

The transferee court is bound by an order made by the court which passed the decree or by an appellate court in relation to execution of such decree.<sup>3</sup>

## 2. STAYING OF ORDER AND QUASHING OF ORDER:

### DISTINCTION

There is distinction between staying of an order and quashing of an order. Quashing of an order means that no such order had ever been passed and there is restoration of position as it stood prior to the passing of the order. Stay of order, however, means that the order is very much there, but its operation is stayed.<sup>4</sup>

## 3. REVIVAL OF EXECUTION PROCEEDINGS: RULE 27

An order of restitution of property or the discharge of the judgment-debtor made under Rule 26 shall not prevent the court from restarting the execution proceedings.<sup>5</sup>

## 4. STAY OF EXECUTION PENDING SUIT: RULE 29

Rule 29 provides for stay of execution pending suit between the decree-holder and the judgment-debtor. It enacts that where a suit by the judgment-debtor is pending in a court against the decree-holder such court may, on the judgment-debtor furnishing security or otherwise as it thinks fit, stay execution of the decree until the disposal of such suit.

The underlying object of this provision is twofold, namely, (i) firstly, to enable the judgment-debtor and the decree-holder to adjust their claims against each other; and (ii) secondly, to prevent multiplicity of execution proceedings.<sup>6</sup>

For this rule to apply, there must be two simultaneous proceedings in one court: (1) A proceeding in execution of the decree at the instance of the decree-holder against the judgment-debtor; and (2) a suit at the instance of the judgment-debtor against the decree-holder.<sup>7</sup>

For the application of this rule, it is not enough that there is a suit pending by the judgment-debtor. Such suit must be against the decree-holder

<sup>3</sup> R. 28; see also *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528; *Gurinder Singh v. Harmala Kaur*, (1982) 2 SCC 54.

<sup>4</sup> *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.*, (1992) 3 SCC 1: AIR 1992 SC 1439.

<sup>5</sup> R. 27; see also *supra*, *Shaukat Hussain v. Bhuneshwari Devi*.

<sup>6</sup> *Mahesh Chandra v. Jogendra Lal*, AIR 1928 Cal 222; *Rangaswami Battar v. Alasinga Battar*, AIR 1936 Mad 103; *Anop Chand v. Hirachand*, AIR 1962 Raj 223: ILR 1962 Raj 345.

<sup>7</sup> *Shaukat Hussain v. Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528; *Shri Krishna Singh v. Mathura Ahir*, (1981) 3 SCC 689: AIR 1982 SC 686; *Hansraj v. Satnarain*, AIR 1957 Raj 219; *Subhas Kumar v. Sheo Balak Singh*, AIR 1975 Pat 307; *Ram Nath v. Kali Prasad*, AIR 1999 Pat 48.

holder in such court. The words "such court" are important and would mean that the suit must be pending in the same court.<sup>8</sup> The provisions of Rule 29 are not peremptory but discretionary.<sup>9</sup> The discretion, however, must be exercised judicially and in the interests of justice and not mechanically and as a matter of course.<sup>10</sup> No hard and fast rule can be laid down in what cases stay would be granted or refused.<sup>11</sup> This rule is based on the principle that a judgment-debtor may not be harassed if he has a substantial claim against the decree-holder which is pending for the decision of the court executing the decree. If the court is of the view that there is some substance in the claim, it may order for the stay of execution filed by the defendant in that case but not otherwise.<sup>12</sup> While exercising the discretion conferred under Rule 29, the court should duly consider that a party who has obtained a lawful decree is not deprived of the fruits of that decree except for good and cogent reasons.<sup>13</sup> So long as the decree is not set aside by a competent court, it stands good and effective and it should not be lightly dealt with so as to deprive the holder of the lawful decree of its fruits.<sup>14</sup> A party should not be deprived of the fruits of the decree obtained by him from a competent court merely because a suit has subsequently been filed for setting aside that decree. A decree passed by a competent court should be allowed to be executed and unless a strong case is made out on cogent grounds no stay should be granted. Even if stay is granted it must be on such terms as to security, etc., so that the earlier decree is not made ineffective due to lapse of time.<sup>15</sup> The discretion of the court under Rule 29 has to be exercised with "very great care" and only in "special cases".<sup>16</sup> It cannot be exercised so as to allow a party to abuse the process of law.<sup>17</sup> Prior to the amendment in the Code in 1976, the jurisdiction to stay execution of a decree vested only in the court which passed the decree. Hence, when the decree was transferred by the court which passed it to

- 8
- Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731: AIR 1973 SC 528.
- 9
- Anop Chand v. Hirachand, *supra*; Quazi Toufiqur Rahman v. Nurbanu Bibi, AIR 1976 Gau 39.
- 10
- Quazi Rahman v. Nurbanu Bibi (*ibid.*); Quazi Talifiquur Rahman v. Sital Prasad, AIR 1977 Gau 25.
- 11
- Proviso to R. 29; Judhistir Jena v. Surendra Mohanty, AIR 1969 Ori 233.
- 12
- Anop Chand v. Hirachand, *supra*, at p. 354; Subhas Kumar v. Sheo Balak Singh, *supra*.
- 13
- Proviso to R. 29; Judhistir Jena v. Surendra Mohanty, AIR 1969 Ori 233.
- 14
- Quazi Toufiqur Rahman v. Nurbanu Bibi, AIR 1976 Gau 39 at p. 40.
- 15
- Ibid*, at pp. 40-41.
- 16
- Shri Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689 at p. 426: AIR 1982 SC 686 at p 689.
- 17
- Quazi Toufiqur Rahman v. Nurbanu Bibi, AIR 1976 Gau 39 at p. 41.

Another court, the transferee court had no power to stay its execution.<sup>18</sup>  
By virtue of the amendment of 1976, now the executing court is also competent to stay not only the decree passed by it, but also a decree passed by another court transferred to it for execution.<sup>19</sup>  
It is submitted that the following observations of Misra, J. (as he then was) in the case of *Judhistir v. Surendra*<sup>20</sup> lay down correct law on the point:  
"The fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off- chance that another suit to set aside the decree might succeed ... . The decree must be allowed to be executed, and unless an extraordinary case is made out, no stay should be granted. Even if stay is granted, it must be on suitable terms so that the earlier decree is not stifled."<sup>21</sup>  
(emphasis supplied) The proviso has been added by the Amendment Act of 1976. It enacts that if the decree is for payment of money and if the court grants stay without requiring security, it shall record its reasons for doing so.<sup>22</sup>

#### 5. ORDER OF INJUNCTION AND ORDER OF STAY: DISTINCTION

There is distinction between an order of injunction and an order of stay. The former is an order against a person or an individual restraining him from doing something. The latter is a direction or an order to a court not to do something. Proceedings taken in contravention of injunction-order are not null and void being without jurisdiction. The effect of non-compliance of an order of injunction may make the person liable to punishment. Proceedings in contravention of an order of stay, on the other hand are a nullity and of no effect whatsoever.<sup>23</sup>

<sup>18</sup>     Shaukat Hussain v. Bhuneshwari Devi, (1972) 2 SCC 731: AIR 1973 SC 528; Shri Krishna Singh v. Mathura Ahir, (1981) 3 SCC 689: AIR 1982 SC 686.  
<sup>19</sup>     R. 29; see also H.L. Nantha v. T.C. Ramalingam, AIR 1978 Mad 269.  
<sup>20</sup>     AIR 1969 Ori 233.  
<sup>21</sup>     Ibid, at p. 234. See also Subhas Kumar Singh v. Sheo Balak Singh, supra; Quazi Toufiquir Rahman v. Nurbanu Bibi, AIR 1976 Gau 39; Quazi Toufiquir Rahman v. Sital Prasad, AIR 1977 Gau 25.  
<sup>22</sup>     Teja Singh Mehta and Co. v. Grindlays Bank Ltd., (1982) 3 SCC 199.  
<sup>23</sup>     Subhas Kumar v. Sheo Balak Singh, AIR 1975 Pat 307; Trimbakrao v. Sampatrao, AIR 1933 Nag 153.

