties	Lays down the machinery and steps by which rights are enforced in court
Vested right	Rights are vested and are protected from retrospective loss	No vested right in a mode of procedure
Effect of change	Ordinarily prospective	Applies to pending proceedings, unless the Act says otherwise
Examples	The law governing the contract or property that is sued upon; the right of appeal	Service of summons, pleadings, summary procedure (Order XXXVII), execution (Order XXI)

The line can blur. The right of appeal sits in the Code yet is a substantive right: it cannot be taken away retrospectively without clear words (*Colonial Sugar Refining Co v Irving*). Section 25 of the Code is also said to contain substantive as well as procedural law.

Conclusion: the Code serves the substantive law, and it must always be applied so that the real dispute is decided on merits.

2. (a) Define Decree and state its essential elements.
(b) Distinguish between Decree and Order. **(5+5)**

(a)

Section 2(2): a decree is the formal expression of an adjudication which, so far as the expressing court is concerned, conclusively determines the rights of the parties on all or any of the matters in controversy in the suit. It may be preliminary or final.

Essential elements:

- The decision is given in a suit (a suit starts with a plaint).
- It is an adjudication on the rights of parties on matters in controversy, as raised in the pleadings.
- The determination is conclusive for that court.
- It is given formal expression.

By deeming, a decree includes rejection of a plaint and determination of questions under s 144 (restitution). It excludes (i) any adjudication from which an appeal lies as an appeal from an order, and (ii) dismissal for default.

Kinds: preliminary (further proceedings needed to dispose of the suit), final (the suit is completely disposed of), and partly preliminary and partly final. More than one preliminary decree is possible, but only one final decree.

> **Adinarayan v Narasimha:** the label is not decisive; what matters is whether s 2(2) is satisfied. **Phool Chand v Gopal Lal:** the Code does not bar a second preliminary decree, for example in a partition suit.

(b) Decree and order

Point	Decree [s 2(2)]	Order [s 2(14)]
Meaning	Formal expression of a conclusive adjudication of rights in a suit	Formal expression of any decision of a civil court which is not a decree
Origin	Only in a suit	May arise in a suit or in other proceedings, such as applications
Rights	Determines rights on matters in controversy	Usually does not finally decide rights
Kinds	Preliminary, final, or both	No such division
Appeal	Appealable as of right under s 96, unless barred; second appeal under s 100	Appealable only if the Code (s 104, Order XLIII) allows it
Deeming	Includes rejection of plaint and s 144 determinations	Dismissal for default is an order

Conclusion: the test is substance, not caption. If all elements of s 2(2) are met it is a decree; otherwise it is an order.

3. (a) Explain, with reference to section 11 of the Code, the doctrine of res judicata with two illustrations.
(b) Differentiate between res judicata and estoppel. **(5+5)**

(a)

Section 11 bars a court from trying a suit or issue in which the matter directly and substantially in issue has already been heard and finally decided between the same parties by a competent court.

It rests on three maxims: no one should be vexed twice for the same cause; it is in the State's interest that litigation ends; a judicial decision is accepted as correct. The plea must be specifically pleaded.

Conditions:

- The matter in the later suit was directly and substantially in issue in the former suit, actually (Expl. III) or constructively, as it might and ought to have been raised (Expl. IV).
- The parties are the same, or claim under the same parties (Expl. VI covers representative and public-right litigation).
- They litigated under the same title.
- The former court was competent to try the later suit (Expl. VIII: a court of limited jurisdiction's decision on an issue also binds).
- The matter was heard and finally decided. A relief claimed but not granted is deemed refused (Expl. V). It applies to execution proceedings (Expl. VII).

Illustration 1: A sues B for damages for breach of a contract and the suit is dismissed on merits. A cannot sue B again for damages for the same breach.

Illustration 2 (constructive): A obtains a decree against B on a contract. B had a plea of fraud available but never raised it. B cannot later sue to avoid the contract on that ground, as it might and ought to have been a ground of defence.

> **Duchess of Kingston's case:** classic statement that a judgment on the point is conclusive between the same parties. **Canara Bank v N.G. Subbaraya Setty:** a matter does not become res judicata until the time to appeal has run out.

