

Paper on the subject of Execution of Decree :

INTRODUCTION

1] Execution is the last stage of any civil litigation. There are three stages in litigation- a. Institution of litigation, b. Adjudication of litigation, c. Implementation of litigation. Implementation of litigation is also known as execution. Decree means operation or conclusiveness of judgment. A decree will be executed by the court which has passed the judgment. In exceptional circumstances, the judgment will be implemented by other court which is having competency in that regard. Execution enables the decree-holder to recover the fruits of the judgment.

EXECUTION- MEANING :-

2] The term “execution” has not been defined in the code. The expression “execution” simply means the process for enforcing or giving effect to the judgment of the court. The principles governing execution of decree and orders are dealt with in Sections 36 to 74 and Order 21 of the Civil Procedure Code. Hon'ble Apex Court in *Ghanshyam Das v. Anant Kumar Sinha (AIR 1991 SC 2251)* dealing with provision of the code relating to execution of decree and orders, observed in following words -

“ so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects. The numerous rules of Order 21 of the code take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be.”

3] Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realize the fruits of the decree and judgment passed by the competent Court in his favour. The execution is complete when the decree-holder gets money or other thing awarded to him by the judgment, decree or order of the Court.

4] Order XXI of the CPC is the lengthiest order provides detailed provisions for making an application for execution and the manner that, how they are to be entertained, dealt with and decided. Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realize the fruits of the decree passed by the competent Court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the Court who passed the decree or where the decree has been transferred to another Court, to that Court. Once an application for Execution of decree is received by the Court, it will examine whether the application complies with the requirements of Rules (11 to 14). If they complied with, the Court must admit and register the application.

Application for Execution of decree :-

5] All proceedings in Execution commence with the filing of an application for Execution. Following persons may file an application for Execution: 1. Decree- holder 2. Legal representative of the decree holder 3. Representative of a person claiming under the decree-holder 4. Transferee of the decree-holder, in some cases.

Court which may execute a decree. :-

6] Section 38 of the Code specifies that, a decree may be executed either by the Court who passed it or by the Court to which it is sent for execution. Section 37 defines the expression 'Court which passed a decree' while sections 39 to 45 provide for the transfer for execution of a decree by the Court which passed the decree to another Court, lay down conditions for such transfer and also deal with powers of executing Court.

7] U/s. 37 the expression Court which passed the decree is explained. Primarily the Court which passed the decree or order is the executing Court. If order or decree is appealed against and the appellate Court passes a decree or order, even then the original Court which passed the decree or order continues to be treated as Court which passed decree. The Court which has passed the decree or order ceased to exist or ceased to

have jurisdiction to execute the decree already passed, then the Court which will be having a jurisdiction upon that subject matter, when application of execution is made will be the competent Court to execute the decree.

8] Merely because the jurisdiction of the Court which has passed the decree is transfer to another Court due to transfer of territorial area, the jurisdiction to execute the decree passed by such a Court is not ceased. However, the Court to whom the transfer of territorial area is made, will also have a jurisdiction to conduct the execution of decree or order. (Sec.37). Sec. 38 contemplates that a decree may be executed either by the Court which passed it, or by the Court which it is sent for execution. However the execution on judgment debtor is criteria of executing Court of territorial jurisdiction.

MODES FOR EXECUTION:

9] Section 51 to 54 describe procedure in execution or mode for execution.

Mode of executing decree under section 51:

10] (a) By delivery of any property specifically decreed. Property may be movable or immovable (b) By attachment and sale of the property or by sale without attachment of the property. (c) by arrest and detention. (d) by appointing a receiver. (e) is the residuary clause and comes into play only when the decree cannot be executed in any of the modes prescribed under clause (a) to (d).