# PART IV

## 5

### Mode of Execution

#### SYNOPSIS

#### 1. GENERAL

THE CODE lays down various modes of execution. After the decree-holder files an application for execution of a decree, the executing court can enforce execution. The substantive provision (Section 51) "merely enumerates different modes of execution in general terms, while the conditions and limitations under which alone the respective modes can be availed of are prescribed further by different provisions". (Order 21)1

1 Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354 at p. 362: AIR 1981 SC 416 at p. 421.

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A decree may be enforced by delivery of any property specified in the decree, by attachment and sale or by sale without attachment of any property, or by arrest and detention in civil prison of the judgment-debtor or by appointing a receiver, or by effecting partition, or in such other manner as the nature of the relief may require.<sup>2</sup>

## 2. CHOICE OF MODE OF EXECUTION

The Code allows more than one mode of execution of decrees.<sup>3</sup> As a general rule, a decree-holder has an option to choose a particular mode for executing and enforcing a decree passed by a competent court in his favour.<sup>4</sup> It is for him to decide in which mode he will execute his decree. This power, however, is "subject to such conditions and limitations

<sup>2</sup> S. 51; see also, Halsbury's Laws of England (4th Edn.) Vol. 17, para 401 at pp. 232-33.

<sup>3</sup> S. 51, reads as under:

"51. Powers of Court to enforce execution.—Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree:

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied:

- (a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, :
  - (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
  - (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or
- (b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
- (c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation. — In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

<sup>4</sup> Mahadeo Prasad Singh v. Ram Lochan, supra.

as may be prescribed" by the Code.<sup>5</sup> It is also subject to the discretion of the court.<sup>6</sup>

### 3. SIMULTANEOUS EXECUTION

Section 51 of the Code is very wide and permits execution of decrees by different modes. It gives an option to the decree-holder of enforcing a decree by several modes available under the Code. As a general rule, therefore, a court passing a decree against the defendant should not ordinarily place any limitation as to the mode in which it is to be executed.

In *Padrauna Rajkrishna Sugar Works Ltd. v. Land Reforms Commr.*<sup>7</sup>, income tax dues were sought to be realised as arrears of land revenue by selling immovable property of the company. It was contended by the company that the Collector at the first instance ought to have sold movables. Negating the contention and upholding the action of the Collector, the Supreme Court stated, "[T]he Code of Civil Procedure imposes no obligation to recover the dues by sale of movables or by arrest and detention of the defaulter before immovable property may be attached."<sup>8</sup> (emphasis supplied)

In *Shyam Singh v. Collector, Distt. Hamirpur*<sup>9</sup> for recovery of certain debts, simultaneous proceedings for attachment and sale of movable as well as immovable property were taken. Upholding the action and following *P.R. Sugar Works*<sup>10</sup>, the Supreme Court observed:

"It has been said the difficulties of a litigant 'begin when he has obtained a decree'. It is a matter of common knowledge that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment- debtor. Perhaps because of that there is no statutory provision against a number of execution proceedings continuing concurrently. Section 51 of the Code gives an option to the creditor, of enforcing the decree either against the person or the property of the debtor; and nowhere it has been laid down that execution against the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property."<sup>11</sup> (emphasis supplied)

<sup>5</sup> S. 51; see also *supra*, *Mahadeo Prasad Singh v. Ram Lochan*; *Shyam Singh v. Collector, Distt. Hamirpur*, *infra*.

<sup>6</sup> *Ibid*, see also *infra*, "Discretion of court".

<sup>7</sup> (1969) 1 SCC 485: AIR 1969 SC 897.

<sup>8</sup> *Ibid*, at pp. 489-90 (SCC): at p. 901 (AIR) (per Shah, J.).

<sup>9</sup> 1993 Supp (1) SCC 693.

<sup>10</sup> *Padrauna Rajkrishna Sugar Works Ltd. v. Land Reforms Commr.*, (1969) 1 SCC 485: AIR 1969 SC 897.

<sup>11</sup> *Ibid*, at p. 700 (SCC); see also *Ram Narayan v. State of U.P.*, (1983) 4 SCC 276: AIR 1984 SC 1213.

is, However, necessary to note that discretion is with the court to order simultaneous execution and that discretion must be exercised judicially The court can refuse simultaneous execution by allowing the decree-holder to avail of only one mode of execution at a time.<sup>12</sup>  
In Anandi Lal v. Ram Samp<sup>13</sup>, the Full Bench of the High Court of Allahabad stated, "... [A]ll the various modes mentioned in Section 51 are not open to an executing court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."<sup>14</sup>  
In Shyam Singh v. Collector, Distt. Hamirpur<sup>15</sup>, the Supreme Court observed, "[I]n the initial dispute, and as such, courts have to aid the creditor in realising the dues from the debtor. But at the same time in the special facts and circumstances of a particular case, the court can direct the decree-holder or the creditor not to put any property on sale if, by the mode already opted by the decree-holder or the creditor, the amount due has been realised or likely to be realised without any further delay."

It is submitted that the following observations in Mono Mohan v. Upendra Mohan<sup>16</sup>, lay down correct law on the point. The Full Bench of the High Court of Calcutta stated:

"It is quite true that in Section 51 of the Code the remedies open to a judgment-creditor are detailed in the five clauses (a) to (e) to that section and it is also true that where the holder of a decree for money comes before the Court and wants process against the person of a judgment-debtor for his arrest, and if there are no special circumstances present, it is not open to the Court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him... . But we are clearly of opinion that there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor, but, we are prepared to go further and say that there may be circumstances which would demand such a refusal."<sup>17</sup>  
(emphasis supplied)

<sup>12</sup> Or. 21 R. 21; see also supra, Shyam Singh v. Collector, Distt. Hamirpur.

<sup>13</sup> AIR 1936 All 495:1936 All LJ 605 (FB).

<sup>14</sup> Ibid, at p. 502 (AIR) (per Sulaiman, C.J.).

<sup>15</sup> 1993 Supp (1) SCC 693 at p. 702.

<sup>16</sup> AIR 1935 Cal 127:154 IC 606: 38 CWN 1085.

<sup>17</sup> Ibid, at p. 129 (AIR); see also A.K. Subramania Chettiar v. A. Ponnuswami Chettiar, AIR 1957 Mad 777: (1957) 1 MLJ 208; Uma Kanta v. Renwick & Co., AIR 1953 Cal 717; Mahadeo Prasad v. Ram Lochan, (1980) 4 SCC 354: AIR 1981 SC 416; Ram Lochan v. Mahadeo Prasad, AIR 1970 All 544 (FB).

