

**: PAPER ON WORKSHOP TO BE HELD ON 4<sup>th</sup> OCTOBER, 2015 :  
EXECUTION OF DECREE WITH SPECIAL REFERENCE TO SECTION 47  
OF THE CODE OF CIVIL PROCEDURE AND OBSTRUCTION  
PROCEEDING UNDER ORDER XXI RULE 97 TO 106 OF THE CODE OF  
CIVIL PROCEDURE**

1. Question to be determined by the court executing the decree under section 47 of the code of civil procedure.

**Introduction and object :-**

2. Execution is the most important aspect of Civil justice. Success or failure of system of Civil justice depends on success in executing decrees of Civil Courts.

3. The object of section 47 is to determine all questions between parties to the suit or their representatives, relating to execution, discharge or satisfaction of the decree in the same proceedings without filing a separate suit. It does not apply where the contest is between the parties to the suit and a stranger.

**Execution, Discharge or Satisfaction of Decree :**

4. “Execution” of a decree is a process by which decree of a Court is enforced by taking legal steps. “Discharge” of a decree is another process by which the liability under decree is fulfilled or put to an end by positive acts of the judgment debtor. Lastly “satisfaction” of the decree means “compliance” with the terms of the decree by the judgment debtor or complying with the order of the Court so as to give full and final relief to the decree holder. (**Vasudev Dhanajibhai Modi Vs. Rajabhai Abdul Reheman and Ors., MANU/SC/0531/1970**)

**Powers of the Executing Court :**

5. The executing court cannot question the validity of a decree or entertain

an objection as to the legality or otherwise of the decree. It has to take the decree as it stands and execute it according to its terms. The executing court must abide by the directions contained in the decree. Court cannot go behind the decree.

6. It not only determines the questions of execution but also decide whether any person is or not the representative of the party. Similarly the disputed parties as well as a purchaser of the property of sale in execution of decree shall be deemed to be the party of the suit. Not only the questions of execution, discharge, or satisfaction but the questions relating to the delivery of possession of such property to the purchaser or his representative shall be deemed to be the questions relating to execution, discharge, or satisfaction of the decree within the meaning of section 47 of the Code.

7. The power of the executing court will determine the questions between the parties is limited and narrow. Right to raise objection does not mean that, objector can re-open the matter. That is not intended by the legislature. Jurisdiction being extremely limited and narrow, the objection must fall within the ambit and the scope of the same. Thus jurisdiction cannot be equated with that of a appeal or review. Executing Court has to go by the decree. **(Savitribai Vs. Suman 2009 (5) Mh.L.J.387 )**

8. If at a Court auction, property is purchased by a bonafide purchaser who was stranger to the decree, and the decree is set aside or reversed, restitution cannot be claimed by judgment debtor. However, by the section 47, auction purchaser irrespective of the fact whether they were parties to the suit from before or not shall be deemed to be such parties for the purpose of this section. After an auction sale of immovable property in execution of a decree, auction-purchaser can move the executing Court for delivery of vacant possession. It is not necessary to file a separate suit for this purpose. Having regard to this, all questions arising between the auction-purchaser and the judgment debtor must be determined by the executing

court and not by a separate suit.

9. A question between the parties as to who are legal representatives of a deceased judgment debtor falls within the purview of section 47 of the Code. Where in execution of a decree passed against a legal representative to be recovered from the estate of the deceased, certain personal property of the legal representative is attached, the objection of the legal representative being a party to the suit shall be determined by the court executing the decree under section 47 and not by a separate suit.

10. A decree for possession of the disputed land was passed but the judgment debtor was allowed to remove the materials of the construction which had been built by him in the disputed land. That right of the judgment debtor to remove the materials from the disputed land is a matter relating to the execution, discharge or satisfaction of the decree. When the decree holder obtained possession in excess of that to which he was entitled under the decree then the judgment debtor who is the owner of excess property, is to apply in execution proceedings and not to file a separate suit for recovery of possession of that property.

11. The legality of execution proceedings or jurisdiction of the execution Court to order sale is a matter falling under section 47. But an objection by the judgment debtor that the decree is invalid as being collusive or that the decree was obtained by fraud can be tried only in regular suit and not in execution. These questions relate to the validity of the decree and not to execution, discharge or satisfaction of the decree.

12. Where a decree is for possession, it is for the executing Court to go into the question if the dispute relates as to which lands constituted the subject matter. When the property was not definitely identified due to the defect in Court record caused by over-looking provisions of Order VII Rule 3 and Order XX Rule 3 of the Code. This defect is capable of being cured under section 47 of the Code. Successful

plaintiff should not be deprived of the fruits of decree when resort can be added to section 152 or section 47 of the Code depending on facts and circumstances of each particular case. **(Pratibha Vs. Shanti, AIR 2003, SC 643 )**

13. Where in execution of money decree a judgment debtor pleads payment or adjustment the question falls within the section 47 of the Code and can be dealt with any execution proceedings, but an uncertified payment or adjustment cannot be entertained under section 47 of the Code by the Court executing the decree. The executing Court has no jurisdiction to enquire into a payment or adjustment before the decree at variance with the later.

