

SUMMARY/GIST OF THE PAPERS ON

SUBJECT :- Different types of Decrees and Modes of their execution as provided in Order XXI and Rule 97 C.P.C.

- (i) Scope of Section 47 C.P.C.
- (ii) Scope of Order XXI and Rules 97 to 101 C.P.C., and
- (iii) Mode of execution of different types of decrees.

INTRODUCTION :

In order to reap the fruits of the litigation successfully decided in favour of the litigant, it is necessary that due execution of decree passed in favour of the Decree Holder be made. Civil Procedure Code is a unique work in that context as on one hand it provides procedure to obtain a decree and on the other, the way and means to execute the decree. The procedure in detail about execution of the decree is provided under Order 21 of the Code. In practice, attachment and sale are the most common. Decree is an anchor sheet enabling a successful litigant to exercise and ultimately to execute the obligation created in his favour by the decree. Litigation ends when the decree is satisfied in the spirit of terms. In **Ghan Shyam Das V. Anant Kumar Sinha AIR 1991 SC 2251** the Hon'ble Supreme Court observed that the provisions of the Code as regards execution are of superior judicial quality than what is generally available under the other statutes and the Judge, being entrusted exclusively with administration of justice, is expected to do better.

What is a "decree" ?

" decree " means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final". A decree is preliminary when

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

TYPES OF DECREE

1. Preliminary :- Where an adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit but does not completely dispose of the suit, it is a preliminary decree. It is passed when the court needs to adjudicate upon some matters before proceeding to adjudicate upon the rest. In **Shankar vs Chandrakant SCC 1995**, SC stated that a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. CPC provides for passing a preliminary decrees in several suits such as - suit for possession and mesne profits, administration suit, suits for pre-emption, dissolution of partnership, suits relating to mortgage. In **Narayanan vs Laxmi Narayan AIR 1953**, it was held that the list given in CPC is not exhaustive and a court may pass a preliminary decree in cases not expressly provided for in the code.

2. Final :- When the decree disposes of the suit completely, so far as the court passing it is concerned, it is a final decree. A final decree settles all the issues and controversies in the suit.

3. Party preliminary and partly final :- When a decree resolves some issues but leaves the rest open for further decision, such a decree is partly final and party preliminary. For example, in a suit for possession of immovable property with mesne profits, where the court decrees possession of the property and directs an enquiry into the mesne profits, the former part of the decree is final but the latter part is preliminary.

4. Deemed Decree:- The word "deemed" usually implies a fiction whereby a thing is assumed to be something that it is ordinarily not. In this case, an adjudication that does not fulfill the requisites of S. 2 (2) cannot be said to be a decree. However, certain orders and determinations are deemed to be decrees under the code. For example, rejection of a plaint and the determination of questions under S. 144 (Restitution) are deemed decrees.

CLASSES OF DECREES:

Decree for delivery of Movable Property	Decree for delivery of property
immovable	
Decree for partition	Cross Decrees
Decree for payment of money	Decree for specific performance of contract
Decree for restitution of conjugal rights	:
Decrees do not include the Following	:

Execution- Different Modes of Execution of a Decree

The proceeding by which the decree holder moves the court for satisfaction of decree is called execution proceedings. There are various modes under C.P.C. by which a decree can be executed.

Execution means the process by which a decree is adjusted or satisfied.

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.

Execution is the medium by which a decree- holder compels the Judgment-debtor to carry out the mandate of the decree or order as the

case may be. All proceedings in execution commence with the filing of an application for execution to be made to the court which pass the decree or where the decree has been transferred to another court, to that court.

Modes of Execution of Decree:

The different modes of execution of a decree are provided in section 51 as under:

(a) by delivery of any property specifically decreed ; (b) by attachment and sale or by sale without (c) by arrest and detention in prison ; attachment of any property ; (d) by appointing a receiver ; or (e) in such other manner as the nature of the relief granted may require.

The Decree holder can opt for any of the mode. It was held in **Padrauna Rajkrishna Sugar Works Ltd. V Land Reforms Commissioner AIR 1969 SC 897** that there is no obligation to move first for detention in civil prison or for sale of movables before opting for sale of immovable property. Even simultaneous proceedings in respect of sale of movables and immovables can be commenced. The discretion however is to be exercised by the court having regards to the circumstances.