Arrest and detention

11] One of the modes of executing a decree is arrest and detention of the judgment-debtor in civil imprisonment. Where the decree is for payment of money, it can be executed by arrest and detention of the judgment-debtor. Following points are very important regarding arrest and detention :-

a. A judgment-debtor may be arrested at any time on any day in execution of a decree. After his arrest, he must be brought before the court as soon as practicable.

b. For the purpose of making arrest, no dwelling house may be entered after sunset or before sunrise. Further, no outer door of a dwelling house may be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or prevent access thereto.

c. No order of detention of the judgment-debtor shall be made where the decretal amount does not exceed Rs.2000.

d. Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released once.

e. A decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman, or a minor, or a legal representative of a deceased judgment-debtor. The Code of Civil Procedure lays down various modes of executing a decree. One of such modes is arrest and detention of the judgment-debtor in a civil prison. The decree-holder has an option to choose a mode for executing his decree and normally, a Court of law in the absence of any special circumstances, cannot compel him to invoke a particular mode of execution. Sections 51 to 59 and Rules 30 to 41 of Order XXI deal with arrest and detention of the judgment-debtor in civil prison.

12] The provisions are mandatory in nature and must be strictly complied with. They are not punitive in character. The object of detention of judgment-debtor in a civil prison is twofold. On one hand, it enables the decree-holder to realize the fruits of the decree passed in his favour; while on the other hand, it protects the judgment-debtor who is not in a position to pay the dues for reasons beyond his control or is unable to pay. Therefore, mere failure to pay the amount does not justify arrest and detention of the judgment-debtor inasmuch as he cannot be held to have neglected to pay the amount to the decree-holder.

When arrest and detention may be ordered

13] Where the decree is for the payment of money, it can be executed by arrest and detention of the judgment-debtor. Likewise, in case of a decree for specific performance of contract or for injunction, a judgment-debtor can be arrested and detained. Again, where a decree is against a corporation, it can be executed with the leave of the Court by detention in civil prison of its directors or other officers.

Who cannot be arrested

14] As per the Civil Procedure Code, the following classes of person cannot be arrested or detained in a civil prison:

1. Judicial officers, while going to, presiding in or returning from their Courts;
2. A woman;
3. The parties, their pleaders, mukhtars, revenue agents and recognized agents and their witnesses acting in disobedience to a summons, while going to, or attending or returning from the Court;
4. Members of legislative bodies;
5. Any person or class of persons, whose arrest, according to the State Government, might be attended with danger or inconvenience to the public;
6. A judgment-debtor, where the decretal amount does not exceed rupees two thousand.

15] The provisions relating to arrest and detention of the Judgment Debtor protect and safeguard the interest of the Decree Holder if the Judgment Debtor has means to pay and still he refuses or neglects to honour his obligations, he can be sent to civil prison. Mere omission to pay, however, cannot result in arrest or detention of the Judgment Debtor before ordering detention, the court must be satisfied that there was an element of bad faith, “not mere omission to pay but an attitude of refusal on demand verging on demand, verging on disowning of the obligation under the decree”, which has been explained by the Hon’ble Krishna Iyer J. in **Jolly George Verghese V/s. Bank of Cochin (1980) 2 SCC 360.**

16] The Court is required to record reasons for its satisfaction for detention of the judgment-debtor. Recording of reasons is mandatory. Omission to record reasons by the Court for its satisfaction amount to

ignoring a material and mandatory requirement of law. Such reasons should be recorded every time and in every proceeding in which the judgment-debtor is ordered to be detained.

Attachment of property-

17] A decree may also be executed on the application of the decree-holder by attachment and sale, only sale without attachment of property. The code recognizes the right of the decree-holder to attach the property of the judgment debtor in execution proceeding and lays down the procedure to effect attachment. Sections 60 to 64 and rules 41 to 57 of Order 21 deals with the subject of attachment of property. The code enumerates properties which are liable to be attached and sold in execution of a decree. It also specifies properties which are not liable to be attached or sold. It also prescribes the procedure where the same property is attached in execution of decrees by more than one court. The code also declares that a private alienation of property after attachment is void.

18] A decree may have to be executed by attachment and sale of JD's property. Attachment of property in decree for injunction or specific performance is aimed at coercing the J.D. to comply with the decree, or to expose him to a penalty in case of disobedience.

19] Attachment in a money decree is primarily for sale of property for eventual satisfaction of the decree out of sale proceeds. Before ordering attachment, the Court must satisfy itself that the J.D. has attachable interest in the property, and that the property is not exempt from attachment. While ordering attachment of salary regard may be had to the portion of salary not liable to attachment. Certain allowances are exempt from attachment.