(b) Res judicata and estoppel

Point	Res judicata	Estoppel
Nature	Rule of procedure under s 11; bars the court	Rule of evidence; bars a party
Stage	Prohibits the inquiry at the threshold	Operates after the inquiry begins, as a piece of evidence
Basis	A previous judgment between the parties	A party's own earlier statement or act relied on by another
Effect	Turns a question of fact into one of law	Stops a party from contradicting what he said before
Detriment	No change of position needs to be shown	Other side must have altered his position

> **Sita Ram v Amir Begam:** res judicata prevents inquiry in limine; estoppel is only evidence. Neither can give a court jurisdiction that the law has not given.

Conclusion: res judicata ends repeated litigation on a decided matter; estoppel protects a party who relied on another's word or conduct.

4. Distinguish between: (a) Revision and Appeal; (b) Reference and Review **(6+4)**

(a) Revision [s 115] and Appeal [ss 96–112, Order XLI]

Point	Appeal	Revision
Nature	Substantive, vested right, but only if a statute gives it	Discretionary supervisory power of the High Court
When it lies	Against decrees, and orders made appealable (s 104, Order XLIII)	Only where no appeal lies [s 115(2)]
Forum	The court authorised to hear appeals; second appeal to the High Court	The High Court alone
Scope	First appeal on facts and law; second appeal only on a substantial question of law (s 100)	Jurisdiction only: exercising jurisdiction not vested, failing to exercise it, or acting illegally or with material irregularity
Facts	Evidence can be re-assessed in first appeal	No re-appreciation of evidence; no interference with plausible findings of fact
Interlocutory orders	Only those listed in Order XLIII	Order must be one that, if made the other way, would have finally disposed of the suit
Stay	May be granted under Order XLI	Does not stay the proceeding unless the High Court stays it [s 115(3)]

A wrongly filed appeal may be treated as a revision and the reverse, if conditions of the other are met. *SS Khanna v Dillon:* revision is concerned with jurisdiction alone.

(b) Reference [s 113, Order XLVI] and Review [s 114, Order XLVII]

Point	Reference	Review
Who acts	A court, on its own or on a party's request, states a case	A person aggrieved applies
To whom	The High Court, for its opinion on a question of law	The same court that passed the decree or order
Purpose	To get a doubt resolved before deciding, mainly in non-appealable matters; mandatory if the court holds an Act, Ordinance or Regulation invalid and no higher court has said so (proviso)	To correct its own decision
Grounds	Reasonable doubt on law; the question must be necessary to decide the case	New and important matter not available despite due diligence; error apparent on the face of the record; any other sufficient reason
Outcome	High Court answers the question; the court then decides	Decree or order may be set aside or modified; not a rehearing on merits

Tika Ram v Mahbeshwari Devi: a reference needs a real doubt, not a disagreement with another court. **Lily Thomas v Union of India:** review is for correcting a grave error, and the power must come from law.

5. Write brief notes on any two of the following: (a) Commissions issued by a civil court; (b) Interpleader suit; (c) Representative suit; (d) Affidavit **(5×2=10)**

Two notes are enough for full marks; all four are given.

(a) Commissions [s 75, Order XXVI]

A commission is an authority given by the court to a person (the Commissioner) to do what the court cannot conveniently do itself. The power is discretionary and may be used on application or suo motu. Section 75 lists the purposes: examine a witness; make a local investigation; examine or adjust accounts; make a partition; hold a scientific, technical or expert investigation; sell perishable property in the court's custody; perform a ministerial act.

- Witness commissions (rr 1–8): for reasons recorded, in the interest of justice or expedition; for persons exempted, sick or infirm, or outside the jurisdiction.
- Local investigation (r 9): to clarify a disputed matter or to find market value, mesne profits or damages.
- The report and evidence (not the evidence alone) form part of the record. The Commissioner may be examined in court, and the court may order further inquiry if dissatisfied (r 10).

(b) Interpleader suit [s 88, Order XXXV]

Two or more persons claim the same debt, money or property adversely to each other from a person who claims no interest in it except charges or costs and is ready to hand it to the rightful claimant. He sues all claimants to get a decision and an indemnity. The real dispute is between the defendants.

- Bar: not allowed if a pending suit can properly decide the rights of all.
- Plaint (O XXXV r 1) states: no interest except charges, the rival claims, and no collusion.
- First hearing (r 4): discharge the plaintiff with costs, or retain him; decide title or frame issues and substitute a claimant as plaintiff.

(c) Representative suit [Order I rule 8]

Where numerous persons have the same interest in one suit, one or more may, with the court's permission or on its direction, sue or defend on behalf of all.