As held in *Shyam Singh Vs. Collector, District Hamirpur reported in (1993) Supp 1 SCC 693*, a decree holder has the option to choose a particular mode for executing and enforcing a decree in his favour. It is for him to decide in which of the several modes he will execute his decree.

PRINCIPLES WITH REGARD TO EXECUTION OF DECREE AND ORDER CAN BE SUMMARISED AS UNDER: :

1. Provision of C.p.c. relating to execution of decree and order shall be made applicable to both Appeal and Suits

2. 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.
3. 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.
4. A court may order for execution of decree on the application 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 (civil imprisonment) (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court.
5. Upon the application of decree-holder, the court may issue “percept” to any other court which is competent in that regard.
6. 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.
7. 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.
8. A judgement-debtor may be arrested at any time and on any date shall required to be brought before the court which has passed the decree and his detention may be in civil prison of the district where decree shall have to be executed.
9. Where immovable property has been sold by the court in execution of a decree such sell 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.

10. 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.

Mode of execution of different types of decrees:

The provisions of O.21 rules 30 to 36 deals with the different mode of execution of decree. As per the provisions of O 21 R.30 it is for the judgment debtor to decide whether he should execute the decree for the payment of money by the civil prison of judgment debtor or by the attachment and sale of his property or by both. Rules under Order XXI have specifically explained the procedure for execution of decree

Execution by delivery of property:

Mode of execution of a Decree for specific movable property

Section 51 & Rule 31 :

By seizure and delivery to the party to whom it has been adjudged, or to his authorized person, or by the detention in civil prison, or by attachment of his property or by both. The movable property must be in the possession of the Judgment debtor. Under Order 21 Rule 31 CPC, where a decree directs the recovery of specific movable property and not for payment of price thereof if the property be not delivered, the decree holder is not entitled to execute the money part of the decree before applying for delivery of the property. Likewise, the judgment debtor has no option in such cases either to deliver the property or pay its value. Where the decree directed that the property should be delivered within a

specified period of time, and provided that in default the plaintiff should recover a certain sum, it was held that this rule was inapplicable and that he was entitled to recover the money without exhausting the remedy against the property. The said rule is inapplicable where the property sought to be attached is not in the possession of judgment debtor.

Decree for delivery of immovable property

The governing provisions thereof are Rules 35 & 36. Property in possession of the judgment debtor or person bound by decree, the decree can be executed by removing them from possession and delivering the property to the decree holder. Delivery of Khas possession is where decree holder is delivered in execution the property identity of which is specifically established by him. Rule 36 provides for property in possession of tenant. In case of property in possession of tenant or any person not bound by the decree, the delivery of such property is to be made by affixing the warrant outside the property and proclaiming by beating of drum or other customary mode i.e. symbolic possession. As per Rule 35 (2) same procedure is to be adopted for delivery of immovable property in joint possession. Rule 35 (3) prescribes procedure to be followed where person bound or a pardanashin lady does not afford free access. Reasonable warning and facility to withdraw has to be given before breaking open into the building.

Under O. 21, R. 35 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. Identification of suit property is an important aspect of execution of a decree relating to immovable property. A person who takes a transfer of property *pendente lite* is bound by the decree passed therein and can be evicted under this rule.

As per Order 21, Rule 36 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.

Attachment and sale of property is to be done as per Section 51 (b) which provides that the court may order execution by attachment and sale or sale without attachment of the property within its jurisdiction even if the place of business of the judgment debtor is outside jurisdiction of the court. The relevant rules are Rule 54 providing for attachment and procedure for proclamation.

Section 51 (c) provides for arrest and detention of the judgment debtor. Condition precedent to arrest and detention is opportunity of showing cause. So also that the judgment debtor is likely to obstruct or delay, likely to abscond, alienate the property to avoid execution. It can also be done if it is established that if since date of decree the judgment debtor had means to satisfy the decree but has refused or neglected to pay or was bound in fiduciary capacity to account for the decree for payment of money. One more exceptional mode of execution is appointment of receiver as per section 51 (d) which cannot be claimed as of right.

Decree for Partition or Separate Possession:

In this case the execution is to be effected by the collector as the revenue authorities are more better placed to deal with such matters than the civil court.

Decree for Payment of Money: According to order 21 rule 30 of C.P.C, “Every Decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed,

- By detention in the Civil Prison of the judgment Debtor or,
- By the attachment and sale of his property, or
- By both.