In execution of a decree for maintenance one third of the salary of J.D. is exempted from attachment. In other money decrees salary to the extent of first four hundred rupees and two third of the remainder are not liable to attachment. Thus, if the J.D. gets a salary of Rs. 1000/- the first

Rs. 400/- plus two third of the remainder or two thirds of Rs. 600/- i.e. Rs. 400/- in all Rs. 800/- would be un-attachable, leaving only Rs. 200/- available for attachment. Pay and allowance of military men and wages of labourers and domestic servants are exempt from attachment.

20] The Court must then determine the mode of attachment. Attachment can be made by seizure or by an order prohibiting the J.D. or other person from dealing with the property or by charging the debtor's interest in the property. When movable property other than agricultural produce is to be attached., it should be actually seized and kept in custody of the attaching officer, except when the property is subject to speedy and natural decay, in which case it may be sold at once. Property which cannot be conveniently removed may be left at the place of attachment in the custody of a respectable person.

Execution against the Agriculturist

21] Before ordering attachment in livestock, the D.H. should be asked to deposit sufficient sum for removal of property to Court premises or other place as the Court may direct and also for its maintenance and guarding . Property attached may be placed in custody of D.H. for removal and conveyance to the place appointed by the Court.

22] Growing crop shall not be attached at any time less than 20 days before it is likely to be fit to be cut or gathered. When crop is attached warrant of attachment should be affixed on the land where the crop is growing, or if the crop has been cut or gathered, on the threshing floor, on the house in which the J.D. resides, and shall also be sent to the Collector. Order for attachment of crop should specify the time at which the crop is likely to be fit to be cut or gathered. The J.D. may be allowed to cut and gather the crop and if he fails the D.H. may be allowed to do the needful.

23] All objections to attachment, including questions of right, title and interest in the property attached, have to be decided by executing Court and not by a separate suit.

24] When decree is satisfied the attachment is removed. When the execution application is for any reason dismissed the court has to indicate the period upto which the attachment shall continue. If the Court fails to pass such orders, attachment shall cease at the expiry of period of appeal.

Sale of property -

25] A decree may be executed by attachment and sale or sale without attachment of any property. Section 65 to 73 and rules 64 to 94 of Order 21 deals with the subject relating to sale of movable and immovable property. Before ordering sale, the court has to decide whether it is necessary to bring entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and decree to be satisfied is small the court must bring to sale only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder.

Properties which are liable to attachment and sale in execution of a decree :-

1. Lands 2. Houses or other buildings 3. Goods 4. Money 5. Banknotes 6. Cheques 7. Bills of exchange 8. Hundis 9. Promissory notes 10. Government securities 11. Bonds or other securities for money 12. Debts 13. Shares in corporation and 14. All other salable property whether movable or immovable.

Enforcement of decree u/s 52 against Legal representative:

26] Section 52 (1) empowers a creditor to execute his decree against the property of deceased in the hands of legal representative so long as it remains in his hand. For application of this clause the decree should

have passed against the party as the legal representative of the deceased person, and it should be for the payment of money out of the property of the deceased.

27] Section 52 (2) empowers a creditor to execute his decree against the legal representative personally if he fails to accounts for the properties received by him from deceased person.

Section 53: Liability of ancestral property -

28] No legal representative should be held personally accountable where the suit has been filed against a joint Hindu family unless he has received some property of joint Hindu family. Under pious obligation if he has received the property of joint Hindu family then will be held liable. Where the decree has been passed against Karta, no execution be made against the son under pious obligation if the decree is passed after partition. Even after partition a son can be held liable if suit was pending before partition.

Section 54: Partition of estate or separation of share.

29] Section 54 comes into play when a decree has been passed for partition or for separate possession of a share of an undivided estate paying revenue to the government. Section 54 deals with a case where though the civil court has the power to pass a decree yet it is not competent to execute the same. Under this section the execution of decree shall be made by collector.

PRINCIPLES WITH REGARD TO EXECUTION OF DECREE:

30] Principles with regard to execution of decree and order can briefly be summarized as under -

- Provision of CPC relating to execution of decree and order shall be made applicable to both Appeal and Suit.