4. DISCRETION OF COURT

Though it is for the decree-holder to choose a particular mode of executing his decree and it is permissible in law to opt for even a simultaneous execution, "the court may, in its discretion, refuse execution at the same time against the person and property of the judgment- debtor".<sup>18</sup>

5. MODES OF EXECUTING DECREES

The Code lays down the following modes for execution of different types of decrees:

(1) Delivery of property

(a) Movable property: Section 51(a), Rule 31

Where the decree is for any specific movable property, it may be executed (i) by seizure and delivery of the property; or (ii) by detention of the judgment-debtor; or (iii) by the attachment and sale of his property; or (iv) by attachment and detention both.<sup>19</sup> The words specific movable (property) do not include money and, therefore, a decree for money cannot be executed under Rule 31.<sup>20</sup> Again, for the application of this rule the property must be in the possession of the judgment-debtor. Where the property is in the possession of a third party, the provisions of this rule do not apply and the property cannot be attached.<sup>21</sup>

(b) Immovable property: Rules 35 and 36

Rules 35 and 36 provide the mode of executing decrees for possession of immovable property to the decree-holder. Rules 35 and 36 correspond to Rules 95 and 96 which lay down the procedure for delivery of possession to the auction-purchaser who has purchased the property in an auction-sale.<sup>22</sup> Where the decree is for immovable property in the possession of the judgment-debtor or in the possession of the person bound by the decree, it can be executed by removing the judgment-debtor or any person bound by the decree and by delivering possession thereof to the decree holder.

If the decree-holder satisfactorily establishes identity of decretal property, the decree must be executed by the court by putting the decree-holder in possession thereof.<sup>23</sup> Possession delivered in this manner is known as khas or actual possession. But if such property is in

<sup>18</sup> Or. 21 R. 21; see also *Anandi Lal v. Ram Sarup*; *Mono Mohan v. Upendra Mohan*; *Padrauna Rajkrishna Sugar Works Ltd. v. Land Reforms Commr.*, supra.  
<sup>19</sup> R. 31.

<sup>20</sup> *Netumprakkot Kumath v. Netumprokkotti Kumath*, AIR 1914 Mad 572: (1914) 37 Mad 381; *Karnani Industrial Bank Ltd. v. Baraboni Coal Concern Ltd.*, AIR 1938 Cal 471.

<sup>21</sup> *Pudmanund Singh v. Chundi Dat*, (1896) 1 CWN 170.

<sup>22</sup> For detailed discussion, see *infra*, Chap. 10.

<sup>23</sup> *Shafiqur Rehman v. Mohd. Jahan Begum*, (1982) 2 SCC 456.



the possession of a tenant or other person entitled to occupy the same and not bound by the decree, the delivery of the property should be made by affixing a copy of the warrant at 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 regarding the property This is known as symbolical or formal possession.

The ambit and scope of Rules 35 and 36 (khas and symbolic possession) has been appropriately explained by Srivastava, J. in the case of Shamsuddin v. Abbas Ali<sup>24</sup> in the following words:

"It appears to me that the possession referred to in sub-rules (1) of (3) of Order 21 Rule 35 is khas or actual possession, while that referred to in sub-rule (2) of Rule 36 is formal or symbolical possession. Formal or symbolical possession is delivered by fixing a copy of the warrant in some conspicuous place of the property and proclaiming by the beat of drum or other customary mode at some convenient place the substance of the decree. Rules 35 and 36 refer to cases where a suit is brought for possession of immovable property and a decree is passed in the suit for the delivery of the property to the decree-holder. If the immovable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, actual possession must be delivered to the decree-holder under sub-rule (1) of Rule 35. Where it is in the possession of a tenant or other person entitled to occupy the same, only symbolical possession can be delivered, and that is to be done under Rule 36. Symbolical possession can in such cases operate as actual possession against the judgment-debtor."<sup>25</sup> Where the decree is for joint possession of immovable property, possession can be delivered by affixing a copy of the warrant at some conspicuous place of the property and proclaiming by beat of drum, or by other customary mode at some convenient place, the substance of the decree.<sup>26</sup>

Where the 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 into the building and put the decree-holder in possession thereof.<sup>27</sup>

<sup>24</sup> AIR 1971 All 117.

<sup>25</sup> Ibid, at p. 121 (AIR); see also Balwant Narayan v. M.D. Bhagwat, (1976) 1 SCC 700: AIR 1975 SC 1767; Ram Prasad v. Bakshi Bindeshwari Prasad, AIR 1932 Pat 145: ILR (1932) 11 Pat 165.

<sup>26</sup> R. 35(2).

<sup>27</sup> R. 35(3); see also B. Gangadhar v. B.G. Rajalingam, (1995) 5 SCC 238: AIR 1996 SC 780.

The expression "any person bound by the decree" includes the judgment-debtor as well as any other person bound by such decree.<sup>28</sup> A subtenant is bound by a decree of ejectment passed against a tenant.<sup>29</sup> Similarly, a decree passed against a benamidar binds the real owner.<sup>30</sup>

The executing court can also award mesne profits as an integral power to order delivery of possession and consequential to unlawful retention of possession of property.<sup>31</sup>

(2) Attachment and sale of property: Section 51(b)

Section 51(b) empowers the court to order execution of a decree by attachment and sale or by sale without attachment of any property. The court is competent to attach the property if it is situated within the local limits of the jurisdiction of the court.<sup>32</sup> It is immaterial that the place of business of the judgment-debtor is outside the jurisdiction of the court.<sup>32</sup>

The words attachment and sale in clause (b) of Section 51 are to be read disjunctively.<sup>33</sup> Therefore, the attachment of the property is not a condition precedent.<sup>34</sup>

Hence, sale of property without an attachment is not void or without jurisdiction and does not vitiate the sale. It is merely an irregularity.<sup>35</sup>

An order of attachment takes effect from the moment it is brought to the notice of the court.<sup>36</sup> Rule 54 provides for the attachment of immovable property and the procedure for the proclamation of such attachment.<sup>37</sup> The object of Rule 54 is to inform the judgment-debtor about the attachment so that he may not transfer or create encumbrance over the property thereafter.<sup>38</sup>

<sup>28</sup> Sk. Yusuf v. Jyotish Chandra, AIR 1932 Cal 241; Patel Naranbhai v. Dhulabhai, (1992) 4 SCC 264: AIR 1992 SC 2009.

<sup>29</sup> Shri Jagadguru Gurushiddaswami G.C. Murusavirmath v. D.M.D. Jain Sabha, AIR 1953 SC 514:1954 SCR 235; Anand Niwas (P) Ltd. v. Anandji Kalyanji's Pedhi, AIR 1965 SC 414.

<sup>30</sup> Patel Naranbhai v. Dhulabhai, (1992) 4 SCC 264: AIR 1992 SC 2009.

<sup>31</sup> Ibid, at p. 271 (SCC).

<sup>32</sup> M.A.A. Raoof v. K.G. Lakshmipathi, AIR 1969 Mad 268: (1968) 2 Mad LJ 34.

<sup>33</sup> Amulya Chandra v. Pashupati Nath, AIR 1951 Cal 48 (FB); Nar Singh Datt v. Ram Pratap, AIR 1961 All 436.

<sup>34</sup> Krishnamukhlal v. Bhagwan Kashidas, AIR 1974 Guj 1: (1973) 14 Guj LR 280; Karnataka Bank Ltd. v. K. Shamanna, AIR 1972 Mys 321; Janki Vallabh v. Moolchand, AIR 1974 Raj 168.