Mode of paying the money can be by depositing it in executing court or by paying it out of court to the decree holder or as per the direction of the court which passed the decree. Payment out of court or adjustment requires it be certified by the court. Upon application by judgment debtor informing such payment or adjustment the notice to the decree holder is required to be issued first.

Decree for Specific performance of Contract:

Order 21 Rule 32 is regarding execution of decree for specific performance, for restitution of conjugal rights or for an injunction. Rule 32 (1) provides that in case of disobedience of decree for specific performance of contract, the same may be enforced by attachment of property, detention in civil prison, or both. As such a decree creates mutual obligations both the parties are entitled to enforce the same. If not provided for delivery of possession is incidental in case of decree for specific performance of contract of sale of immovable property. In case of decree against the corporation it can be enforced by attachment of its property or detention of the directors in civil prison, albeit upon leave of the court. (Rule 32 (2)).

The decree in a suit for specific performance creates mutual rights and obligations and both the parties occupy the position of judgment debtors and decree holders thereunder. In the suit for specific performance, it is open to the plaintiff to pray for possession of the properties in addition to specific performance. Even if the decree is silent on the relief of possession, the Court can order the same in execution. Sub rule 1 applies to both prohibitory and mandatory injunctions. Where an injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within three years of such breach under Article 137 of the Limitation Act. Similarly, punishment of civil imprisonment in the case of violation or disobedience of the order of injunction is to be awarded in addition to and not in lieu of or in the alternative, of the punishment of attachment of his property. Under sub rule 3 in a decree for restitution of conjugal rights the Court cannot order the property of the judgment debtor to be sold, unless it has been under attachment for a period prescribed by the sub rule. Under sub rule 5 if the judgment debtor commits a gross violation of the terms of mandatory injunction then the court may direct the act to be done so far as practicable by the decree holder or some other person appointed by the court.

Decree for specific performance for restitution of conjugal rights or for an injunction:

According to Order (21) rule (32) of C.P.C, “Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for an injunction, stay has been passed, has had an opportunity of obeying the decree and if he has willfully failed to obey it, the decree may be enforced, in the case of a decree for restitution of conjugal rights.

A decree against a partnership firm can be executed by attachment of the property belonging to it as per Rule 49 (1).

Rule 32 also provides that a Decree for Injunction can be enforced by attachment of the property of the judgment debtor or by detention in civil prison.

As per Rule 34 a decree for execution of document may be executed in case of disobedience by preparing the draft of the document in prescribed form and executing it by the court after notice to the decree holder. Similar is the case in case of decree for endorsement of negotiable instrument.

Under rule 33 in the event of the decree for restitution of conjugal right not being obeyed within such period as may be fixed in this behalf, the judgment debtor shall make to the decree holder such periodical payment as may be just. The court may from time to time vary or modify any order made for payment of money, either by altering the times of payment or by increasing or diminishing the amount or may temporarily suspend the same and again revive the same. The decree for restitution of conjugal right is executable only against husband in terms of order 21 rule 33 of CPC.

As per rule 34 the execution court get executed the document or negotiable instrument from judgment debtor if the decree is in respect of execution of document or for the endorsement of negotiable instrument. The draft of the document which the decree holder has to prepare and deliver to the court under this sub rule must be in conformity with the terms of the decree. Where the document to be executed relates to some property, the property must be a subject matter

of the suit. If a document requires registration it must be registered, though executed by the court.

Under O. 21, R. 35 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. Identification of suit property is an important aspect of execution of a decree relating to immovable property. A person who takes a transfer of property *pendente lite* is bound by the decree passed therein and can be evicted under this rule.

As per Order 21, Rule 36 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.

In case of decree for unascertained sum of rent or mesne profit, or any other sum, as per Rule 42, the court may order attachment of the property of the judgment debtor till the amount due from him is ascertained. The term “any other sum” is to be read *ejusdem generis*. [Paul Bros V. Ashim Kumar (1990) 3 SCC 726]

Power of Court to enforce Execution:

The provisions of section (51) C.P.C, enumerates in general terms the various modes, in which the court may in its discretion order the execution of a decree according as the nature of the relief granted may require. This section states generally the powers of the court in regard to the execution of decree leaving the detail to be determined by the rules.