- Notice of the suit must be given to all interested, at the plaintiff's expense, personally or by public advertisement.
- Abandonment, withdrawal or compromise needs notice to all, and a compromise needs leave of court (Order XXIII r 3B), failing which it is void.
- A careless representative may be replaced. The decree binds all persons represented, and by Expl. VI to s 11 it operates as res judicata against them if the litigation was bona fide.

(d) Affidavit [Order XIX]

A written, sworn statement of facts, in the first person, stating facts and not inferences or arguments. The oath is administered by a court, magistrate, notary or other authorised officer (s 139).

- Rule 1: for sufficient reason the court may order a fact to be proved by affidavit. It will not do so if a party bona fide wants to cross-examine a witness who can be produced.
- Rule 2: the court may order the deponent to attend for cross-examination.
- Rule 3: confined to facts within the deponent's own knowledge; statements of belief are allowed on interlocutory applications if the grounds are given.

Group B: answer any five questions

6. (a) What do you mean by 'Caveat'? Who may lodge a caveat?
(b) State briefly the rights and duties of the caveator, of the applicant who intends to obtain an interim order and of the court. **(5+5)**

(a)

A caveat is a notice to the court that no order should be passed on an expected application without first hearing the person who lodged it (the caveator). It is provided by s 148A.

- Where an application is expected or has been made in a suit or proceeding instituted or about to be instituted, any person claiming a right to appear at its hearing may lodge a caveat.
- The person likely to be affected by an interim order may lodge it, whether a necessary party or only a proper party.
- It applies to suits, appeals and other proceedings, but not where the person has no right to be heard, for example at the initial stage of execution.
- Its object is to prevent ex parte interim orders and to avoid multiplicity of proceedings.

(b) Rights and duties

Person	Rights	Duties
Caveator	Notice of any application filed [s 148A(3)]; copy of the application and supporting papers on payment of expenses [s 148A(4)]; hearing before an order	Serve notice of the caveat by registered post, acknowledgment due, on the expected applicant [s 148A(2)]; pay the copying expenses; note that a caveat lapses after 90 days unless the application is made in that time [s 148A(5)]
Applicant	To move his application and seek the interim order	On notice of the caveat, forthwith furnish the caveator a copy of the application and of all papers filed or to be filed with it [s 148A(4)]
Court	May dispense with notice under sub-s (2) where compliance is not possible and the subject-matter is clear	Serve notice of the application on the caveator [s 148A(3)]; keep a register of caveats; hear the caveator before passing the interim order

> **NC Dutta v GN Roy:** any person likely to be affected by the interim order may lodge a caveat. **RBI Employees' Association v RBI:** an interim order passed without notice to the caveator is not without jurisdiction and stands until set aside.

Conclusion: s 148A gives a cheap safeguard against surprise orders, but it is a rule of notice and not a bar on the court's jurisdiction.

7. (a) When can an application for temporary injunction be granted?
(b) Explain in brief the guiding principles for granting such order. **(5+5)**

(a)

A temporary injunction is an interim order, made under s 94(c) and Order XXXIX, that preserves the position until the suit is decided or the court orders otherwise.

Order XXXIX rule 1: where it is proved by affidavit or otherwise that

- property in dispute is in danger of being wasted, damaged or alienated by any party, or wrongfully sold in execution of a decree; or
- the defendant threatens or intends to remove or dispose of his property to defraud creditors; or
- the defendant threatens to dispossess the plaintiff or otherwise injure him in relation to the property in dispute.

Rule 2: in a suit to restrain a breach of contract or other injury, the plaintiff may apply at any time after the suit begins, even after judgment, to stop the breach or a like breach; the court may fix terms as to duration, accounts and security.

Rule 3: notice must go to the opposite party first, unless delay would defeat the object. If notice is not given, reasons must be recorded and the applicant must deliver copies of the application, affidavit, plaint and documents at once.

The interim relief must relate to a relief claimed in the suit; for example, no interim injunction is granted in a suit for bare declaration.

(b) Guiding principles

Granting is a matter of judicial discretion, exercised on three tests, all of which must be met:

- **Prima facie case:** a fair question to be tried and a probability of success on the material placed. The plaintiff need not prove the case to the hilt.
- **Balance of convenience:** the harm to the plaintiff from refusal must exceed the harm to the defendant from grant.
- **Irreparable injury:** injury that damages cannot adequately remedy. Where compensation in money is enough, no injunction.