<sup>35</sup> Rahim Bux Haji & Sons v. Firm Samiullah & Sons, AIR 1963 All 320.

<sup>36</sup> Viswanathan v. Muthuswamy Gounder, AIR 1978 Mad 221.

<sup>37</sup> For detailed discussion, see infra, Chaps. 9, 10.

<sup>38</sup> Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131.

(3) Arrest and detention: Section 51(c)

It is for the decree-holder to decide in which of the several modes he will execute his decree. One of such modes of executing a decree is arrest and detention in civil prison of the judgment-debtor. However, clause (c) should be read subject to the proviso to Section 51.<sup>39</sup>

The proviso lays down that where the decree is for payment of money, execution by detention in civil prison should not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be so detained, the court for reasons to be recorded in writing is satisfied (i) that the judgment-debtor with the object of obstructing or delaying the execution of the decree (a) is likely to abscond or leave the local limits of the jurisdiction of the court; or (b) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or (ii) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same; or (iii) that the decree is for a sum which the judgment-debtor was bound in a fiduciary capacity to account for.<sup>40</sup>

These provisions are mandatory in nature and must be strictly complied with. They are not punitive in character. The object of detention of a judgment-debtor in a civil prison is twofold. On the one hand, it enables the decree-holder to realise the fruits of the decree passed in his favour; while on the other hand, it protects the judgment-debtor who is not in a position to pay the dues for reasons beyond his control or is unable to pay. Therefore, mere failure to pay the amount does not justify arrest and detention of the judgment-debtor inasmuch as he cannot be held to have neglected to pay the amount to the decree-holder.<sup>41</sup>

(4) Appointment of receiver: Section 51(d)

One of the modes of execution of a decree is the appointment of a receiver. Execution by appointment of a receiver is known as equitable execution and is entirely at the discretion of the court.<sup>42</sup> It cannot be

<sup>39</sup> S. 51(c); see also *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360: AIR 1980 SC 470; *Prem Ballabh v. Mathura Datt*, AIR 1967 SC 1342: (1967) 2 SCR 298; *Shyam Singh v. Collector, Distt. Hamirpur*, 1993 Supp (1) SCC 693.

<sup>40</sup> Proviso to S. 51; see also *supra*, *Jolly George Varghese v. Bank of Cochin*.

<sup>41</sup> See "Arrest and detention", *supra*. For detailed discussion and case law, see *infra*, Chap. 7.

<sup>42</sup> *Kerr on Receivers* (1972) at pp. 37-39; *Shephard, Re*, (1889) 43 Ch D131 (CA); *Saileshwar Lakhaiyar v. Kanti Kumar*, AIR 1965 Pat 238; *Dhirendra Nath v. Santasila Debi*, AIR 1969 Cal 406.

claimed as of right.<sup>43</sup> It is thus an exception to the general rule stated above that it is for the decree-holder to choose the mode of execution and that the court has no power to refuse the mode chosen by him.

The appointment of a receiver in execution proceedings is considered to be an exceptional remedy and a very strong case must be made out in support of it.<sup>44</sup> The decree-holder before resorting to this mode must show that there is no effective remedy for obtaining relief by the usual statutory modes of execution.<sup>45</sup> The court also must be satisfied that the appointment of a receiver is likely to benefit both the decree-holder and the judgment-debtor rather than a sale of the attached property.<sup>46</sup>

It has also to be satisfied that the decree is likely to be realised within a reasonable time from the attached properties so that the judgment- debtor may not be burdened with property while he is deprived of the enjoyment of it<sup>47</sup> Again, this mode of execution cannot be resorted to in order to circumvent the statutory provisions<sup>48</sup>

Thus, the decree-holder cannot be permitted to pray for the appointment of a receiver in respect of property which has been expressly excluded from attachment by the statute.<sup>46</sup> The provident fund amount standing to the credit of a retired government servant is exempt from attachment and sale under the provisions of the Provident Funds Act, 1925. Since no execution can lie against such amount, no receiver can be appointed for the said sum<sup>49</sup> A receiver can be appointed even before the attachment of the property,<sup>50</sup> and even in respect of the property situate outside the territorial jurisdiction of the court.<sup>51</sup>

This section, however, should be read with the provisions of Order 40 Rule 1 regarding the appointment of a receiver and his powers.<sup>52</sup>

<sup>43</sup> Ibid, see also Onkarlal v. V.S. Rampal, AIR 1961 Raj 179.

<sup>44</sup> Bhagwati Bai v. Padma Bai, AIR 1955 Ajm 58; Onkarlal v. V.S. Rampal (ibid.); Dhirendra Nath v. Santasila Devi, supra.

<sup>45</sup> Nawab Bahadur v. Karnani Industrial Bank Ltd., (1930-31) 58 IA 215: AIR 1931 PC 160; Ambalal v. Vijai Singh, AIR 1955 Ajm 61; supra; Saileshwar Lakhaiyar v. Kanti Kumar, supra.

<sup>46</sup> Toolsa Golal v. John Antone, (1887) 11 Bom 448; Partap Singh v. Delhi & London Bank Ltd., ILR (1908) 30 All 393.

<sup>47</sup> Hemendra Nath Roy v. Prokash Chandra, AIR 1932 Cal 189; Nawab Bahadur v. Karnani Industrial Bank Ltd., supra; Onkarlal v. V.S. Rampal, supra.

<sup>48</sup> Kerr on Receivers (1972) at pp. 84-87; Union of India v. Hira Devi, AIR 1952 SC 227: 1952 SCR 765.

<sup>49</sup> Union of India v. Hira Devi, supra; Union of India v. Radha Kissan, (1969) 1 SCC 225: AIR 1969 SC 762; Union of India v. Jyoti Chit Fund and Finance, (1976) 3 SCC 607: AIR 1976 SC 1163.

<sup>50</sup> Nawab Bahadur v. Karnani Industrial Bank Ltd., supra; Vakharia & Sons v. Kantilal, (1970) 11 GLR 1069.

<sup>51</sup> Dhirendra Nath v. Santasila Devi, AIR 1969 Cal 406.

<sup>52</sup> For detailed discussion about "Receiver", see supra, Pt. II, Chap. 11.

(5) Partition: Section 54

Where a decree is for partition or separate possession of a share of an undivided estate assessed to the payment of revenue to the Government, the partition or separation of the share should be made by the Collector.<sup>53</sup>

The object underlying this provision is twofold: firstly, the revenue authorities are more conversant and better qualified to deal with such matters than the civil court<sup>54</sup>, and secondly, the interests of the Government with regard to the revenue-paying estate would be better safeguarded by the Collector than by the court.<sup>55</sup>

(6) Cross-decrees and cross-claims: Rules 18-20

Rules 18 to 20 of Order 21 deal with set-off of cross-decrees and cross-claims.

(a) Cross-decrees: Rules 18 and 20

(i) Doctrine explained.—Rule 18 enacts that cross-decrees for the payment of money shall be set-off against each other. If the amounts under the two decrees are equal then both the decrees shall satisfy each other and full satisfaction will be recorded and no payment is required to be made by any party and no execution will be allowed to be taken out.