ARREST AND DETENTION :

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. A judgment-debtor may be arrested at any time on any day in execution of a decree. After this arrest, he must be brought before the court as soon as practicable. 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. No order of detention of the judgment-debtor shall be made where the decretal amount does not exceed Rs.2000. Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released once. 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.

ATTACHMENT OF PROPERTY

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.

Section 60(1) declares what properties are liable to attachment and sale in execution of a decree, and what properties are exempt therefrom. All saleable property(movable or immovable) belonging to the judgment-debtor or over which or the portion of which he has a disposing power which he may exercise for his own benefit may be attached and sold in execution of a decree against him.

Section 61 deals where the judgment-debtor is agriculturalist. It state that judgment-debtor is agriculturalist. Any agriculturalist produce is subject matter of agriculturalist. The quantum of attachment of agricultural product depends upon the quantum of decretal amount.

Section 63 where two different courts have attached the same property through different decree, then it will be looked, that which court is superior. The value of the property will determine whether further attachment can be done or not.

PRECEPT

Section 46- “precept” means a command, an order, a writ or a warrant. A precept is an order or direction given by court which passed the decree to a court which would be competent to execute the decree to attach any property belonging to the judgment-debtor.

Section 46 provides that court which passed a decree may, upon an application by the decree-holder, issue a precept to that court within whose jurisdiction the property of the judgment-debtor is lying to attach any property specified in the precept. A precept seeks to prevent alienation of property of the judgment-debtor not located within the

jurisdiction of the court which passed the decree so that interest of the decree-holder is safeguarded and protected. It is interim attachment of the property which lies outside the jurisdiction of court which has passed the order. The interim order for attachment is valid for the period of only 2 months.

GARNISHEE ORDER

It is the proceeding by which the decree-holder seeks to reach money or property of the judgment-debtor in the hands of a third party (debtor of judgment-debtor).

SALE OF THE PROPERTY

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.

Cross-decree:

Cross-decrees are decrees held by the plaintiff and the defendant against each other in different suits so that a decree-holder in one suit is the judgment-debtor in the other.

Such decrees are set off against each other in the execution proceedings.

Mode of execution.—Where applications are made to a court for the execution of cross-decrees in separate suits for the payments of two sums of money passed between the same parties and capable of execution at the same time by such court, then—

(a) If the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) If the two sums are unequal, execution may be taken out only by the holder of the decree for the large sum and for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

The above rule shall, also applies whether either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons. (O. 21, R. 18 & 20)

The provisions relating to cross-decrees for the payment of money also apply to decree for sale in enforcement of a mortgage or charge.

Execution of cross claims is governed by rules 19 to 20. Rule 19 provides for set off in case of cross claims in same decree.

Court by which decree may be executed:

According to Section 38 C.P.C, a decree may be executed either by the court which passed it, or by the court to which it is sent for execution.

What decree may be executed:

The decree of a court against which no appeal has been made shall be executed after expiry of the limitation period.

Where a decree is reversed, modified on appeal, the only decree capable of the execution is the appellate decree, but exceptionally where the appellate judgment simply dismisses the appeal. General rule that the appellate decree alone is to be executed, does not apply and the court should look at the later decree for the information of its contents. For composite decree, one for sale of mortgaged property and the other simple money decree See **State Bank of India -Vs- Indexpost Registered, AIR 1992 SC 1740.**

SCOPE OF SECTION 47 C.P.C.

Section 47 provides for determination by the executing court of all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree. No separate suit is contemplated. As per sub section (3) where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court. Explanation I to the section provides that for the purposes of the section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. As per explanation II a purchaser of property at sale in execution of a decree is be deemed to be a party to the suit in which the decree is passed; and all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section. [Explanation added after the decision of the Privy Council in Ganpathy v. Krishnamchiar]

Exclusive jurisdiction has been conferred on the executing court in respect of all matters relating to execution, discharge or satisfaction of a decree arising between the parties or their representatives. Once the suit is decreed, this section requires that the executing court alone should determine all questions in execution proceedings and filing of a separate suit is barred. Since Section 47 embraces all matters connected with the execution of a decree between the parties or their representatives, and covers all questions relating to the execution, discharge or satisfaction of the decree, it should be liberally construed so as to empower the court to determine all such questions, unless they clearly fall outside the scope and purview of it. It does not matter whether such questions arise before or after the decree has been executed. It is held in the matter of *Savitribai Vs. Suman reported in 2009 (5) Mh.L.J. 387* that Jurisdiction under section 47 is limited and narrow. Right to raise the objection doesn't 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 scope of the same. This jurisdiction can't be equated with that of an appeal or review. Executing Court has to go by the decree.