- A decree may be executed by the court which passed the judgment and decree or by some other court which is having competency to implement the judgment passed by such other court.
- The court which passed the decree may send it for execution to other court either on application of the applicant (decree-holder) or by the court itself.
- A court may order for execution of decree on the application of decree holder (a) by delivery of any property which was in possession of judgment-debtor and decree has been specifically passed concerning such property (b) by attachment and sell of the property of the judgment-debtor (c) by arrest and detention (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court.
- Upon the application of decree-holder, the court may issue “percept” to any other court which is competent in that regard.
- All questions arising between the parties to the suit in the decree shall be determined by the court while executing the decree and not by separate suit.
- Where a decree is passed against a party as the “legal representative” of a deceased person and decree is for payment of money out of the property of deceased person, it may be executed by attachment and sell of any such property.
- Where immovable property has been sold by the court in execution of a decree such sale shall be absolute. The property shall be deemed to be invested in the favour of purchaser, and the purchaser shall be deemed as a party to litigation.
- The court to which decree is sent for execution shall require certifying to the court which has passed decree stating the manner in which decree has been implementing concerning the fact of such execution.

Whether Executing Court can go behind the decree :-

31] Section 38 lays down the general rule that, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The executing Court has no power to entertain any objection as to the validity of the decree or as to the legality or correctness of the decree. The reason underline the above rule is that, although a decree may not be according to law, it is binding and conclusive as between the parties to the suit, unless it is set aside in appeal or revision. It is for the same reason

that, the Court executing a decree cannot alter, vary or add to the terms of the decree even with the consent of the parties. In the case of **V. Ramswami Vs T.N.V.Kailash Theyar reported in AIR 1951 S.C,189 (192)**, it was observed that, "*the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation*".

It has been held by the Supreme Court in **Karansing Vs Chaman Pawan reported in (1955) 1 SCR 117**, that a decree passed by a Court without jurisdiction is a nullity, and its validity can be set up whenever and wherever, it is sought to be enforced or relied upon, including the stage of its execution.

In **Topanmal Vs M/s Kundomal Gangaram reported in AIR 1960, SC 388**, it was held by the Supreme Court that, an executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree.

32] A Court executing a decree cannot go behind the decree. The court must take the decree as it finds it. It cannot entertain any objection that, the decree is incorrect in law or on facts, because until the decree is set aside by an appropriate proceedings in appeal, or in revision, a decree even if erroneous, is binding between the parties. It has to see the decree as it is and execute it in accordance with the terms therein. It cannot question the correctness or legality of the directions. However, if the court which passed the decree has no inherent jurisdiction, the decree is incapable of execution. Dealing with this question, the Supreme Court observed in **Karan Singh V. Chaman Paswan** that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings. However, where the defect in jurisdiction was of a kind that fell within the saving of S.21 of the Code or S.11 of the Suits Valuation Act, it could not be

raised except in the manner and subject to the conditions mentioned therein. This rule holds good only between parties to the decree and their representatives. The Court has no power to entertain any objection as to the validity of the decree that, it was obtained by fraud, or as to the legality or correctness of the decree, e.g. An objection that the decree sought to be executed was passed against a wrong person; or that it was passed against a lunatic or a minor not properly represented; or that the court which passed it, had no jurisdiction to do so. The reason being that a decree, though not according to law, is binding and conclusive between the parties until it is set aside, either in appeal or revision. For the same reason, the court executing a decree, cannot alter, vary or add to the terms of the decree even by the consent of the parties. A decree passed against an unregistered firm in violation of S.69(2) of the Partnership Act is not a nullity and cannot be questioned in execution. It is not open to the executing court to go into the validity of an order amending the decree. Broadly speaking, the distinction is one between a plea that the decree sought to be executed is a nullity and a plea that, it is invalid, improper or erroneous. It has been held that, the award of mesne profit for more than 3 years is in contravention of O.20 R.12, and is a nullity and that the objection can be taken in execution. An objection to the execution of a decree passed on a rent control order is admissible. The executing court cannot entertain an objection that the personal decree passed against the defendant before proceeding against the properties is erroneous. It is also not open to the executing Court to enquire whether the property charged by the decree was not available on the date of decree. Also, the objection based on the absence of territorial jurisdiction could be taken in execution, unless it is apparent on the face of the decree. However, when on the allegations in the plaint, the suit is beyond the pecuniary jurisdiction of the Court, a decree passed by it is a nullity and that objection can be raised in execution.