Further guides: the court does not decide the merits in detail at this stage; injunction is an equitable relief, so delay and unclean hands count against the plaintiff; an ex parte order is exceptional and must be for a limited time, weighing serious mischief, delay, acquiescence and good faith; orders must not be passed mechanically.

> **Preston v Luck:** there must be a serious question to be tried and a probability that the plaintiff is entitled to relief.

Conclusion: prima facie case alone is not enough; all three tests must be satisfied.

8. (a) Discuss the nature, object and scope of summary suits.
(b) What is the difference between a Summary suit and an Ordinary suit? (6+4)

(a)

Order XXXVII gives a fast procedure for certain money claims, so that a defendant who has no real defence cannot delay the plaintiff.

Object: to give credibility to financial and commercial dealings and to stop unreasonable obstruction by a defendant with no defence.

Scope [rule 1]: applies to High Courts, City Civil Courts and Courts of Small Causes, and to other courts as notified by the High Court. Suits covered:

- on bills of exchange, hundis and promissory notes;
- to recover only a debt or liquidated demand in money, with or without interest, arising on a written contract, on an enactment (a fixed sum, not a penalty), or on a guarantee for a debt or liquidated demand;
- to recover receivables by an assignee.

Nature of procedure:

- The plaint must state that the suit is brought under Order XXXVII and that no other relief is claimed.
- Summons requires appearance within the time fixed; if the defendant does not appear, the allegations are deemed admitted and the plaintiff gets a decree.
- The defendant has no right to defend. He must apply within ten days of service of summons for judgment, with an affidavit showing facts that call for leave.
- Leave is refused only if there is no substantial defence or it is frivolous or vexatious. If a triable issue arises, leave is given unconditionally; if the defence is doubtful or for delay, on terms such as deposit or security. Admitted amount must be deposited.
- Appeal is available as in other suits.

> **Santosh Kumar v Mool Singh:** once a triable issue exists, leave should be given. **Mechelec Engineers v Basic Equipment Corp:** principles for grant of unconditional or conditional leave.

(b) Summary suit and ordinary suit

Point	Summary suit	Ordinary suit
Defence	Only with leave of court	Right to defend by written statement
Claims	Limited classes: negotiable instruments, written contracts, enactments, guarantees	Any civil claim
Courts	As specified in rule 1	All competent courts
Trial	Judgment on summons if no leave; trial only after leave	Full trial on issues
Failure to appear	Decree on deemed admission	Ex parte hearing and proof under Order IX

Conclusion: a summary suit is an expedited remedy for clear money claims, but leave to defend is given wherever a real triable issue exists.

9. (a) Define pleading. State the object of pleadings.
(b) Can leave to amend pleadings be allowed after commencement of trial? **(5+5)**

(a)

Order VI rule 1: "pleading" means plaint or written statement.

Object:

- to bring the parties to definite issues and narrow the area of dispute;
- to tell each side what case it must meet, so that there is no surprise;
- to reduce expense and delay, since evidence is confined to the issues;
- to prevent a miscarriage of justice.

Rules: the pleading states only the material facts, concisely, and not the evidence (rule 2). The plaintiff pleads all facts that make up his cause of action, and the defendant the facts of his defence. Pleadings are the foundation: no amount of proof can make up for a missing pleading. Fresh pleas or evidence at variance with the pleadings need an amendment.

> **Throp v Holdsworth:** the whole object of pleadings is to bring the parties to an issue. **Vikram Kashinath Rawat v Vinayak Joshi:** pleadings reveal the real dispute and prevent surprise.

(b) Amendment after commencement of trial

Yes, but only under the proviso to Order VI rule 17: after the trial has commenced, amendment is not allowed unless the court concludes that, in spite of due diligence, the party could not have raised the matter before the trial began.

- Main rule: the court may at any stage allow amendment on just terms, as needed to decide the real questions in controversy.
- The burden lies on the party seeking late amendment to show due diligence.
- Courts ask: is the amendment necessary for proper decision; is it bona fide; does it cause prejudice that costs cannot cure; will refusal cause injustice or multiple suits; does it change the nature and character of the suit; would a fresh suit on the new claim already be time-barred.
- Amendment is refused if it brings a wholly new and inconsistent case. An admission cannot be withdrawn by amendment, though it may be explained (*Ram Niranjan Kajaria v Sheo Prakash Kajaria*).
- Delay or even earlier negligence is not fatal if the other side can be compensated by costs.