Conditions:- Following conditions must be cumulatively satisfied for applicability of section 47.

- (i) The question must be one arising between the parties to the suit in which the decree is passed, or their representatives; and
- (ii) It must relate to the execution, discharge or satisfaction of the decree.

This section presupposes the existence of a decree which is capable of execution. Questions arising between parties and a stranger are out of purview of section 47.

Object of Section 47—Principle behind its enactment is that matters relating to the execution, discharge or satisfaction of a decree and arising between the parties including the purchaser of a sale in execution should be determined in execution proceedings and not by a separate suit and to provide a cheap and expeditious procedure for its trial

In **Patankar -Vs-Sastri AIR 1961 SC 272** it is held by the Hon'ble Apex Court that where in execution of a decree in ejection, the decree holder obtained possession and satisfaction of the decree was recorded and thereafter the judgment debtor applied for redelivery on the ground that the order for delivery was illegal, it was held that whether the decree was completely satisfied and the Court became functus officio was a question which related to execution, satisfaction and discharge of decree and should be tried under Section 47. Also see- *Hanifa v. Shalima Dhanu, AIR 1992 Mad. 111 & Gangabai Gopaldas Mohata -Vs- Ful Chand AIR 1997 SC 1812.*

When a decree-holder takes in execution a property not included in the decree, the judgment-debtor has to proceed by an application under section 47 of the Code for recovery of such property and a separate suit for that purpose will not lie. The question as to the validity of the decree is not one relating to the execution, discharge or satisfaction of the decree and cannot, therefore, be tried in execution proceedings under section 47 and is required to be tried by way of a separate suit. The execution court has got duty to resolve the dispute whereby somebody claims to be representative of decree-holder's interest and decree-holder disputes it. It is also settled that what has been decided and also questions which ought to have been raised and have been not been raised would also be questions which cannot be gone into by the executing court.

Exceptions—Nullity or unexecutable decree:

It does not apply to cases where the decree sought to be executed is either a nullity or declaratory in character. A decree is a nullity when it has been passed by a Court having no jurisdiction or against a dead person. The Hon'ble Apex Court in **Kiran Singh -Vs- Chaman Paswan, 1995 (1) SCR 117** held that though a Court executing a decree cannot go into the question of correctness or legality of a decree, it entertains the objection that it is a nullity on the ground that the Court which passed it had no jurisdiction to pass it. This is not going behind the decree since the decree being null and void, there is no decree at all. An executing court can entertain objection as to defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action. But where the objection as to jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the question raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. See. **Sunder Das v. Ram Prakash (1977) 6 SCC 662**. Though section 99, C.P.C. provides that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case, however, it excludes from its operation the defects of jurisdiction.

There are few clearly carved out exceptions, one where in case the court or authority had no jurisdiction to decide the same or where a decree is nullity or is unexecutable on account of happening of an event and such questions even if decided prior to the decree cannot exclude the executing court to go into the question as it goes to the very root of

the matter. It is for all these reasons this question even if decided in a suit or proceeding is always permitted to be raised in a subsequent suit or in a collateral proceeding or in execution proceedings.

In regard to a question or a fact which is prior to the decree, if it in any way modifies, amends or substitutes a decree, the executing court cannot go into that question. However, if the execution of the decree is not possible and the decree is unexecutable then such a decree would be nullity and such a question could always be raised and the executing court has the jurisdiction to decide the same.

Powers of the executing court:

It is beyond an executing court's province to question legality or correctness of a decree.. [2005 (9) SCC 1 2 3]. It cannot allow objections that the decree was obtained by fraud or passed against a wrong person or against a minor, who was not properly represented. Such pleas require a separate suit or by means of an appeal, if the same is permissible. A pre-decree agreement even if the same is entered into by the parties cannot be looked into by the execution court unless the same is incorporated in the decree itself and the parties choose to bring to the notice of the court before passing the decree.

