Summary of workshop papers of Civil Side on the subjects:

1) Stay of suit under Section 10 of the Code of Civil Procedure and res-judicata.

2) Issuance of Succession certificate, heirship certificate and probate

3) Ex-parte and temporary injunction.
1) Stay of suit under Section 10 of the Code of Civil Procedure and res-judicata.

Section 10 of C.P.C. Deals with stay of civil suits and Section 11 of the C.P.C. relates to a matter already adjudicated upon. Section 10 provides for doctrine of res sub judice and Section 11 provides for doctrine res-judicata.

Stay of suit under Section 10 of the Code of Civil Procedure:

Section 10 of the Code of Civil Procedure provides the rule with regard to stay of suits where things are under consideration or pending adjudication by a court. Section 10 requires that a suit must be stayed if the matter directly and substantially in issue in that suit is also directly and substantially in issue in a previous suit that is pending.

Object:

The object underlying in Section 10 is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. The Section intends to protect the person from multiplicity of proceedings and to avoid conflict in decisions. It also aims to avoid inconvenience to the parties and gives effect to the rule of res judicata.
Conditions for the applicability of Section 10:

In order to apply Section 10 of the C.P.C., following conditions must be satisfied.

(a) the matter in issue must be substantially the same.

(b) Previously instituted suit must be pending in the same court or any other court. Such court must be competent to grant the relief claimed.

(c) Both the suits must be between same parties or their legal representatives.

(d) Such parties must be litigated in both the suits under the same title.

(e) The court must be Indian Court only. It does not include foreign Court.

Section 10 enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. The stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties.

The words of Section 10 are mandatory and the test to determine whether the matter in issue in the second suit is also directly and substantially in issue in the previously...
instituted suit and whether if the first suit is determined the matter raised in the second suit Will be res judicata by reason of the decision of the prior suit. It is not necessary that the subject matter and cause of action should be the same. But what is essential is that there must be substantial identity between the matters in dispute and parties in the earlier and later suits. The second suit is not to be dismissed as barred. It is only the trial of the suit that is not proceeded with and is stayed. There is no bar for the institution of a second suit.

Res-judicata :

Section 11 of the Code deals with the res judicata and provides that, if such a suit has already been tried earlier and decided by the competent Court, it is not open to Court to decide the said matter once again.

Object :

The doctrine of res judicata is based on three maxims -

(a) nemo debet lis vexari pro una et eadem causa (no man should be vexed twice for the same cause):

(b) interest republicae ut sit finis litium (it is in the interest of the State that there should be an end to a litigation):

(c) res judicata pro veritate occipitur (a judicial decision must be accepted as correct)

Thus the doctrine of res judicata is the combined
result of public policy reflected in maxims (b) and (c) and private justice expressed in maxim (a): and it applies to all judicial proceedings whether civil or criminal. The principle is founded on justice, equity and good conscience.

**Conditions for applicability of doctrine of res judicata:**

1. The matter must be directly and substantially in issue in two suits.

2. The prior suit must have been between the same parties or persons claiming under them.

3. Such parties must have litigated under the same title in the former suit.

4. Subject to the provisions contained in Explanation VIII, the court which determined the earlier suit must be competent to try the later suit or the suit in which such issue is subsequently raised.

5. The question directly and substantially in issue in the subsequent suit should have been heard and finally decided in the earlier suit.

**Constructive Res Judicata:**

When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter is deemed to have
been constructively in issue and therefore, is taken as decided. This provision is also enacted to avoid multiplicity of litigation and to bring about finality in the decision.

**Difference between res sub judice and res judicata:**

(a) Res sub judice relates to matter pending judicial inquiry or trial sub judice. Whereas res judicata relates to a matter already adjudicated or matter in which decision is already there.

(b) Res sub judice bars a trial of suit in which the matter directly and substantially in issue is pending adjudication in a previously instituted suit, whereas res judicata bars the trial of suit or an issue which has been decided in former suit.

(c) Res sub judice does not apply to execution proceeding. Whereas res judicata is applicable to suit, appeal and in execution proceeding.

The provisions of Section 10 relating to stay of suit and the principle of Res Judicata contained in Section 11 of the Code of Civil Procedure are based on the public policy. It is in the interest of individual and also State, to end the litigation. These two principles are embodied in the law with a view to achieve this goal. It saves time of the Courts as well as the litigants. These principles are also founded on justice, equity and good conscience which require that, a party who has once succeeded on an issue should not be harassed by multiplicity of
proceedings involving the same issue.