14. It is open to the parties to enter into a compromise with reference to their rights and obligations under a decree. There is nothing in the Code which prevents the parties from entering to the compromise. If the compromise amounts to an adjustment of the decree, it must be recorded under Order XXI Rule 2 and If not so recorded, it cannot be recognized by any Court executing the decree. Exclusive power to determine such question is given to the executing Court by section 47 of the Code. **(Moti Lal Banker Vs. Maharaj Kumar Mahmood Husan Khan, AIR 1968 SC 1087)**

#### **Fresh suit for possession is barred -**

15. Where the plaintiffs were granted a decree for possession by partition which they did not execute and allowed it to get time-barred and not even otherwise obtain possession over the property, they cannot maintain a fresh suit for possession on the basis of the earlier decree, and such a suit is barred by section 47 of the Code.

#### **Exceptions -**

16. A executing Court cannot go behind the decree. Executing Court cannot question the decree and has to execute as it stands, is correct, but this

principle has no operation when the objection is based on effect of the provision of the Act, which deprived the party of his proprietary rights. In these circumstances, the executing Court can refuse to execute decree holding that, it has become inexecutable on the account of change in law. There are, however, some cases where the executing court can go behind the decree. These are as under:

### **I) Nullity of Decree:**

17. Where the decree is a nullity. The objection of the judgment debtor that the decree is a nullity because it was passed against a dead person, without bringing his legal representatives on the record, is an objection which can be entertained by the executing court, for in such a case if the objection is proved, there is no executable decree at all. Court can interfere only if the decree is null and void without jurisdiction. (**Dashrath Singh Vs. State of Punjab, 2007(4) Mh.LJ. 361 (SC)** )

### **II) Ambiguous Decree:**

18. Where the decree is ambiguous. A decree instead of meaning one thing may mean two or more different things. In such a case it is the duty of the executing court to go behind the decree and seek to ascertain from the judgment and pleadings the true implication of the decree. This is necessary to enable the executing court to execute the decree.

### **III) Decree made without jurisdiction:**

19. Where the decree has been made by a court without jurisdiction, i.e., in respect of territorial or pecuniary jurisdiction or in respect of the judgment debtor's person. An objection based on the ground of jurisdiction can be entertained by the executing court for, if the decree has been passed without jurisdiction by a court, there is no executable decree.

20. Executing Court cannot go behind the decree and question its correctness; but when the decree is silent and gives no indication as to what property should be sold in execution, it is permissible for the court to look into the judgment in order to find out whether upon any issue of property raised and determined as between the parties interested the property brought to sale has been held to belong to the judgment debtor.

**Obstructionist proceeding, scope and nature of inquiry**

21. It is said that justice must not only be done but it must appear to have been done. In justice delivery system only passing of decree is not an aim but its achievement lies in the execution of decrees. Execution of decree is a real justice to the people. Once decree is passed by the court, the court is bound to enforce its execution peacefully and without causing any obstruction or resistance either by judgment debtor or by a third person.

22. The provisions contained in section 51 to 74 of CPC deal with the substantive law relating to execution of decree. The numerous rules of order XXI of the Code take care of different situations, providing effective remedies not only to decree holder, auction purchaser and Judgment debtors but also to objectors claiming independent rights, title and interest in the property. Third party may make an application to the executing court for ventilating their grievances.

**Rights of decree-holder/auction purchaser and obstructionist:**

23. If a decree-holder, is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order XXI, Rule 35 then the decree-holder has to move an application under Order XXI, Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist

the Court can pass appropriate order after adjudicating upon the controversy between the parties as per R. 97 sub-rule (2) of Order XXI of CPC, It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without just cause by the Judgment- debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per order XXI, Rule 97 sub-rule (2) and the decree holder would be permitted to be put in possession. Even in such an eventuality the order passed would be treated as a decree under Order XXI, Rule 103 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree.

24. If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under order XXI, rule 99, cpc claiming that his dispossession was illegal and that possession deserves to be restored to him.

25. In the case of [**Bramhadeo Chaudhary Vs. Rishikesh Prasad Jaiswal** (AIR 1997(S.C.) 856)], the Hon'ble Apex Court has observed that :-

“ If a Decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the manner by obtaining warrant for possession under O. 21 Rule 35 of Code of Civil Procedure, then the decree-holder has to move an application under order 21 Rule 97 of Code of Civil Procedure. Court can pass appropriate order after adjudicating upon the controversy between the parties.”

**Scope of inquiry:**

26. If the resistance is from judgment debtor or any person claiming through him, then the scope of inquiry will be of summary nature and if the resistance

is from a third person claiming independent right, title or interest in the immovable property then the scope of inquiry will be wider. It is desirable for the executing court to hear the objection of third party as a suit. The executing court can even frame the issues and call upon the parties to lead the evidence,

**Nature of inquiry :**

27. 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 stranger to the decree and which is noted by the Executing Court as well as by the decree- holder, the remedy available to the decree-holder against such an obstructionist is only under 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.