The powers of the executing court were fully discussed in **Kalipada Sarkar v. Hari Mohan Dalai (1931) I.L.R 9 Rang. 480**. It was observed that the court executing a decree must take the decree as it stands, and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. Objections under section 47, C.P.C. are applications and are governed by Article 173 of the Limitation Act.

SCOPE OF ORDER XXI AND RULES 97 TO 101 C.P.C.

The Rule 97 to 101 deals with provisions relating to the resistance to delivery of possession to Decree-holder or purchaser. Rules 97, 98 and 101 are to be read together.

Under Rule 97 the application of the decree holder or the auction purchaser is maintainable if he complains with regard to the resistance or obstruction made by the third party in obtaining possession of the property. This rule is permissive and not mandatory, and does not compel the decree holder or the auction purchaser to apply under this rule. The decree holder could either resort to summary remedy provided by this rule or he could bring a regular suit. The decree holder can resort to a separate suit, yet if he does choose to proceed under r. 97 he cannot later bring a suit. (amended r. 103). However, a transferee *pendente lite* has no *locus standi* to offer resistance or obstruction in the execution of the decree.

However, where the execution of decree for delivery of possession is challenged or obstructed by a stranger, who is in possession, the Court must hold an inquiry under O 21, r 97, and the stranger need not wait until he loses possession. It has been held by the Hon'ble Supreme Court, in **Niyamat Ali Molla Vs. Sonagaon Housing Co-op. Society Ltd.**, AIR 2008 SC 225, that an applicant in the case of an execution of a decree, who was not impleaded as a party in the suit although he claimed to be in possession, was not bound by the decree. Such a person would be entitled to take recourse to such remedies which are available to him in law including filing of an application under O. 21, rules 97 and 99 of the Code. And when such recourse is taken the same has to be determined in accordance with law.

Under rule 98 the executing Court upon determination of the questions referred to in r. 101 may pass the appropriate order. An order under rule 98 becomes conclusive between the parties except where the party other than the judgment debtor against whom the order was passed files a fresh suit under rule 103. However, in **N.D.Patil Vs. Hirabai, AIR 2000 Bom. 68** it was held that the order under r. 98 would be appealable and no separate suit would lie against such order as enjoined by r.101.

Rule 99 deals with dispossession by decree holder or purchaser. Under this rule it is optional for the person, who is other than a judgment debtor and has been dispossessed to make an application to the Court complaining of his dispossession. The remedy available under this rule is not exhaustive, thereby debarring him completely from preferring a suit for possession. It will be for him to choose either of the two forums only in case he is dispossessed in pursuance to the warrant of possession. The inquiry under this rule is no longer of a summary nature but a full-fledged adjudicating inquiry permitting parties to adduce evidence and the Court to take into account all questions relevant to such proceedings including questions as to the title in the property.

Under rule 100 the Court pass the order upon application complaining of dispossession after determination of the questions referred in r. 101. As per the provisions of r.101 all the questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under r. 97 or r. 99 or their representatives and relevant to the adjudication of the application, shall be determined by the Court. A third party to the decree who offers resistance or obstruction to the execution of the decree would fall within the ambit of this rule if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree.

Para No. 443 of Civil Manual reads 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 contained 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. 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."

As per rule 101 of Order 21, upon any application arising from rule 97 or rule 99, Court has to adjudicate all questions including right, title or interest in the property and no separate suit is mandated. The executing Court shall record its findings on all the questions that may arise for the consideration by permitting parties to lead evidence.

High Court Amendment (Bombay) Adds the following proviso to rule:

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 "

As per Bombay Amendment to Rule 98 (2) : "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."

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. This rule takes into account the ground reality and provides no exception to transferee pendent lite. (**Usha Sinha Vs. Dinaram in (AIR 2008 SC 1997)**).

In a case of **Silver line Forum Pvt. Ltd. Vs. Raju Trust and another** , (**AIR 1998 SC 1754**), in which the obstructer was a transferee pendent lite, 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. 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.

CONCLUSION

In view of above discussion, 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 party 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.

.....

SOME NOTABLE CASE LAWS:

Executing Court may look into the proceedings to find out the correct meaning of the decree and consequently may provide some clarity to the decree and may construe the decree to effectively implement the decree (**Bhavan Vaja V. Solanki Hanjuji Khodaji Mansang AIR 1972 SC 1371**).