33] If the decree is free from ambiguity, the court of execution is bound to execute it whether it be right or wrong. But though a court executing a decree cannot go behind the decree, it is quite competent to

construe the decree whether the terms of the decree are ambiguous, and to ascertain its precise meaning, for, unless this is done, the decree cannot be executed. But it cannot, under the guise of interpretation, make a new decree for the parties. The construction of a decree must be governed by the pleadings and the judgment. But when a particular construction has been put upon a decree in former execution proceedings, it is not open to the court to treat that construction as erroneous in a subsequent application.

Objection of parties

34] Whereas an objection to attachment or claim to attach property if made by a third party, the objector may either proceed by an application under this rule before the executing Court or he may bring a suit to establish his objection. His failure to proceed by an application under this rule is no bar to a separate suit. The object of this rule is to give a speedy and summary remedy, but this rule does not deprive him of his remedy by way of suit.

35] As per Para 345 of Civil Manual, the concerned Court is required to frame issue casting burden of proof on a particular party. Objections or claims filed against execution must not be disposed of without granting an opportunity to lead evidence.

36] In claim petition, the burden is on the claimant to prove that on the date of attachment, he has some right, title or interest or was in possession of property attached. If the claimant is succeeded in proving that fact, then burden is shifted on decree-holder to prove that the objector was not the owner or holds any interest for judgment-debtor. In a suit filed by a third party to the litigation, burden of establishing right, title or interest in the property is upon the plaintiff.

37] The Honourable Apex Court in the case of Brahmdeo Choudhary V/s Rishikesh Prasad Jaiswal AIR 1997 SC 856 held that, it can not be said that the only remedy available to the stranger to the decree for

possession who has resisted its execution, to have his claim adjudicated is the one under R. 99 of O.21 after he has lost possession to the decree-holder and that he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceeding.

It is also held that it is easy to visualize that a stranger to the decree who claims an independent right, title, and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order 21 Rule 99. Order 21 rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can adjudicated upon before actual delivery of possession to the decree-holder. While Order 21 rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest dehors the interest of the judgment debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it even if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. Provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executive Court as well as by the decree-holder the remedy available to the decree-holder against such an obstruction is only Order XXI, Rule 97 sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction

of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession.

It is also held that the view that claim of stranger obstructionist would only be considered after he has lost possession to decree-holder would result in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder.

38] In the case of Silver line Forum Pvt Ltd. v. Rajiv Trust and another AIR 1998 SC 1754 held that, “ Resistance or obstruction made even by a third party to the execution of decree can be gone into under O.21 R.97. Rule 97 to 106 are substantial under the caption “ resistance to delivery of possession to decree-holder or purchaser.” Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by “ any person” in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub rule (2) makes it incumbent upon such complaint in accordance with procedure laid down.

It is also held that all question arising between the parties to a proceeding on an application under R. 97 or R. 99 shall be determined by the executing court, if such question are relevant to the adjudication of the application.

Delivery of Immovable Properties

39] Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

In **Madhukar Timbak Gore vs Vasant Ramkrishna Kolhatkar, AIR 1983 Bom 277**, it is held that when in execution a question arises as to the identity of the property of which possession has to be delivered to the decree-holder obviously such a question would relate to the execution of the decree and it would be for the executing Court to decide it as required by sub-section (1) of Section 47 of the Code, since it would not be possible for the decree-holder to get it determined by a separate suit, The proposition is so obvious so as not to need any authority. The Allahabad High Court in **Rahim Buxv. Mohammad Shafi** has held that in such cases it is for the execution Court to decide the question after taking such evidence as may be necessary as to what is the property of which possession has to be delivered. Thus, Order 21, Rules 35 and 36, Rules 97 to 104 of the Civil Procedure Code provide for the complete code to deal with the execution of decree of delivery of possession to decree-holder or purchaser.

Custody and disposal of movable properties

40] A decree may have to be executed by attachment and sale of J.D.'s property. The attachment of movable property, other than agricultural produce, in possession of judgment debtor is to be made as per provisions of O.21 R 43 of C.P.Code by actual seizure.