2) **Issuance of Succession certificate and heirship certificate and probate**:

A succession certificate, under Indian Succession Act, is a document that gives authority to the person who obtains it, to represent the deceased for the purpose of collecting debts and securities due to him or payable in his name. Section 370 empowers grant of succession certificate in respect of debts and securities only. The heirship certificate issued under the Bombay Regulation VIII of 1827 Chapter I provides for rules for the recognition of heirs, executors and administrator when there is competent claimant. Probate is a legal process in which the court satisfies the authenticity of the Will. Probate can be granted only to the executor appointed by the Will.

**A) Issuance of succession certificate**:

A succession certificate is generally issued to legal heirs of deceased person. Under Section 372 of Indian Succession Act, a succession certificate is an order granted by the Court to the successors of the deceased on the application made by them as legal heirs, if a person passes away without leaving a Will. A succession certificate can be granted by the Court to release the assets, securities and debts of the deceased person. An application for issuance of succession certificate can be made in respect of any debt or debts due to the deceased creditor or in respect of portion thereof. The main object of succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to
the representatives of deceased person. Succession certificate merely authorizes its holder to collect the debts due to the deceased as a trustee and does not however decide its title.

The beneficiary has to approach the Court within whose jurisdiction the assets fall and file a petition for a succession certificate. The High Court has invested all Civil Judges (Senior Division), with all the powers of a District Judge to take cognizance of any contested proceeding under Indian Succession Act, arising within the local limits of their respective jurisdiction that may be transferred to them by their respective District Judges. The High Court has also invested all Civil Judges (Junior Division) with all the powers of a District Judge in the matter of issuing succession certificate limited to debts and securities to the extent or their pecuniary jurisdiction. Hence, Civil Judge (Junior Division) are authorized to issue succession certificate in non-contentious cases, but not in contentious cases having regard to their pecuniary jurisdiction.

For obtaining succession certificate the applicant is required to prefer application duly signed and verified giving all the details such as time of death of the deceased, his ordinary place of residence at the time of death, his family, rights of the applicant and details of debts and securities etc. In case of any fallacious statement made in the application, the applicant will be liable for prosecution u/sec. 198 of IPC. If the application is found entitled to be entertained, a notice is to be issued to the persons who in the opinion of the Judge requires notice of the matter. At the date fixed for hearing, the right to the certificate is decided in summary manner. Even if the intricate questions of law or fact are involved, certificate may be granted to the person having prima facie best title thereto.
Even if rights between parties are not resolved or settled by grant or refusal of succession certificate, the Civil Court can adjudicate rights of parties and pass an appropriate order in a suit preferred in that regard. In case the applicant fails to establish his/her entitlement, the certificate may be refused. The certificate should specify the debts and securities. It empowers the person to receive the interest or dividend and to negotiate the securities.

Where certificate is granted to the applicant on his showing prima facie entitlement, surety or other sufficient security for rendering accounts of debts and securities and indemnification of person who may be entitled thereto is required to obtained. Where all respondents want succession certificate to be issued in favour of the applicant, there is no requirement of furnishing security and succession certificate can be issued to applicant.

**B) Issuance of legal heirship certificate:**

Under a clause 7 and 8 of the Bombay regulation VIII of 1827 that the court is not required to determine the title of the deceased to any property. It is to be considered whether the person claiming heirship certificate is the legal heir of the deceased. The purpose of issuance of the heirship certificate under the Bombay regulation is only to provide formal recognition to the heirs. A person may obtain heirship certificate in the following situations:

1) if he so desires,
2) where his right as an heir is disputed,
iii) in order to give confidence to the persons in possession of or indebted to the estate and to deal with them.

Thus grant of heirship certificate is solely, for the convenience of the heir. The rules also indicate that, it is mandatory for the Court to issue an heirship certificate, if after publication of citation, no objector comes forward within one month from the date of publication. In that case, the Court shall forthwith receive such proof as may be offered of the right of the person making the claim, and if satisfied, shall grant a certificate in the prescribed form declaring him the recognized heir of the deceased. The scope of such enquiry is limited to ascertain the claim of heirship of the applicant.

Application under Section 2 of regulation VIII of 1872 can be entertained by Civil Judges directly or when transferred to them by the District Judges.

Whenever a person dies leaving property, whether movable or immovable, the heir or executor or legal administrator, may assume the management, or sue for the recovery of the property, in conformity with the law of usage applicable to the disposal of the said property, without making any previous application to the court to be formally recognized.

But if an heir, executor or administrator is desirous of having his right formally recognized by the Court, for the purpose of rendering it more safe for persons in possession of, or indebted to the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation in the form contained in Appendix-A, inviting all persons who dispute the
right of the applicant to appear in the Court within one month from the date of the proclamation and enter their objections, and declaring that if no sufficient objections is offered, the Judge Will proceed to receive proof of the right of the applicant, and, if satisfied, grant him a certificate of heirship.