> **Revajeetu Builders v Narayanaswamy & Sons:** the guiding factors for amendment. **Rameshkumar Agarwal v Rajmala Exports:** bona fide and necessary amendments should be allowed liberally, mala fide ones never.

Conclusion: a post-trial amendment is the exception, allowed only on proof of due diligence and no prejudice.

10. "The executing court cannot go behind the decree." Explain and comment. **(10)**

The court executing a decree must take it as it stands. It cannot question its correctness or legality, because until a decree is set aside in appeal, revision or review, it binds the parties, even if wrong.

Law:

- Section 38 gives the executing court power to execute a decree. Section 47(1) says that all questions between the parties or their representatives relating to the execution, discharge or satisfaction of the decree are decided by the executing court and not by a separate suit. Section 47 assumes a valid decree exists.
- If the decree is free from ambiguity, it must be executed whether it is right or wrong.
- An executing court cannot vary the terms of the decree. An order that travels beyond the decree is without jurisdiction.
- Powers under s 47 are narrower than those of appeal, revision or review. The validity of a decree can be challenged only in a proper proceeding or suit.

> **Pirbhu v Rup Singh:** an unambiguous decree must be executed, right or wrong. **VD Modi v Rehman:** the court must take the decree as it finds it. **S. Bhaskaran v Sebastian:** an order beyond the decree is without jurisdiction.

Comment: recognised limits.

- **Nullity:** a decree passed by a court without inherent jurisdiction is a nullity, and its invalidity can be set up in execution (*Kiran Singh v Chaman Paswan; Sunder Das v Ram Parkash*). This is not going behind the decree, since there is no real decree. A defect that is cured by s 21 or the Suits Valuation Act cannot be raised.
- **Construction:** where the decree is ambiguous, the court may interpret it by looking at the pleadings and judgment, but cannot make a new decree.
- **Execution, discharge, satisfaction:** payment, adjustment, or a recorded agreement for time may be examined.
- **Changed circumstances or fraud:** a decree obtained by fraud has been refused execution, and a decree became inexecutable when the property was no longer with the judgment-debtor.

Conclusion: the rule protects the finality of decrees and stops the executing court from becoming a court of appeal. Its exceptions, nullity and construction, keep it fair.

11. (a) What is an exparte decree? Is it enforceable like a bi-parte decree?
(b) What are the remedies open to the defendant against the exparte decree? **(5+5)**

(a)

An ex parte decree is one passed when the defendant does not appear on the day fixed for hearing and the court, being satisfied that summons was duly served, orders the suit to be heard in his absence (Order IX rule 6(1)(a)).

- If summons was not duly served, a fresh summons issues; if served but not in time, the hearing is postponed (rule 6(1)(b), (c)).
- The court must still be satisfied on evidence that the plaintiff has made out at least a prima facie case. Absence of the defendant does not by itself prove the plaintiff's case.

Enforceable? Yes. A party is as much bound by an ex parte decree as by a contested one. It is executed in the same way and can operate as res judicata where the matter was heard and decided on merits. It remains valid until set aside, and the defendant can even apply under Order IX rule 13 after it is executed or satisfied.

(b) Remedies of the defendant

- **Application under Order IX rule 13** to the same court: the defendant must show that summons was not duly served, or that sufficient cause prevented him from appearing. Limitation is 30 days from the decree, or from knowledge where summons was not duly served. The court sets aside the decree on terms as to costs or payment into court. A decree is not set aside merely for an irregularity in service if the defendant had notice and time to appear. If the decree cannot be set aside against one defendant alone, it may be set aside against others (proviso). Rule 14 requires notice to the other side.
- **Appeal under s 96(2)** against the ex parte decree on merits or on any error or irregularity affecting the decision. It cannot be converted into an application under rule 13.
- **Appeal under Order XLIII rule 1(d)** against an order refusing to set aside the ex parte decree.
- **Review** under s 114 and Order XLVII.
- **Separate suit** to set aside the decree for fraud.

The defendant may pursue appeal and rule 13 together, but if the appeal is decided on merits, the Explanation to rule 13 bars the rule 13 application.

Conclusion: an ex parte decree binds and can be executed, but a defendant who has a genuine reason for absence can promptly seek to have it set aside.