41] The attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof. However, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

42] When the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to rule 43, he may, at the instance of the judgment debtor or of the decree holder or of any other person claiming to be interested in such property, leave it in the village or place where it has been attached, in the custody of any respectable person as the “custodian”.

43] However, if the custodian fails, after due notice, to produce such property at the place named by the court before the officer deputed for the purpose or to restore it to the person in whose favour restoration is ordered by the court, or if the property, though so produced or restored, is not in the same condition as it was when it was entrusted to him,—

(a) the custodian shall be liable to pay compensation to the decree holder, judgment debtor or any other person who is found to be entitled to the restoration thereof, for any loss or damage caused by his default; and

(b) such liability may be enforced—

(i) at the instance of the decree holder, as if the custodian were a surety under section 145;

(ii) at the instance of the judgment debtor or such other person, on an application in execution; and

(c) any order determining such liability shall be appealable as a decree.

When the decree directs delivery of specific movable property, the court would have indicated the amount to be recovered as an alternative if delivery of specific movable property can not be effected. If delivery of such property can not be effected by seizure or by detention of JD in civil prison or attachment of his other property, the court may award to the D.H. the amount indicated in the decree. If no such amount is indicated in the decree, the executing court would fix such compensation as it thinks fit and award to D.H.

Execution of decrees against person in military service

44] When any officer or soldier actually serving Government in military capacity is a party to a suit and cannot obtain leave of absence for

prosecuting or defending a suit, he can appoint some other persons to act on his behalf by an authority in writing given in the manner prescribed in Order XXVIII of the Code of Civil Procedure. He is provided by his Unit Commander with a certificate to enable him to obtain priority of hearing. This certificate must be presented by him in person to the Court.

45] Under Section 28 of the Army/Air Force Act, no arms, clothes, equipment, accoutrement or necessaries of any person subject to either of these Act nor any animal used by him for the discharge of his duties can be seized, nor can his pay and allowances or any part thereof be attached by direction of any civil or revenue Court or revenue officer in satisfaction of any decree or order enforceable against him.

46] Section 29 of the Army/Air Force Act provides that no person subject to either of these Acts, so long as he belongs to the Armed Force, can be arrested for debt under any process issued by, or by the authority of a civil or revenue Court or a revenue officer. Where, inspite of the above any such arrest is made, the Court of the revenue officer concerned on receipt of a complaint by such person or by his superior officer to that effect, may discharge him and award reasonable costs to the complainants. The costs may be recovered in like manner as if they were awarded to him by a decree against the person obtaining the processes. No Court-fees are payable for the recovery of such costs.

Reciprocal execution of decrees by courts in India and foreign countries

47] Any decree passed by any Civil Court established in any part of India to which provisions of this Code do not extend, or by any Court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in the manner herein provided within the jurisdiction of any Court in the territories to which this Code extends.

48] Under this section, read with sections 44 and 45, the Indian courts have power:

- i) to execute decrees of those Indian courts to which the Code does not apply, such as Schedule Districts;
- ii) to execute decrees of civil courts outside India, which are established by the authority of the Central Government;
- iii) to execute the decrees of revenue courts in any part of India, to which the provisions of the Code do not apply; and
- iv) to execute decrees of Indian courts in the state to which the state government has notified that s. 45 would apply.

49] Section 45 contemplates courts established by the Central Government. The words any part of India to which the provisions of this Code do not extend, have been constructed to include the sovereign states like former Indian states to which the Code could not be extended.

Stay of execution

50] As per Order XXI Rule 26 the executing Court may stay the execution proceeding, the Court which passes the decree can stay the proceeding on application of judgment-debtor enabling him to file the appeal and to bring the stay to the execution proceeding. Where the suit is pending in any Court decree-holder and judgment-debtor in such circumstances if the Court is found the rights of parties are required to be adjudicated by the Court where such suit is pending and unless the rights are to be determined, the decree cannot be executed in such circumstances, Court can stay the execution proceeding. The appellate Court can also grant the stay to the execution proceeding.