C) Issuance of probate:

Probate is legal process in which the Court certifies the authenticity of the Will. Probate can be granted only to the executor appointed by the Will. A probate is copy of Will certified by the Court of competent jurisdiction. It proves that it is the last and final Will of the deceased. A probate is granted with a court seal and copy of Will attached to it. As per Section 276 of Indian Succession Act petition for probate can be made and it should contend all particulars as given in the said section. The petition for probate shall also be verified by at least one of the witness to the Will. Till the order remains in force it is conclusive as to the due execution and the validity of the Will not only upon all the parties before the court but also upon all other persons whatever in all proceeding arising out of the Will or claims under or connected therewith.

The court may impose a percentage of assets as a fee to issue a probate. In Maharashtra, for example, a court fee of 2% is payable for assets less than fifty thousand to two lacs and 7.5% for assets over two lacs.

Procedure for obtaining probate:

A petition for probate must be filed in court along
with the Will in question. It should contain the following facts:

(a) The time of the testator's death

(b) That the writing annexed in his last Will and testament

(c) That it was duly executed

(d) The amount of assets which are likely to come to the petitioner's hands, and

(e) the petitioner is the executor named in the Will

The application for the probate shall be signed and verified by the executor or beneficiary. The petitioner shall furnish a blank stamp paper of value equal to the requisite court fee, along with the application. The court shall grant the probate on the said stamp paper. After receipt of the petition, the court issues notice to the next of kin of the deceased to file their objections, if any, to the grant of probate. A general public notice is also given in a newspaper. The petitioner is thereafter asked to establish following facts:

(a) Proof of death of the testator

(b) Proof that the Will has been validly executed by the testator

(c) Will is the last Will and testament of the deceased.
Ex parte and temporary injunction:

An injunction is judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing. Temporary injunction can be granted in accordance with the provisions i.e. Section 94, 95 and Order 39 of C.P.C.

Object:

The primary purpose of granting interim relief is the preservation of property in dispute till legal rights and conflicting claims of the parties before the court are adjudicated.

Ex parte ad-interim injunction:-

As per Order 39 Rule 3 in all cases the court shall, before granting an injunction, direct notice of the application of injunction to be given to the opposite party. There is exception to the rule that where it appears to the court that the object of granting the injunction would be defeated by the delay then only it grant exparte injunction otherwise not. If the court comes to conclusion that ad-interim injunction shall be given then it is mandatory to record the reasons and to mention that the object of granting the injunction would be defeated by delay.

After granting ad-interim injunction, it is mandatory on the part of court to make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted and where it is unable so to do, it shall record its reasons for such inability.
In landmark case of *Morgan Stanley v. Kartick Das*, reported in (1994)4 SCC 225, Hon'ble Supreme Court indicated the factors which should weigh with the court in the grant of an Ex-parte injunction.

(i) Whether irreparable or serious mischief will ensure to the plaintiff.

(ii) Whether the refusal of the Ex-parte injunction would involve greater injustice than grant of it would involve.

(iii) The court will also consider the time at which the plaintiff first had noticed of the act, complained of so that the making of an improper order against a party in his absence is prevented.

(iv) The court will consider whether the plaintiff had acquiesced for some time, and in such circumstances it will not grant an Ex-parte injunction.

(v) The court would except the party applying for Ex-parte injunction to show utmost good faith in making the application.

(vi) Even if granted, the Ex-parte injunction would be for a limited period of time.

(vii) General principles like prima-facie case, balance of convenience and irreparable loss
would also be considered by the court.

**Temporary injunction:**

It is well settled that a court while granting temporary injunction has to satisfy whether its interference is necessary to protect the party applying for such relief from the particular kind of injury before the legal right of any party is established at the trial. It is also necessary to see the comparative mischief and inconvenience resulting from the refusal of such an injunction in relation to one resulting to the other side in the event of it being granted.

**Conditions:**

The relief of temporary injunction can be granted if following conditions are satisfied:

1. the existence of a prima facie case.
2. an irreparable injury Will result, if injunction is not granted.
3. the conduct of the plaintiff has not been blameworthy.
4. it is proper or necessary to grant an injunction.
5. the balance of convenience requires that injunction should be issued.

The power to grant a temporary injunction is at the discretion of the court. This discretion, however, should be exercised reasonably, judiciously and on sound legal principles. Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of
equitable relief, and the court has undoubtedly power to impose such terms and conditions as it thinks fit. Such conditions, however, must be reasonable so as not to make it impossible for the party to comply with the same and thereby virtually denying the relief which would otherwise be ordinarily entitled to. The general rule is that grant of an injunction is a matter of discretion of the court and it cannot be claimed as of right. However, the discretion has to be exercised in a judicious manner and in accordance with the provisions relating to the grant of injunction contained in the Specific Relief Act. It is well settled that no interim injunction would be issued if final relief cannot be granted. When plaintiff has no personal interest in the matter, injunction cannot be granted.