28. In view of above discussion regarding obstruction proceeding, nature and scope of inquiry under Sec. 74 read with O.XXI Rule 97 to 106 of CPC, it can be summarized that O.XXI of CPC is an independent Code in itself and it not only provide procedure to be followed by the decree- holder to get the fruits of the decree, at the same time it provides an opportunity to the judgment-debtor or the third party/ objection petitioner to raise the grievances or objection in the execution proceeding itself. Recourse to independent proceedings by filling a separate suit is clearly prohibited. Therefore, objections if any, are raised by the judgment-debtor or the third partly in execution proceedings, the same are required to be adjudicated by

executing court following the same procedure as if it was a suit and the orders by the executing court having the force of a decree.

**Execution of decree for immovable property with special reference to order XXI  
Rule 35 & 36.**

**Scope:-** The application for execution must be in writing and should contain the particulars set forth in Rules 11 (2) to 14. Order 21 R. 35 & 36 of the Code of Civil Procedure deals about the decree for immovable property.

**Rule 35 :-Decree for immovable property :**

(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or the customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other Act necessary for putting the decree holder in possession.

4) Under this rule the plaintiff gets or the defendant is obliged or constrained to give the very property and not merely damages for retaining or continuing to retain property.

5) During execution of decree for immovable property, identification of suit property is an important aspect.

6) Actual and formal possession and its delivery

The possession referred to in sub - rule (1) and (3) is khas or actual

possession, while that referred to in sub rule (2) and Rule 36 below is formal or symbolic possession. Formal or symbolic possession is delivered by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming by the beat of drums or any other customary mode, at some convenient place, the substance of decree.

7) In **Shew bux V/s Bengal Breweries Ltd , (AIR 1961 SC 197)**- the Honourable Supreme Court has held that “ where a decree holder entitled to khas possession accepts symbolical delivery, and allows the person in actual possession to continue in possession, the decree is satisfied and can not be executed .”

### **Resistance during delivery of possession:-**

29. If a person has succeeded in getting a decree for possession of a certain property, he is entitled under this rule to get an order from the court for delivery of that property to him, by any person bound by the decree. He need not invoke the assistance of the court if he can get possession peaceably. But he may apply under this rule or rule 36 for the assistance of the court to put him in possession. If he is resisted or obstructed in obtaining possession through the court the procedure so followed is that prescribed by rules 97 to 103 of this order. Where delivery of possession ordered under this rule is obstructed by a third person, any question whether he is a sub-tenant of the judgment-debtor must be determined not under this rule but Under Rule 97.

### **Resistance by third party:-**

30. Where an independent right is set up by a third party who is alleged to have resisted the execution of the decree, the court can not straightway order execution with police and without recording reasons merely on the process server's report of resistance.

31. In the case of **Bhanwar Lal V/s Satyanarain (AIR 1995 SC 398)** –

Hon'ble S. C. held that

“where a person in possession and bound by the decree, does not afford free access, the officers of the court may after giving reasonable warning and facility to a pardanashin lady to withdraw, break open the building put the decree holder in possession thereof .”

32. Where obstruction is caused by a stranger, the proper rule is Order 21 R 97 (1) and not Order 21 R. 35 (1). In **Bhanwarlal V/s Satyanarayan (1995) 1 SCC 6 – In this case** Hon'ble Supreme Court held that – if the application dismissed Under Order 35 R (1), as made Under the wrong rule, that Order can not operate as res-judicata in an application made under proper rule i.e. Under O. 21 R 97 (1) of the C.P.C.

**Rule 36 Decree for deliver of immovable property when in occupancy of tenant :**

33. 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.

**Mode of execution :**

34. When physical and actual possession of the immovable property is given to the decree holder, the mode is known as 'khas' or 'actual possession'. But where the property is in possession of a tenant or any other person entitled to occupy it and not bound by the decree, the delivery thereof should be made by affixing a warrant at some conspicuous part of the property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree relating to the property. This mode is called 'symbolic' or 'formal possession'.

Where the decree holder accepts possession without the actual removal of the person in possession, he can not later on complain that he had not been given possession to which he was entitled Under the Law.

**Objection during eviction:**

35. A decree for eviction was passed against a tenant. In execution, the wife raised an objection that only constructive delivery could be given. It was held that the wife, being a member of the family, was bound by the decree and her objection could not be sustained.

36. A decree for partition is in substance a decree for the delivery of possession of properties, and in consequence an application to eject a tenant who had been let into possession prior to the suit for partition, and who had not been impleaded therein is governed by this rule.

37. A lease granted by a usufructuary mortgage ceases when the mortgage is redeemed, and accordingly the decree holder who redeems the mortgage is entitled to actual possession, and not merely symbolical possession Under this rule.

38. **Warana Valley Sahkari Kharedi...vs Shri. Ashok Jaywant Gaikwad**  
And another decided on 26/03/2015 in writ petition no. 2542/2015, In this case Hon'ble Bombay High Court held that - "obstructing the execution of decree for the alleged ' impossibility of performance ' constitutes a clear abuse of judicial process."