The executing Court cannot entertain an objection that decree is incorrect in law or in fact. (**Vasudev Dhanjibhai Modi Vs. Raja bhai Abdul Rehman, A.I.R. 1970 SC 1475**).

The safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objections; if he can waive it, it amounts to any irregularity if he cannot, it is nullity (**Dhivendra Nath Govai Vs. Sudhir Chandra Gosh A.I.R. 1964 SC 1300**).

When a decree holder complains of resistance of a decree it is incumbent on the execution Court to adjudicate upon it. But while making adjudication, the Court is obliged to determine only such question as may be arising between the parties to a proceeding on such complaint and that such question may be relevant to the adjudication of the complaint. (**Silverline Forum Pvt. Ltd. v. Rajeev 1998**) 3 SCC 723).

The Legislature purposely amended provisions in Order XXI to enable the third parties to seek adjudication of their rights in execution proceedings themselves with a view to curtail the prolongation of litigation and arrest delay caused in execution of decrees. [**Ashan Devi V. Phulwasi Devi, AIR 2004 SC 511 at p. 516**].

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”. **Jolly George Verghese V/s. Bank of Cochin (1980) 2 SCC 360**.

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.

V. Ramswami Vs T.N.V.Kailash Theyar reported in AIR 1951 S.C,189 (192)

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. **Karansing Vs Chaman Pawan reported in (1955) 1 SCR 117**

For Questions before Executing Court in a Decree passed in respect of Joint Family Property, purchaser of the same and sale of part of it by one coparcener See: Jagdish Dutt v. Dharam Pal, (1999) 3 SCC 644.

In Harnandrai Badridas v. Debidutt Bhagwati Prasad, (1973) 2 SCC 467 referring to the decision of the Privy Council in Ganapathy v. Krishnamachariar [AIR 1917 PC 121 : 45 IA 54], the Hon'ble Apex Court in relation to the status of Auction Purchaser observed that Section 47 should be construed liberally and there is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him.

Madhukar Timbak Gore vs Vasant Ramkrishna Kolhatkar, AIR 1983 Bom 277, Identification of the property to be delivered to the decree holder is a question that can be determined under section 47.

Chavdas Totaram Bhortakke v. Papilabai, 1998 SCC OnLine Bom 225 : (1999) 3 Mah LJ 42: *No person can obstruct to the execution if he claims through the judgment debtor but if he has independent right, then his objection has to be considered and if accepted, the decree for possession cannot be executed against him.*

Mani Nariman Daruwala v. Phiroz N. Bhatena, 1990 SCC OnLine Bom 275 : 1991 Mah LJ 376 the Hon'ble Bombay High Court observed that the phrase "holder of a decree for possession postulates that he has to be a holder of valid decree for possession and not one which is one hit by nullity.

In Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal, (1997) 3 SCC 694 at page 702 :

the following observations of the Hon'ble Supreme Court are very important:

- Once resistance is offered by a purported stranger to the decree and which comes to be 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 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, 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 21, Rule 99 CPC and pray for restoration of possession.

➤ It is easy to visualise 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 be 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 in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors 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 the aforesaid scheme of Order 21 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

possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him.

➤The statutory scheme envisaged by Order 21, Rule 97 CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves.

In *Bhanwar Lal v. Satyanarain*, (1995) 1 SCC 6 the Hon'ble Apex Court has held that the very application under Order XXI, Rule 35 of C.P.C for police protection for removal of the obstruction can be treated as an application under Order XXI, Rule 97 of C.P.C Under Order XXI, Rule 97, it is the decree holders, who can apply to the executing Court complaining of such resistance or obstruction of possession of the immovable property, in execution of a decree, where the execution is resisted or obstructed by any person.

Imposition of exemplary costs by executing court: See- Warna Valley Sahkari Kharedi Vikri Society Ltd., Islampur Vs. Ashok J. Gaikwad and others, 2015(3) Mh.L.J. :

Scope of Section 47 See: Walchandnagar Industries Ltd. Vs. Indraprastha developers, Pune and others, 2015(3)Mh.LJ.,786.

.....