Distribution of assets

51] The multiplicity of proceedings may happen in cases where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every

one separately attaching and separately selling that property (Dundappa Virupaxappa Kallolgi v. Annaji Vardaji MANU/MH/0063/ 1953: AIR 1953 Bom 65.). It is also aimed at to provide for rateable distribution of assets upon which two or more decree-holders have equal claims. Section 73 of the Code of Civil Procedure is intended to provide expeditious, summary and cheap remedy for the execution of money decrees held against the same Judgment-debtor by several persons, the claims of rival decree-holders getting adjusted without the necessity for separate proceedings.

52] Section 73 provides that where assets are held by a Court, and more persons than one have, before receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same Judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons (PL. CT. PL. Palaniappa Chettiar v. A.R.M.A.L.A. Muthu Veerappa Chettiar MANU/TN/0195/ 1966: AIR 1966 Mad 406; Peddireddy Ganga Raju v. K. Mangamma, AIR 1958 AP 334).

Execution of decree in specific performance of contract

53] The court can direct that the act required to be performed by J.D. may be performed as far as practicable by D.H. or any other person for and at the cost of J.D. This is an addition to the remedies of attachment of property and detention of the J.D. in civil prison. A decree for specific performance of agreement of sale is executed by obtaining from the decree holder a draft of the document prepared in terms of the decree. The draft is then served on the J.D. inviting his objections. After objection, if any, are dealt with and the draft is approved, the J.D., having failed to execute the same, the court would cause it to be registered by sending it to the sub registrar either with an officer of the court or a commissioner appointed for this purpose.

Preliminary Decree and Final Decree :-

54] Preliminary decree in a partition action is a step in the suit which continues until the final decree is passed. Where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the Court may pass preliminary decree declaring the rights of the several parties interested in the property and giving such further direction as may be required. In a suit for partition by coparcener or co-sharer, the Court is not expected to give decree only for the plaintiff's share, but it has to consider the shares of all the heirs after making them parties to the suit and then to pass preliminary decree. Therefore, the preliminary decree for partition is only a declaration of rights of the parties and the shares they have in the joint family or coparcenary property. The Court can pass more than one preliminary decree depending upon the facts and circumstances. For example, situation giving rise to change in the extent of the shares of the parties to the suit.

55] Hon'ble Bombay High Court in the case of **Kusum Dashrath Kharmare Vs. Popat Madhav Gangarde and others, 2008(1) Mh.L.J 267**, laid down the law that, there is nothing in the Code of Civil Procedure which prohibits the Court from passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suit when after the preliminary decree some parties die and shares of other parties are thereby augmented. The proceeding is brought to an end when the final decree is drawn.

Hon'ble Bombay High Court in the case of **Annasaheb Rajaram Nagane and another Vs. Rajaram Maruti Nagane and others AIR 2001 Bom.303** gave directions to the Civil Courts as follows:

56] By way of general directions, all the civil Courts are directed to remit, to the Collector, within four months from the date of signing the decree under Section 54 of CPC, all the relevant papers for partition of property or a separate possession of undivided estate assessed to the payment of revenue to the Government, without there being any application or request or prayer for the same; so as to follow the mandate of Section 54

of CPC. Any application seeking direction to send necessary papers to the Collector, should be disposed of within 30 days from the receipt thereof, treating it as an application filed in the disposed of suit, without opening any independent proceeding in this behalf. Such application should be treated as a request to a Judge or Court to send necessary papers to the Collector for effecting partition under Section 54 of CPC. Such application is really nothing but a request to the Judge or Court to discharge his ministerial duty. In view of this, even no notice to any of the parties to the application is necessary as it is not a petition seeking any adjudication of any of the rights of the parties.

Execution of decree for restitution of conjugal rights

57] A decree of restitution of conjugal rights implies that the guilty party is ordered to live with a aggrieved party. Restitution of conjugal rights is the only remedy which could be used by the deserted spouse against the other. A husband or wife can file a petition for restoration of their rights to cohabit with the other spouse. But the execution of the decree of restitution of conjugal rights is very difficult. The Court though is competent to pass a decree of restitution of conjugal rights, but it is powerless to have its specific performance by any law. The non-compliance of the issued decree results to constructive destruction on the part of the erring spouse. Decree of restitution of conjugal rights could be passed in case of valid marriages only.