**Difference between Rule 35 and Rule 36.**

39. It was held in **Mumtaz Jehan v. Insha Allah, MANU/DE/0435/1982: AIR 1983 Del 65** that Under Rule 35(1) actual possession is delivered to the decree-holder by removing all persons bound by the decree and under Rule 36 symbolical

possession is delivered if the property is in occupation of tenants entitled to occupy and not bound by the decree to deliver possession.

40. It was held in **Ratan Lal Jain v. Uma Shankar Vyas; Shamsuddin v. Abbas, MANU/SC/0058/2002: AIR 2002 SC 804** that the former is known as actual or physical delivery of possession while the latter is known as delivery of formal or symbolic possession. In the latter case, the person in actual occupation is not physically dispossessed from his possession of the decretal property. Still delivery of possession in the manner contemplated by Rule 36 remains delivery of formal or symbolic possession so far as the person in actual possession is concerned but as against the person bound by the decree, it amounts to actual delivery of possession.

**Adjudication of claims to, or objections to attachment of property under order 21 rule 58 of Code of Civil Procedure.**

41. Rule 58 and 59 deals with adjudication of claims preferred to property attached in execution of decree and all objections to attachment of property.

42. The object of the rule is to put an end to protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in the execution. These objections and claims are usually raised by two categories of persons:-

- 1) by the parties to litigation or their representatives;
- 2) by the third party.

43. The objections made by judgment debtor or his representatives are required to be dealt under section 47 of Civil Procedure Code. A separate suit for raising these objections and claims is barred. Such objections and claims are required to be adjudicated under section 47 of Code of Civil Procedure.

44. For raising a claim under order 21 rule 58, the claimant must possess

valid and substantial rights in the property which is sought to be attached or otherwise proceeded with in execution. Claims which are not recognized in law are not permitted to be raised. All the persons who on the date of attachment have some interest or in possession of the property attached could prefer a claim under rule 58.

**Procedure for deciding claims and objections:-**

1) 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 off without granting an opportunity to lead evidence.

2) 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 the property attached. If the claimant is succeed 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 third party to the litigation, burden of establishing right, title or interest in the property is upon the plaintiff.

3) As per Sub rule (1) and (2) of Rule 58, while entertaining a claim or objection the court must investigate fully and adjudicate upon all questions including questions of right, title and interest in the attached property arising between the parties.

**Limitation for filing such objections or claims:-**

45. On being aggrieved by the order passed by executing court refusing to entertain a claim or objection against attachment made by the executing court, the claimant has to bring the suit as per sub rule 5 of rule 58. Such suit is to be filed within a period of one year of the final order passed by the executing court and to such a suit Art 98 of Limitation act is attracted.

46. When a suit is filed by third party to challenge the attachment and sale

of property residuary article of Limitation Act i. e. Article 113 is applicable and accordingly three years period of limitation is prescribed from arising of cause of action.

**Order on claim or objection:-**

47. As per sub rule 3 of Rule 58 of the CPC the court either

- a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
- b) disallow the claim or objection; or
- c) continue the attachment subject to any mortgage, charge or other interest in favor any person; or
- d) pass such order as in the circumstances of the case it deems fit.

48. An order passed after such investigation determining such question, has the force of a decree and the remedy of the party against whom the order passed is by way of appeal and not by way of a suit (sub rule (3)(d)). An order on a claim petition is subject to a suit under the present rule only if the court has refused to entertain the claim or objection (sub rule 5).

49. Where the property attach is subject to a mortgage, charge or interest in favor of any person, the court can continue the attachment.

**Maintainability of the claim petition after sale:-**

50. There are divergent opinions on the maintainability of the claim or objection petition after sale. Some decisions held that it is maintainable and others that it is not. The proviso to rule 58(1) states that no claim or objection shall be preferred if the property has been sold. The Hon'ble Supreme court in the matter of **Kancherla Laxminarayan V. Mattaparthi Syamala** (Air 2008 SC 2069) has clarified that the word sold used in clause (a) of the proviso to rule 58 (1) has to be read as meaning thereby a complete sale including the confirmation of sale. In view of this ratio, even after the auction sale, claim or objection would be maintainable till

the court auctioning the property makes the sale absolute. However sale once made absolute by the court, objection or claim will not be maintainable.

Analysis of the provisions of Rule 58:-

51. **-Property is attached in execution of a decree.** -claim is made or an objection is raised by a third party to such attachment.

-Such claim or objection is raised on the ground that such property is not liable to such attachment.

-executing court has to decide such claim or objection by way of full fledged inquiry.

-in such inquiry court shall decide all questions including questions relating to right, title or interest in the property attached.

-court has discretion to pass such order as it deems fit in the circumstances of each case.

-an adjudication order which is given after the full fledged inquiry has to be treated as decree.

-court can refuse to entertain such claim or objection if it is made after the sale of attached property is complete or absolute by confirmation of sale.