If, on the other hand, the amounts under the two decrees are unequal then full satisfaction will be recorded upon the decree for the smaller amount, and part satisfaction upon the decree for the larger amount, and the execution will be allowed only for the balance.

(ii) Illustrations.— This principle may be explained by the following two illustrations:

(i) A holds a decree against B for Rs 10,000. B also holds a decree against A for the same amount (i.e. Rs 10,000). A and B each applies for the execution of his decree to court C which is having jurisdiction to execute both the decrees. The decrees, being cross-decrees, will be set-off against each other fully and neither party will be allowed to take out execution.

(ii) If in the above illustration B holds a decree against A only for Rs 5000, i.e for the smaller amount, he will not be allowed to take out execution of his decree. Execution will only be allowed of /4's decree to the extent of Rs 5000 being difference between the two decrees which remains due after the set-off.

(iii) Object.— The underlying object of this rule has been explained by Their Lordships of the Privy Council in the case of Hazari Ram v. Rai

<sup>53</sup> S. 54; see also Sanjay Dinkar v. State of Maharashtra, (1986) 1 SCC 83: AIR 1986 SC 414; Ramrathibal v. Surajpal, AIR 1995 Bom 445; Chintaman v. Shankar, (1999) 1 SCC 76.

<sup>54</sup> Bhimangauda Konapgauda Patil v. Hanmant Rangappa Patil, AIR 1918 Bom 206.

<sup>55</sup> Zahrun v. Gowri Sunkar, ILR (1888) 15 Cal 198; K.V. Srinivasathathachar v. Naravalur Srinivasathathachar, AIR 1933 Mad 259; Khemchand Shankar v. Vishnu Hari, (1983) 1 SCC 18: AIR 1983 SC 124.

Bahadur Bansidhar<sup>56</sup>, in the following words, "It is true that under Rules 18 to 20, the set-off of decrees is not a discretionary matter depending upon equitable considerations Such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from, circuitry of proceedings thereunder can be avoided and should be avoided. This is the principle of the rules."<sup>57</sup>

(emphasis supplied)

(iv) Extent and applicability.—Over and above ordinary suits, the provisions of Rules 18-20 also apply to mortgage suits.<sup>58</sup> The court has also power to allow set-off to cases not strictly covered by Rule 18.<sup>59</sup>

(v) Conditions.—In order that this rule may apply, the following conditions must be satisfied:

- (1) The decrees must be for the payment of different sums of money;
- (2) They must have been passed in separate suits;
- (3) The decree-holder in one decree must be the judgment-debtor in the other decree; and
- (4) Each party must fill the same character in both the suits.

Illustrations

(a) A and B, co-plaintiffs, obtain a decree for Rs 1000 against C, and C obtains a decree for Rs 1000 against B. C cannot treat his decree as a cross-decree under this rule.

(b) A obtains a decree against B for Rs 1000. C who is a trustee for B obtains a decree on behalf of B against A for Rs 1000. B cannot treat C's decree as a cross-decree under this rule.

(c) A, B, C, D and E are jointly and severally liable for Rs 1000 under a decree obtained by F. A obtains a decree for Rs 100 against F singly and applies for the execution to the court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

(5) Both the decrees must be capable of execution by the same court at the same time.

Illustration

(d) A holds a decree against B for Rs 1000. B holds a decree against A for the payment of Rs 1000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(6) Applications should have been made to the court for execution of both the decrees.

(vi) Test.—In deciding whether the two decrees are cross-decrees, one must look at the substance and not the form.<sup>60</sup>

<sup>56</sup> AIR 1937 PC 39: (1936-37) 64 IA 67.

<sup>57</sup> Ibid, at p. 41 (AIR) (per Sir George Rankin).

<sup>58</sup> R. 20.

<sup>59</sup> Lakshmichand v. State of A.P., (1987) 1 SCC 19 at p. 22: AIR 1987 SC 20.

<sup>60</sup> Bansidhar v. Hazari Ram, AIR 1933 Pat 210 at p. 20:143 IC 542.

(b) Cross-claims: Rules 19-20

(i) Doctrine explained.—Rule 19 provides for a set-off in the case of cross-claims in the same decree. It lays down that if the two sums in cross-claims under the same decree are equal, satisfaction of each shall be entered in the decree and no execution shall be allowed to be taken out. If the two sums are unequal, the party entitled to the larger sum may take out execution for the balance.

(ii) Object.—The principal object of Rule 19 is to prevent each side executing a decree in respect of sums due under the same decree. This is a rule of procedure based on the principle of equity that a party who is liable to pay under a decree cannot be allowed to recover under that decree if the amount which he is entitled to recover is smaller than the amount which he is liable to pay.<sup>61</sup>

(iii) Extent and applicability.—The provisions of Order 21 Rules 18-20 apply to ordinary suits, mortgage suits and other suits not covered by the provisions of the Code.<sup>62</sup>

(iv) Conditions.—For the applicability of the rule, it must be shown that the party seeking the relief to recover a sum of money under the very same decree which is sought to be executed by the opposite party. To put it differently, there should be two rival claims by contesting parties against each other arising out of one and the same decree sought to be executed by one against the other party.<sup>63</sup>

(v) Material date for satisfaction.—The material date for the satisfaction of the decree is the date of decree itself.<sup>64</sup>

(7) Payment of money: Rules 2, 30

(a) Nature and scope

A decree for payment of money (simpliciter or as an alternative to some other relief) may be executed by attachment and sale of property of the judgment-debtor or by his detention in civil prison or by both.<sup>65</sup>

The provision is not exhaustive and does not override other provisions of the Code.<sup>66</sup> Hence, a decree for payment of money can be executed by the appointment of a receiver.<sup>67</sup> Since rateable distribution of

<sup>61</sup> Thacker Ravji v. Thacker Kesharbai, AIR 1954 Kutch 55; Kotigari Rangiah Chetti v. Chintalapalli Narasayya, AIR 1917 Mad 226; Rangiah v. Narasaya, AIR 1991 Mad 226.

<sup>62</sup> R. 20; see also Lakshmichand v. State of A.P., (1987) 1 SCC 19 at p. 22: AIR 1987 SC 20.

<sup>63</sup> Mahendra Singh v. Dataram Jagannath, (1998) 9 SCC 28 at pp. 37-38: AIR 1998 SC 1219 at p. 1225.

<sup>64</sup> Sreepathi Achariyar v. Sankaranarayana Iyer, 1961 Ker LT 875: (1961) 2 Ker LR 478.

<sup>65</sup> R. 30.

<sup>66</sup> Saraswatibai v. Govindrao Keshavrao, AIR 1961 MP145 (FB): 1961 MP LJ 256 (FB).