58] In a decree of restitution, the party, against whom the decree is passed, cannot be compelled physically to restore cohabitation. A Court is not competent to direct that the wife or husband be, bodily handed over to other spouse and restrain him or her of liberty until he or she is willing to render him or her conjugal rights. As per provisions of the present Act, the aggrieved party can move a petition for a decree after one year from the date of the passing of the decree and the competent Court can pass a decree of divorce in favour of the aggrieved party. Another advantage the aggrieved wife can have from this provision is that she can claim maintenance from the husband.

Modes of early disposal of execution petition

59] Taking into consideration the fact that it is only the execution which reveals and signifies the importance of the decrees to be passed, there can be some basic modes for early disposal of execution petition. In that regard some modes can be by reserving some special day for execution work. Execution of decrees should receive the same attention from the Courts as original civil work and should be methodically and regularly dealt with, as expeditiously as possible. Where parties have to be heard or evidence recorded in the course of execution proceedings, notice should be given, processes issued and dates fixed as in the case of original suits. As a rule, one day during the week should be reserved for execution work so as to ensure proper attention being paid to it; sometimes two days are necessary.

60] At the time of dealing of execution proceeding, if Court strictly follow the rules, then execution proceeding can be disposed of as early as possible. In this proceeding, Section 5 of Limitations Act is not maintainable. If below 2 years from decree, no notice under Order XXI Rule 22 of C.P.C. be sent. Notice not necessary if Court feels that unreasonable delay will be caused. In cases of salary attachment, no notice to pay disbursing officer is necessary. It is sufficient if attachment warrant is sent to him.

61] Stay of proceeding is the obstacle for early disposal of execution proceeding. This is where the proceedings get stuck without any progress. If we strictly follow the provision and decisions of High Court and Supreme Court delay will be considerably cut down and justice will be done in time.

62] Court cannot stay of execution of its own decree. Only under Order 41 Rule 5 C.P.C., stay can be granted by Trial Court, but for fixed time only. No stay can be granted if appeal is filed with delay condonation petition. If Court is satisfied that appeal is pending, then no purpose in keeping the execution proceeding pending. Execution proceeding can be

dismissed with liberty to file fresh execution petition after disposal of appeal. The limitation will be saved since decree will merge in appellate Court decree and time will run afresh after disposal of the appeal.

Decrees in Garnishee

63] Garnishee means a judgment-debtor's debtor. He is a person who is liable to pay a debt to a judgment-debtor or to deliver any movable property to him. A garnishee order is an order passed by a Court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.

64] The primary object of a garnishee order is to make the debt due by the debtor of the judgment-debtor available to the decree-holder in execution without driving him to a suit.

65] Garnishee proceeding is a process of enforcing a money judgment by the seizure or attachment of debts to accruing due to the judgment-debtor which found part of his property available in execution. Before using attachment, the Court may issue notice to garnishee. Such notice calls upon garnishee to pay the amount to satisfy the decree or to show cause why he should not do so. If garnishee makes payment in the Court, it will amount to hasty discharge of his debts. A garnishee has right to show cause why such debts is not payable or why he should not be called upon to make the payment in the Court. If the garnishee disputes the liability, it shall be decided as if it were an issue in a suit and upon determination of such issue, the Court can make order as deemed fit.

CONCLUSION -

66] From the above discussion it clearly appears that execution is the enforcement of decrees and orders by the process of Court, so as to enable the decree-holder to realize the fruits of the decree. Order 21 of the

Code contain elaborate and exhaustive provision for execution of decrees and order, take care of different type of situation and provide effective remedies not only to the decree-holder and judgment-debtors but also to the objectors and third parties.

Thanking you,

Paper prepared by : Core committee of Group "A"

(Smt. K.B.Agrawal)
Dist. Judge-1 & Addl.Sessions Judge,
Judge, Jalgaon.

(A.K.Patni)
Dist.Judge-4 & Addl.Sessions,
Jalgaon.

(S.S.Ghorpade)
Civil Judge, S.D., Jalgaon.

(B.D.Pawar)
3rd Jt. Civil Judge, S.D. & Addl.
C.J.M., Jalgaon.