-court can refuse to entertain such claim or objection if it considers that such claim or objection is purposefully raised to delay the execution.

-in case the court has refused to entertain the claim or objection on above two grounds, a claimant or an objector can file suit to establish his right to the property attached.

-Subject to the result of such suit an order of refusal to entertain such claim or objection is conclusive.

#### **4. Nature of Proceedings relating to resistance to delivery of Possession to Decree Holder or purchaser.**

52. After amendment of 1976 in the Code of Civil Procedure, the

provisions regarding resistance to the decree of possession of immovable property embodied in Rule 97 to Rule 106 of Order XXI are in the nature of "complete code", dealing with all issues relating to resistance, obstruction, to the delivery of possession to decree-holder or auction purchasers. Prior to the amendment of 1976, order passed under Order 21 Rule 97 was ever subject to fresh suit, which has been taken away by the amendment. The changes are effected as :-

1. Executing Court should undertake a full and complete inquiry in from of suit not merely summary inquired.
2. The orders passed in such inquiry are to be treated as decree as per Section 2 (2) of the Code. **Babulal Vs Rakumar Reported in (AIR 1996 SC 2050)**

53. Para No. 443 of Civil Manual is as under,

"All questions relating to the right, title or interest in the property and relevant to the adjudication of the application complaining of the resistance or obstruction to the possession of the decree holder or any claimant other than the judgment debtor of the immovable property in dispute, are required to be dealt with in accordance with the law contend in section 74 and rules 97 to 106 of Order 21 as amended under the rules framed by the High Court under section 122 of Code of Civil Procedure.

54 There are two categories of aggrieved persons. First is decree holder or purchaser, who at the time of execution of decree for possession has been obstructed and second one is a person who is not the judgment debtor but has been dispossessed in execution of possession warrant. Decree Holder can apply under order 21 Rule 97 and a person who is not a real judgment debtor can apply under order 21 Rule 99.

55. As per rule 101 of Order 21, upon any application arising from rule 97 or rule 99, Court has to adjudicate it. All questions including right, title or interest in the property has to be determined by executing Court and not by way of separate suit.

56 All the questions relating to the right, title and interest in the property, which is subject matter of execution may have to be decided by the Court. Concerned parties must get the opportunity to lead oral and documentary evidence. The executing Court shall record its findings on all the questions that may rise for the consideration.

57. High Court Amendment ( Bombay) Add-the following proviso to rule 101 of Order XX1:-

" Provided that when the Court is not competent to decide such question due to want of pecuniary jurisdiction the Court shall send the execution case to the Court of the District Judge, to which the said Court is subordinate and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge, shall deal with it in the same manner as if the case had been originally instituted in that Court "

58. Rule 98 (2) as amended by Bombay Amendment . If the court is satisfied that, a resistance or obstruction was occasioned without any just cause by judgment -debtor or by some other person at his instigation, or by the transferee where such transfer was made during pendency of the suit or execution proceeding ,then court can direct the applicant be put into the possession of the property and even thereafter, the resistance still continues, then court can order the detention of the Judgment Debtor or any person acting on his behalf, to be detained in Civil Prison for a term which may extend to Thirty days, besides that Court may order for the cost for delay and expenses and also reasonable compensation to the decree -holder and any order made under this rule have the same force as if it were a decree.

59. Rule 105 and Rule 106 :-provides for the hearing of the application and consequences of non-appearance of the parties at hearing and Rule 106 provides for setting aside the Exparte orders subject to filing an application within

the thirty days from the date of the order, or in case of Exparte order where the notice was not duly served, within thirty days from the date when the applicant had knowledge of it.

60. As per order 21 Rule 102 provisions of Rule 98 and 100 of C.P.C shall not apply to resistance or obstruction in execution of decree for the possession of immovable property by a person to whom the judgment-debtor had transferred the property after the institution of the suit; in which the decree was passed. A transferee from judgment debtor is presumed to be aware of the proceeding before the Court of Law. He should be careful before he purchases the property which is the subject matter of litigation. This rule takes into account the ground reality and refused to extend helping hand to transferee pendent-lite. Rule 102, therefore, clarifies that there should not be resistance or obstruction by the transferee pendent- lite. It declares that if the resistance is caused by a transferee pendent-lite of the judgment debtor, he can not seek benefit of Rule 98 or 100 of Order XXI of C.P.C . The scope of adjudication in such event is clarified to a limited extent as to whether he was transferee pending the suit in which decree for possession is passed. Once that finding is recorded in affirmative the executing Court must hold that such transferee pendent- lite having knowledge of Court proceeding had no right to resist the decree. In short, inquiry of Court proceeding had no right to resist the decree . In short, inquiry in respect of defence set up on the ground of bona-fide purchasers for value, is not the matter of such inquiry, through the Court when obstructionist is the purchasers pendent-lite. (**Usha Sinha Vs. Dinaram in (AIR 2008 SC 1997)**).