<sup>67</sup> Pt. Jai Dayal v. Pt. Jagdeo Narain, AIR 1939 Oudh 116 (DB); Balkishen v. Narain Dass, AIR 1936 Lah 239; Lahanu Bai v. Harakchand, AIR 1915 Nag 98.

assets is one of the recognized modes of execution of a decree for payment of money, the same can also be invoked by the decree-holder.<sup>68</sup>

(b)      Modes of paying money

All money payable under a decree shall be paid either (i) by depositing in the executing court; or (ii) out of court to the decree-holder; or (iii) as per the direction of the court which has passed the decree. The judgment-debtor is bound to pay the decretal debt in one of the above modes.<sup>69</sup>

(c)      Payment in court

Where the payment has to be made in court, it may be made either by depositing the decretal amount in court or by a postal money order or through a bank. If the court is closed on the last day for making such payment, the maxim *les non cogit ad impossibilia* (the law does not compel a man to do that which he cannot possibly perform) will apply and the payment can be made on the day the court reopens.<sup>70</sup> This is an enabling provision for the benefit of judgment-debtors.<sup>71</sup>

Where payment is made by depositing the decretal amount in the executing court, or as per the direction of the court, which has passed the decree, the judgment-debtor shall give notice of such payment to the decree-holder through court or directly to him by registered post acknowledgment due.<sup>72</sup> On the amount being paid, interest shall cease from the date of service of the notice.<sup>73</sup>

(d)      Payment out of court

A payment to the decree-holder out of court also discharges the decree. Such payment may be made by postal money order or through a bank or by any other mode wherein payment is evident in writing.<sup>74</sup>

When the payment is made out of court, the following particulars must be accurately stated:<sup>75</sup>

(i)      The number of the original suit;

(ii)     The names of the parties or where there are more than two plaintiffs or more than two defendants, as the case may be, the names of the first two plaintiffs and the first two defendants;

<sup>68</sup>      *Saraswatibai v. Govindrao Keshavrao*, AIR 1961 MP 145 (FB): 1961 MP LJ 256 (FB).

<sup>69</sup>      R. 1; see also *Sita Ram v. Sukhnandi Dayal*, (1971) 3 SCC 488: AIR 1972 SC 1612; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131; *Katikireddi v. Surireddi*, AIR 1978 AP 144.

<sup>70</sup>      *C.F. Angadi v. Y.S. Hirannayya*, (1972) 1 SCC 191: AIR 1972 SC 239; *K. Saraswathy v. Somasundaram Chettiar*, (1989) 4 SCC 527: AIR 1989 SC 1553.

<sup>71</sup>      *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131.

<sup>72</sup>      R. 1(2).

<sup>73</sup> *Saraswatibai v. Govindrao Keshavrao*, AIR 1961 MP 145 (FB): 1961 MP LJ 256 (FB).

<sup>74</sup>      R. 1(b); see also *Ramanathan Chettiar v. Ramanathan Chettiar*, AIR 1968 SC 1047: (1968) 3 SCR 367.

<sup>75</sup>      R. 1(3).



- (iii) How the money remitted is to be adjusted, that is to say, whether it is towards the principal, interest or costs;
- (iv) The number of the execution case of the court, where such case is pending; and
- (v) The name and address of the payer.

This provision has been made with a view to furnish necessary details to the decree-holder as to the payment made by the judgment-debtor.

A payment made in accordance with Rule 1 of Order 21 discharges the judgment-debtor from decretal dues. On the amount being paid, interest shall cease from the date of payment,<sup>76</sup>

Where the decree-holder refuses to accept the postal money order or payment through a bank, interest shall cease to run from the date of such refusal.<sup>77</sup>

But the Code requires a certificate of payment or adjustment by the decree-holder and recording of such payment or adjustment by the executing court.<sup>78</sup> It also contemplates an application by the judgment-debtor informing the court of payment or adjustment. In that case, the court may give notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. If the decree-holder fails to show cause against such certification, the court shall record payment or adjustment.<sup>79</sup>

(e) Certification of payment

No payment or adjustment can be recorded by the court at the instance of the judgment-debtor unless such payment has been made either in the court executing the decree, or as per the direction of the court which has passed the decree, or out of court to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evident in writing; or such payment or adjustment is proved by documentary evidence, or such payment or adjustment is admitted by or on behalf of the decree-holder in his reply to the notice by the court or before the court.<sup>80</sup>

The object of certification is to ensure that the executing court should not be troubled with disputes with regard to payment or adjustment out of courts. The provision also seeks to avoid fraud in respect of payment made out of court.<sup>81</sup>

<sup>76</sup> R. 1(4), (5).

<sup>77</sup> Proviso to R. 1(5).

<sup>78</sup> R. 2(1).

<sup>79</sup> R. 2(2).

<sup>80</sup> R. 2(2-A).

<sup>81</sup> *Sultana Begum v. Prem Chand Jain*, (1997) 1 SCC 373. AIR 1997 SC 1006; *Padma Ben v. Yogendra Rathore*, (2006) 12 SCC 138: AIR 2006 SC 2167.

## (f) Effect of payment

A payment made in accordance with the provisions of the Code operates as a valid discharge of the decree against the judgment-debtor.<sup>82</sup> When interest is awarded on the decretal amount by the court, it will cease to run on the sum deposited in the court or paid to the decree-holder or to any person as per the direction of the court.<sup>83</sup>

## (g) Uncertified payment

The Code prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded.<sup>84</sup> The rule is mandatory and prohibition is absolute. The bar applies as much to a total discharge as to a partial discharge. Payment or adjustment not certified under Rule 2(3) of Order 21 would not be recognized by the executing court.<sup>85</sup> It is, however, open to the judgment-debtor to contend before the executing court in answer to an execution application that the decree was satisfied and nothing remained to be paid to the decree-holder.<sup>86</sup>

## (8) Specific performance of contract: Rule 32

Where a decree is for specific performance of a contract, and the judgment-debtor wilfully disobeys it, it may be executed by attachment of his property, or his detention in civil prison, or by both.<sup>87</sup>

A decree for specific performance creates mutual rights and liabilities in favour of both the parties. The defendant is as much entitled to enforce the decree as the plaintiff.<sup>88</sup> Where the decree does not specify the time for performance of the contract, it should be performed within reasonable time.<sup>89</sup> Even if the decree for specific performance does not provide for delivery of possession, the court can deliver possession

<sup>82</sup> Jagannath Prasad v. Chandrawati, AIR 1970 All 309 at pp. 310-11 (FB); Ahmad Hossain v. Bibi Naeman, AIR 1963 Pat 30 at p. 34; Padullaparthi Mutyala v. Padullaparthi Subbalakshmi, AIR 1962 AP 311 at p. 310.

<sup>83</sup> Champalal v. Rupchand, AIR 1968 Bom 363 at p. 365: (1968) 70 Bom LR 151; Laxminarayan v. Ghasiram, AIR 1939 Nag 191; Amtul Habib v. Mohd. Yusuf, AIR 1918 All 234.

<sup>84</sup> Bhabani Dasya v. Tulsi Ram Keot, AIR 1990 Gau 90; P. Narasaiah v. P. Rajoo Reddy, AIR 1989 AP 264; Nandagopal Gounder v. Kannan, AIR 1988 Mad 224; C.K. Xavier v. Bhagaraj Singh, AIR 1987 Ker 145; Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan, AIR 1968 SC 1087: (1968) 3 SCR 158.

<sup>85</sup> R. 2(2-A); see also Sultana Begum v. Prem Chand, (1977) 1 SCC 373: AIR 1977 SC 1006; Badamo Devi v. Sagar Sharma, (1999) 6 SCC 30; Lakshmi Narayanan v. S.S. Pandian, (2000) 7 SCC 240: AIR 2000 SC 2757.

<sup>86</sup> Ram Dass v. Mathura Lal, (1982) 3 SCC 198.

<sup>87</sup> R. 32(1); see also Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90: AIR 1984 SC 1562.