LIST OF CASE LAWS FOR DISCUSSION IN WORKSHOP

1	<p>Narayan-Vs-Archdiocese, 2016 (4) Mah. L.J. 356 (Suit filed simpliciter for permanent injunction on basis of possession without any relief of declaration of title is maintainable if there is no cloud on title)</p>
2	<p>Muddasani Venkata Narsaiah-Vs-Muddasani Sarojana, AIR 2016 SC 2250 (In written statement denial shall be specific. Denial for want of knowledge is no denial at all)</p>
3	<p>Vijay Prakash Jarath -Vs-Tej Prakash Jarat, AIR 2016 SC 1304 (Right to file counterclaim)</p>
4	<p>Sadhu Saran Singh -Vs-State of UP, AIR 2016 SC 1107 (Appreciation of evidence in criminal cases)</p>
5	<p>State of MP -Vs-Udaybhan, AIR 2016 SC 1150 (Sentence-undue leniency in awarding of, to be avoided)</p>
6	<p><u>AIR 2016 SUPREME COURT 2231</u> <i>Satyendra Kumar and others -vs- Raj Nath Dubey and others. ----- when the cause of action as well as the subject matter i.e. the property in issue in the subsequent suit are entirely different, res judicata is not attracted and the competent Court is therefore not debarred from trying the subsequent suit which may arise between the same parties in respect of other properties and upon a different cause of action. “issue estoppel” which flows from principles of evidence such as from Sections 115, 116 and 117 of the Indian Evidence Act, 1872 and from principles of equity- attracted</i></p>
7	<p><u>Mahesh Zangoji Ghotekar -vs- Prayas Sakhare and another, reported in 2016(4) Mh.L.J. 134</u> <i>Joint family property --- Merely because property is joint family property, possession of one of co-owners cannot be treated as possession of all co-owners.</i></p>

8	<p>Vitthal Ganpatrao Adhaoo and another Vs. Shrikisan Nanaji Kondalkar and others, 2016 (1) Mh.L.J. 575.</p> <p>Effect of the admission of the documents in terms of Order XII is only the admission of the documents and not the admission of the truth of the contents of the documents.</p>
9	<p>Shreya Vidyarthi Vs. Ashok Vidyarthi and others, AIR 2016 Supreme Court 139.</p> <p>While there can be no doubt that a Hindu Widow is not a coparcener in the HUF of her husband and, therefore, cannot act as Karta of the HUF after the death of her husband but where the sole male coparcener is a minor. The HUF does not come to an end and the mother of the male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his legal guardian.</p>
10	<p>Santosh Popat Chavan and others Vs. Mrs. Sulochana Rajiv and others, AIR 2016 Bombay 29.</p> <p>The right having been given to a widow or mother or women under the Act of 1956, she cannot be told that though she has a right to get share, but she cannot file a suit for recovery of share of her deceased as she has no right to file a suit. When a right is given, the remedy has to be there namely; remedy to file a suit for partition, which cannot depend upon the desire or demand of other coparceners in the family to have a partitioned of the joint family property.</p>
11	<p>Maharashtra Rent Control Act- In a suit for eviction, issue of comparative hardship cannot be gone into if landlord has not made out a case of reasonable and bonafide requirement.</p> <p>- Raghunath S.Dixit (Since deceased) by his legal heirs Seeta D. Dixit vs. Surendranath B. Burad (Since deceased) by his Lrs. Surekha S. Burad 2016 (3) Mh.L.J. 720.</p>
12	<p>Section 4 of C.P.C.- Saving of special law- Except where there is specific provision to contrary- provision excepting applicability of special law - Has to be in code itself.- AIR 2016 SC 1213 (B).</p>

16	Section 67 of Evidence Act- Execution of document- Burden of proof- when document is lost and its copy is not available, evidence on execution of document needs to be given- defence that original document itself was forged- it becomes necessary for party relying on document to prove execution of documents- only after proof of execution, party making allegation of forgery needs to prove forgery.- Kashinath Yadeo Hiwarde Vs. Osman Baig Sandu Baig (NOC) 266 (Bom)
17	Section 16 Specific Relief Act- Decreeing suit for specific performance of contract only on basis of finding on genuineness of agreement to sell is not proper. Consideration of other aspects, necessary.- AIR 2016 SC 1438.
18	Article 64 of Limitation Act- Adverse possession- Mere mutation of entries does not confer title- Mere absence of name of appellants in revenue records is not the ground for respondent to claim to have acquired title over suit property by pleading adverse possession.- AIR 2016 SC 1633.