61. In a case of **Silver line Forum Pvt. Ltd. Vs. Raju Trust and another** , (AIR 1998 SC 1754), the Hon'ble Apex Court observed that,

" The words " all questions arising between the parties to a proceeding on an application under rule 97 would envelop only such questions as would legally arise for determination between those parties. In other words, the Court, is not obliged to determine a question merely because the resistor raised it. The questions which

executing Court is obliged to determine under rule 101 must possess to adjuncts. First is that such questions should have legally arisen between the parties, and second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructer admits that he is transferee pending lite, it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by decree holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceeding. Hence, it is necessary that the questions raised by the resistor or the obstructer must legally arise between him and the decree holder.

**5. Role of Civil Court to entertain the Objections in a partition decree pending before Collector.**

62. Section 54 of Code of Civil Procedure empowers the Collector or any gazetted sub-ordinate deputed by him, to partition and separation of the share of an undivided estate assessed to the payment of revenue to the Government, and therefore, on passing a decree for partition and separate possession of the share, the Civil Court becomes *Functus officio*. The decree passed by the Civil court is in the nature of preliminary decree and it is for the Collector to make it final and execute the same.

63. The application of a party to send the decree for partition to Collector, is a step taken towards passing a Final decree and it is not an execution application, and therefore, the question of Limitation does not arise.

64. In a case of **Bikoba Deorao Gaikwad & Ors Vs Hirabai Maurtirao Ghorgare** and Ors decided by Hon'ble Supreme Court on 27-5-2008 by the two Judges Bench: (S.B.Sinha, Lokeshwar Singh Panta JJ. ) It is held that, Section 54 only provides for, a Ministerial Function of a Court, and it cannot be termed to be an

Execution proceeding. The application filed before the Court to sent decree and papers to Collector to carry out partition is not an application in execution and provision of Limitation would not apply.

65. In the case of **Kisan Bhikaji Dalvi Since . Vs Krishnabai Maruti Dalvi**, Bombay High Court, reported in (2000(4) Mh.L.J. 485), it is held that, the decree declaring the shares of the parties in partition is definitely a preliminary decree , and when such decree is in such respect of the land assessable to land revenue all further proceedings are required to be taken before the Collector or any gazetted officer sub-ordinate to him, to whom the powers are delegated by the Collector as per Section 54 of C.P.C. When the matters goes before the Collector, then he has to pass the final decree, by coming to the conclusion, how the land should be and then partitioned between the parties he has to execute that decree by actually putting the parties in possession of the portion allotted to them. The Civil Court has no say in the matter as to how the land is partitioned between the parties, so to say, for preparing the final decree. All that work is to be done by the Collector.

#### **DIRECTION OF THE HON'BLE HIGH COURT.**

66. In the case of **Annasaheb Rajaram Nagane and Anr. Vs Rajaram Maruti Nagane** Bombay High Court reported in( 2001 (3) Mh.Lj. 53, ), it is held that, the decree for partition of the land assessable to revenue is a preliminary decree and all further proceeding are required to be taken before the Collector. It is a duty of the Court, to sent necessary papers to the Collector as per the direction given in the decree itself, an application, even if made, in the form of a Darkhast, with a prayer to sent the decree to Collector, is not an application in execution. The dismissal of first execution application shall not operate as a res- judicata. As it is step taken by the decree holder just to remind its duty and hardly can be said to be any proceeding attracting Section 11 of C.P.C.

67. In the above referred authority Hon'ble Bombay High Court has issued

directions to all the Civil Courts to remit to the collector within four months of the date of signing the decree, without their being any application or request or prayer for the same. The Hon'ble High Court has also directed to send necessary papers to the Collector within 30 days of receipt of the application , 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 C.P.C, to discharge its ministerial duty. Even no notice to any parties to the application is necessary as it is not a petition seeking an adjudication of any right of the parties. This direction are also applicable to pending proceedings.

### **OBJECTIONS TO THE DECREE SENT TO COLLECTOR.**

68. Since, the decree sent to Collector for partition, is a Preliminary decree, and rest of the part to finalize the decree and effect partition is within the jurisdiction of Collector, the Court becomes *Functus officio* and it cannot entertain any objection raised to execution of the decree, after sending precept to the Collector. The office of Collector becomes executing Court, and all the objections to the decree are required to be entertained by the Collector. However, if any question regarding title arises then Collector has to direct the parties to get it decided in Civil Court. Whereas, all other objections are required to be decided by Collector ,before effecting partition.

69. All questions arising between the parties to the suit, relating to execution, discharge of satisfaction of the decree, envisaged in section 47 of C.P.C, and the resistance or obstruction to the delivery of possession to the decree holder or purchaser envisaged in Order 21 Rule 97 to 106 are required to be dealt with by the court executing the decree, and in the case of partition decree, the Collector is the executing court and all such objections are to be entertained by him.

70. It is necessary to see the powers of the Collector, in effecting the partition of the land assessed to land revenue as given in Maharashtra Land Revenue

Code, 1966. In particular, section 85 of the Code, provides that subject to the provisions of Bombay Prevention of Fragmentation and Consolidation of Holding Act, 1947, a holding may be partitioned of the decree of Civil Court, or on application of co-holders in the manner provided by the Code.