<sup>88</sup> Hungerford Investment Trust Ltd. v. Haridas Mundhra, (1972) 3 SCC 684: AIR 1972 SC 1826 at p. 1836; Jai Narain v. Kedar Nath, AIR 1956 SC 359:1956 SCR 62.

<sup>89</sup> Hungerford Investment Trust Ltd. v. Haridas Mundhra, supra.

as incidental to the execution of the sale deed.<sup>90</sup> A party seeking to execute the decree for specific performance must fulfil the obligations imposed upon him by the decree. If he deposits considerations in the court, he is entitled to have the sale deed executed.

Where the party against whom a decree for specific performance has been passed is a Corporation, the decree may be enforced by attachment of the property of the Corporation or, with the leave of the court, by detention in civil prison of the directors or other principal officers thereof, or by both attachment and detention.<sup>91</sup>

(9) Injunction: Rule 32

Where a decree is for injunction, and the judgment-debtor disobeys it, it may be executed by attachment of his property, or his detention in civil prison, or by both.<sup>92</sup>

The provision applies to prohibitory as well as mandatory injunctions.<sup>93</sup>

Where the party against whom a decree for an injunction has been passed is a Corporation, the decree may be enforced by attachment of the property of the Corporation or, with the leave of the court, by detention in civil prison of the directors or other principal officers thereof, or by both, attachment and detention.<sup>94</sup>

(10) Restitution of conjugal rights: Rules 32-33

Where a decree is for restitution of conjugal rights, and the judgment-debtor wilfully disobeys it, it may be executed by attachment of his property.<sup>95</sup>

A decree for restitution of conjugal rights cannot be executed by sending the person (husband or wife, as the case may be) to civil prison and the only permissible mode of executing the decree is attachment of the property of the judgment-debtor.<sup>96</sup>

Where the parents do not comply with the decree for restitution of conjugal rights, they can be dealt with under this provision.<sup>97</sup> Refusal

<sup>90</sup> Narendra Chandra v. Matangini Roy, AIR 1971 Trp 1; Sri Sri Janardan Kishore v. Girdhari Lal, AIR 1957 Pat 701; Dadulal v. Deo Kunwar, AIR 1963 MP 86; Pt. Balmukund v. Veer Chand, AIR 1954 All 643; Subodh Kumar v. Hiramoni Dasi, AIR 1955 Cal 267.

<sup>91</sup> R. 32(2).

<sup>92</sup> R. 32(1).

<sup>93</sup> Sachi Prasad v. Amar Nath Rai, AIR 1919 Cal 674; ILR (1919) 46 Cal 103; 45 IC 864; Paul v. Cheeran Narayanan, AIR 1969 Ker 232; Evuru Venkata Subbayya v. Sristi Veerayya, AIR 1969 AP 92; Sarup Singh v. Daryodhan Singh, AIR 1972 Del 142 (FB).

<sup>94</sup> R. 32(2).

<sup>95</sup> R. 32(1); see also Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90; AIR 1984 SC 1562.

<sup>96</sup> Sheo Kumari v. Mathura Ram, AIR 1936 All 657; Vankar Kuber v. Vankar Lilaben, (1979) 20 Guj LR 584; 1979 Hin LR 559.

<sup>97</sup> M.J. Sivarama v. V. Veerappa, AIR 1914 Mad 219.

by wife to live with her husband in unequivocal terms amounts to wilful disobedience.<sup>98</sup>

If the judgment-debtor obeys the decree and goes to live with the decree-holder, satisfaction can be entered of the decree. If the judgment-debtor is ready and willing to obey the decree, but the decree-holder obstructs execution thereof without reasonable cause, the court can, at the instance of the judgment-debtor, enter satisfaction of the decree.<sup>99</sup>

Where a decree is passed against the husband, the court, either at the time of passing the decree or at any time thereafter, may order that in the event of the decree being disobeyed within the period fixed by the court, the judgment-debtor shall make such periodical payments to the decree-holder (wife) as may be just and proper.<sup>100</sup>

The only sanction provided by law is by attachment of property of the defaulting judgment-debtor. This is an inducement offered by the court in an appropriate case to the husband or wife to live together in order to give them an opportunity to settle the matter amicably. It serves a social purpose as an aid to the prevention of break up of marriage.<sup>101</sup>

(emphasis supplied)

(11) Execution of document: Rule 34

Where a decree is for the execution of a document and the judgment-debtor neglects or refuses to obey the same, the court shall, after giving an opportunity to the decree-holder as well as to the judgment-debtor to prepare a draft of the document in accordance with the terms of the decree, execute a document in the prescribed form. It shall have the same effect as the execution of a document by the party ordered to execute the same.<sup>102</sup>

Where the document to be executed does not relate to the subject-matter of the suit, the provision will not apply.<sup>103</sup> A document executed by the court shall be treated as executed by the party himself.<sup>104</sup>

Where the decree is for the execution of a document, the executing court has to determine whether the draft document is in conformity with the terms of the decree. The court, for that purpose, may scrutinize

<sup>98</sup> Pedapudi Nookaratnam v. Pedapudi Venkata, AIR 1949 Mad 374; M.P. Shreevastava v. Veena, AIR 1965 Punj 54: ILR (1964) 2 Punj 803.

<sup>99</sup> Sreevastava v. Veena, AIR 1965 Punj 54: ILR (1964) 2 Punj 803.

<sup>100</sup> Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 SCC 90: AIR 1984 SC 1562 (per Mukharji, J.).

<sup>101</sup> Ibid, at p. 1568 (AIR) (para 17).

<sup>102</sup> R. 34; see also Pratibha Singh v. Shanti Devi, (2003) 2 SCC 330: AIR 2003 SC 643.

<sup>103</sup> Saudamini Dasi v. Behary Lal, (1920) 25 CWN 68: 61 IC 535.

<sup>104</sup> Neelakantan Velu v. Gheervarghese Koruthu, ILR 1960 Ker 678; Kantilal v. Snehlata, (1979) 20 Guj LR 490 at pp. 494-95; Harshad Chiman Lal v. DLF Universal Ltd., (2005) 7 SCC 791: AIR 2005 SC 4446.

the document and may also make alterations in the draft to bring it in conformity with the terms of the decree.<sup>105</sup>

An order made under this provision is appealable.<sup>106</sup>

(12) Endorsement of negotiable instrument: Rule 34

Where a decree is for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the court shall, after giving an opportunity to the decree-holder as well as to the judgment-debtor to prepare a draft of endorsement in accordance with the terms of the decree, endorse a negotiable instrument in the prescribed form. It shall have the same effect as the endorsement to the negotiable instrument by the party ordered to endorse the same.<sup>107</sup> An order made under this provision is appealable.<sup>108</sup>

(13) Attachment of rent, mesne profits, etc.: Rule 42

Where a decree is for unascertained rent, or mesne profits, or any other matter, the court may order attachment of the property of the judgment-debtor before the amount due from him is ascertained.<sup>109</sup> Such attachment, however, cannot affect any interest created in the property prior to the attachment.<sup>110</sup> The expression "any other matter" should be construed ejusdem generic.<sup>111</sup> It covers matters similar to rent and mesne profits. An attachment under this rule is in the execution. It is thus similar to attachment before judgment.<sup>112</sup> A decree- holder applying for attachment under this provision can claim rateable distribution.<sup>113</sup>

(14) Liability of surety: Section 145

Where any person has furnished security or given a guarantee (a) for the performance of any decree or any part thereof; or (b) for the restitution of any property taken in execution of a decree; or (c) for the payment of any money, or the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon; the decree or order may be executed (i) if he has rendered himself personally liable, against him to that extent; (ii) if he has furnished any property as security, by sale of such property to the

<sup>105</sup> Sashimohan v. Monomohan, AIR 1971 A&N 118:1970 Ass LR 52.