71. Sub section 2 of Section 85 provides that if in holding there are more than one co-holder, any such co-holder may apply to the Collector for partition of his share, in the holding provided that, wherein any question of title is raised, no such partition shall be made, until such question has been decided by civil suit. The Collector has to hear all co-holders and then divide the holding in accordance with the rules made by the State Government under this Code.

#### **RULES FOR PARTITION**

76. The State of Maharashtra has, formed the rules for partition of the agricultural land in the " Maharashtra Land Revenue( Partition of Holdings ) Rules, 1967", which prescribes the procedure for partition for the agricultural land. The application for partition is to be in particular form and with the document of the entries in record of rights, with the name of the co-holders. The survey no, Hissa Number, and Area must be specifically mentioned.

77. On receiving such application the Collector has to issue notice to the co-holders and issue a proclamation in the Form B of the Rules. The Collector has also a power to reject the application for partition if, on hearing the parties, he is of the opinion that the applicant has no interest in a holding in respect of which application is made or applicant's title is disputed. The Collector can direct the applicant to get the question of title decided by Civil Court.

78. Rule 4 of the Maharashtra Land Revenue ( Partition of Holdings ) Rules, 1967 empowers the Collector to entertain the objections of any other persons than the Co-holders, who may appear before him after issue of proclamation, or

appear Suo-moto.

79. Rule 5 provides for modes of effecting partition, when Collector proceeds to effect the partition. He may personally or effect partition either through such agency as he may appoint. So, far practicable, whole survey Number or subdivisions, of the survey number shall be allotted and recourse to the further division as far as possible, be allotted to each party and care should be taken to ensure that the productivity of the area allotted to each party is in proportion to his share in the holding.

80. Rule 6 provides for apportionment of assessment and Rule 7 provides the procedure to hear any objection, which the parties may make, and then confirm the partition. The partition shall take effect from the commencement agricultural year, next following the date of such confirmation. Rule 9 provides for partition under the decree of Civil Court, and Rule 5, 6 and 7 are made applicable to such partition .

81. Thus, the rules prescribed by Maharashtra Land Revenue ( Partition of Holdings ) Rules, 1967 is a complete code for effecting partition by the Collector and objections to the executions of the partition decree are to be entertained by the Collector. The Civil Court has no role, to play in respect of the objections raised to the decree of partition sent to the Collector.

82. Following are some questions, the answers of which decide Role of Civil Court to entertain the objections in partition decree pending before Collector ;

**Q.No.1 What is the nature of decree for partition of property of which land assessed to revenue, preliminary or final ?**

**Ans.-** After considering section 54 of Civil Procedure Code, definition of decree as per Order 20, Rule 18 of Civil Procedure Code. Hon'ble Bombay High Court has held in the case of District Beed Vs. The Collector (decided on

08/08/2008), when a decree relates to an estate assessed to the payment of revenue to the Government, it shall declare rights of the several parties interested in the property but shall direct such partition and separation to be made by the Collector, in accordance with such declaration and with the provisions of section 54. The decree as such is partly preliminary and partly final. Therefore, if objection that decree of partition being preliminary in nature can not be sent to Collector can not be entertained.

**Q.No.2 Whether Civil Court can entertain subsequent Darkhast when the Collector has finally executed decree of partition of property assessed to Land Revenue and the parties have been put into possession there of ?**

**Ans.-** Such subsequent Darkhast can not be entertained. The issue has been settled by Hon'ble Bombay High Court in the case of **Adarsha Sahakari Doodh Utpadak Vs. Tarabai** (decided on 19th October, 2010).

**Q.No.3 If an agricultural land subsequently got changed into non agricultural use, can decree to be sent to the Collector for execution ?**

**Ans.-** In the case law of **District Beed Vs. Commissioner** it is held that the objection regarding the land is not assessable to the Land Revenue can not be taken first time in the execution. If agricultural land is converted into non agricultural use subsequently by the Judgment Debtor, It can not said that the Collector has lost his powers to execute the decree. Under such circumstances also it is the Collector who executes the decree and not the Civil Court.

**Q.No.4 Whether Judgment Debtor can object the execution proceeding, that decree can not be executed for reason that the property to be partitioned is constructed thereafter, and there is no specific direction of handing over vacant possession of the property ?**

**Ans.-** Judgment Debtor can not object as such. If during continuation of litigation, construction has been raised by Judgment Debtor, he can not seek advantage of the willful, unlawful act committed by him during continuation of the

litigation. It is therefore in such cases even though there is no direction for demolition of construction and handing over of the vacant possession, decree can be executed by the Collector by handing over vacant possession of the suit property. As held in the above case law.

**Q.No.5 Whether dismissal of previous execution petition operates as resjudicata ?**

Ans.- The execution in partition decree is only the letter of request. Its dismissal does not mean that there was any judicial decision on merits. Therefore, the dismissal of the previous execution petition does not operate as res judicata and it does not bar the present execution. (**Ramagouda Rudregowda Patil v. Smt. Lagmavva, AIR 1985 Kant 82 at 84, 85.**)

**Q.No.6 Whether Collector can make corrections in precept?**

Ans In the case of **Uddhav Devrao Gaikwad & Ors Vs Hirabai Marutrao Goghare & ors.** of Bombay High Court Writ Petition No. 5943 of 2003 decided on 28<sup>th</sup> February, 2005 by the (Court Coram : B.H. Marlapalle J.) It is held that, the correction in the precepts sent for partition is to be done by the Civil Court and the correction to the precept cannot be left to the revenue officer. To exclude the property from partition or include any property for partition .

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Prepared by Core Group A :

(P.D.Digraskar)  
District Judge-4, Ahmednagar

(R.V. Tamhanekar)  
Civil Judge (S.D.) A'nagar.

(S.S.Deshpande)  
4<sup>th</sup> Jt Civil Judge (S.D.) A'nagar.

(M.S.Todkar)  
4<sup>th</sup> Jt Civil Judge (J.D.) A'nagar.

(M.D.Nanaware)  
10<sup>th</sup> Jt Civil Judge (J.D.) A'nagar.

## : CITATION LIST :

- 1) **Sameersing vs. Abdul Rab**, Supreme Court Judgments, decided on 14 October, 2014, it is in respect of Order 21 Rule 97, 99 and 101 of the C.P.C.
- 2) **Riyaz Khan s/o Rahim Khan Vs. Dnyaneshwar Vitthalrao Chamat & ors. 2015 (8) LJSOFT (NAG) 87**

Code of Civil Procedure, 1908- Order XXI Rule 97(2)- Section 47-Decree of eviction\_ Execution proceedings-Objection-Nature of enquiry. Execution of decree- Appellant raised an objection claiming to be the legal heir of tenant being son from the first wife-Adjudication under Order 21 Rule 97(2) of CPC need not necessarily involve a detailed enquiry or collection of evidence-Court can make the adjudication on admitted facts or even on the averments made by the resistor-On appreciation of material on record the courts below found that the appellant/objector has failed to establish his possession over the suit property and it is not necessary to direct the parties to adduce evidence-Not a case where the appellant can be permitted to lead evidence in support of the objection raised.

Result : Appeal dismissed.

- 3) **Warna Valley Sahkari Kharedi Vikri Society Ltd., Islampur Vs. Ashok J. Gaikwad and others, 2015(3) Mh.L.J.**

(a) Civil Procedure code, O.21, R.35 - Execution of decree- Suit partly decreed and decree holders entitled to recovery of possession of only two rooms out of six rooms- Petitioner making repeated applications to frustrate execution proceedings. Notwithstanding, the dismissal of such applications by executing Court, petitioner filing further applications only with a view to protract and thereby frustrate execution proceedings. Petitioner creating unwarranted hurdles in execution of decree and proceedings. Therefore, exemplary costs of Rs.50,000/- imposed on petitioner.(Para

24).

(4) **Walchandnagar Industries Ltd. Vs. Indraprastha developers, Pune and others, 2015(3)Mh.L.J.,786.**

(i) Civil Procedure Code, SS.99 and 47:- Scope of section 99 prohibits challenge to any decree on ground of any error, defect or irregularity in any proceedings in suit,, unless it is shown that it affects merits of case or jurisdiction of Court. Section 99 is in the nature of prohibition to challenge a decree or an order under section 47 unless it is shown that such a decree or order passed suffers from an error, defect or irregularity in any proceedings in the suit or relating to such order an affects the merits of the case or the jurisdiction of the Court or the decision in the proceedings under section 47. [ Para 27(k)]

(5) **Guttikonda Benkataramaiah Vs. Godavarthy Venkateswarlu and another, [ 2015(4)Mh.L.J], 96**

Civil Procedure Code, O.21, RR.64, 66 and 90-Execution proceedings- Property in question was sold by auction and appellant auction purchaser put in possession of said property. Respondent no.1 judgment debtor challenged order of High Court by filing Civil Revision before High Court. High Court set aside sale with directions to Executing Court to take action for sale in accordance with provisions of Order 21, Rules 64 and 66, Civil Procedure Code- Held , Judgment Debtor had never shown fairness in entire proceedings. He never made sincere efforts to get decree set aside. Only after auction sale had concluded, he initiated different proceedings before different Courts,perhaps only with a intention to see that property I question is not transferred to auction purchaser. Intention of principal debtor is to avoid making payment to decree-holder- Impugned judgment if up-held entire proceedings with regard to execution will commence de novo- Said Judgment is quashed in the interest of justice ( Paras 17 to 21).

**6. Madhav Sheshadri Kulkarni Vs. Chairman Market Committee  
(2015(4)Mh.L.J.312)**

It is held by Hon'ble Bombay High Court that, order granting permission by executing court did not relate to adjudication of right, title or interest in property.. said order was not examined by District Judge, Appeal against same was neither maintainable under Order 43 and under Order 21, Rule 97 read with Rule 101 of Code.