<sup>106</sup> Or. 43 R. 1(i).

<sup>107</sup> R. 34.

<sup>108</sup> Or. 43 R. 1(i).

<sup>109</sup> R. 42.

<sup>110</sup> Paul Bros. v. Ashim Kumar, (1990) 3 SCC 726 at p. 733: AIR 1991 SC 796.

<sup>111</sup> Dasarathi v. Krishna, (1961) 27 Cut LT 412.

<sup>112</sup> Jagat Tarini Dasi v. Surajranjan Pal, AIR 1941 Cal 357: (1941) 1 Cal 363:196 IC 247. For detailed discussion, see supra, Chap. 11.

<sup>113</sup> Paul Bros. v. Ashim Kumar, supra.

extent of the security; (iii) if the case falls under both the clauses, i.e. he has rendered himself personally liable as well as has furnished security, then to the extent specified in clauses (i) and (ii) above. The person who has furnished security or given a guarantee shall be deemed to be a party within the meaning of Section 47.114

The main object of this provision is to provide a summary remedy for the enforcement of the liability of a surety who has furnished security or given a guarantee for any of the purposes enumerated in the section.115 It dispenses with the necessity to file a separate suit by the party for whose benefit the security has been furnished or guarantee has been given and enables him to execute the decree against a surety as if he were a party to the suit and a principal debtor.116

Where the surety is liable for the fulfilment of conditions imposed by the court, the decree can be executed against him to the extent to which he has been made personally liable under the surety bond.117

The liability of a surety is joint and several. Hence, if the creditor seeks to enforce the surety bond against one or some of the sureties, the other surety or sureties will not be discharged.118 If the decree-holder enters into a compromise with the principal debtor without making the surety a party, the latter is discharged from his liability.119

Notice to the surety is a condition precedent to the validity of the proceedings against him120 Attachment of the property without notice is illegal.121 It may be given by the decree-holder, or by the court which passed the decree or by the executing court.122

(15) Decree against corporation: Rule 32

Where the party against whom a decree for specific performance of a contract or for injunction has been passed is a corporation, and has wilfully failed to obey the decree passed against it, the same may be executed by the attachment of its property or with the leave of the

114 S. 145. See also Chouthi Prasad Gupta v. Union of India, AIR 1967 SC 1080: (1967) 1 SCR 207.

115 Raja Kirtyanand v. Raja Prithi Chand, AIR 1933 PC 52: 60 IA 43; SBI v. Indexport Registered, (1992) 3 SCC 159 at p. 169.

116 Ibid, see also Bank of Bihar Ltd. v. Dr. Damodar Prasad, AIR 1969 SC 297: (1969) 1 SCR 620; SBI v. Saksaria Sugar Mills Ltd., (1986) 2 SCC 145: AIR 1986 SC 868.

117 Howrah Insurance Co. Ltd. v. Sochindra Mohan, (1975) 2 SCC 523: AIR 1975 SC 2051.

118 Sri Chand v. Jagdish Pershad, AIR 1966 SC 1427: (1966) 3 SCR 451.

119 Amar Chand v. Bhano, 1995 Supp (1) SCC 550: AIR 1995 SC 871; Raja Bahadur Dhanraj v. Raja P. Parthasarthy, (1963) 3 SCR 921.

120 Proviso to S. 145.

121 Sk. Rahim-ud-Din v. Murli Dhar, AIR 1938 Lah 593; Govinda v. Abhiram, ILR 1958 Cut 309; Ko Maung Gyi v. Daw Tok, AIR 1928 Rang 249; K.A. Mohd. Sultan Sahib v. Nagoji Rao, AIR 1931 Mad 828.

122 Lakshmishankar v. Raghmal, ILR (1905) 29 Bom 29; Rahim-ud-Din case, supra.

court by detention in civil prison of its directors or other officers or by both.<sup>123</sup>

(16) Decree against firm: Rules 49 and 50

Where a decree has been passed against a partnership firm, it may be executed against (a) any partnership property; (b) any person who has appeared in his own name as a partner, or admitted to be a partner; or

(c) any person who has been individually served with a summons as a partner and has failed to appear.<sup>124</sup>

If a decree-holder wants to execute a decree against a person other than those mentioned in clauses (b) and (c) as a partner in the partnership firm, the liability of such person may be determined by the court.<sup>125</sup> Such determination operates as a decree.<sup>126</sup>

Property belonging to a partnership firm can be attached or sold in execution of a decree passed against the firm or against the partners in the firm as such.<sup>127</sup>

Similarly, a decree against a firm as such will not affect any partner therein who has not been served with a summons to appear and answer.<sup>128</sup> The prime object of this provision is to afford an opportunity to such partner of disputing his liability as a partner if he desires to do so.<sup>129</sup>

The provisions of Rule 50 of Order 21 should be read with Order 30. The latter deals with the procedure in suits instituted by or against firms, while the former provides the mode of execution of decrees which have been obtained against firms in the firm name.<sup>130</sup>

(17) Attachment of decree: Rule 53

Where the property to be attached is a decree either for payment of money, or for sale in enforcement of a mortgage or charge, the attachment can be effected either by the court which passed the decree, or by the executing court by issuing notice to the court which has passed the decree.<sup>131</sup> Other decrees can be executed by issuing notice to the decree-holder, prohibiting him from transferring or changing the property to be attached and also by sending a notice to the executing court to abstain from executing the decree until such notice is cancelled.<sup>132</sup>

<sup>123</sup> R. 32(2).

<sup>124</sup> R. 50(1). See also *Topanmal v. Kundomal*, AIR 1960 SC 388; *Gajendra Narain v. Johrimal*, AIR 1964 SC 581:1963 Supp (2) SCR 30.

<sup>125</sup> R. 50(2). See also *Gajendra Narain v. Johrimal* (ibid).

<sup>126</sup> R. 50(3).

<sup>127</sup> R. 49(1).

<sup>128</sup> R. 50(4). See also *Ravindra Finance v. Yaanai Tobacco Co.*, AIR 1979 Mad 25.

<sup>129</sup> *Ravindra Finance v. Yaanai Tobacco Co.* (ibid.).

<sup>130</sup> *Gambhir Mal v. J.K. Jute Mills Co. Ltd.*, AIR 1963 SC 243: (1963) 2 SCR 190.

<sup>131</sup> R. 53(1), (2), (3).

<sup>132</sup> R. 53(4).

The provision is intended to prevent the holder of the attached decree from realising and taking away the fruits of the decree and to enable the attaching creditor to come to the court which has passed the decree to apply for execution and thus to safeguard the interests of the attaching creditor also.<sup>133</sup>

(18)      Payment of coins or currency notes: Rule 56

Where the property to be attached are coins or currency notes, the court may direct that such coins or currency notes or a part thereof sufficient to satisfy the decree, be paid to the decree-holder.<sup>134</sup>

Zamindari Compensation Bonds are not coins or currency notes.<sup>135</sup>

<sup>133</sup>      Mahalingam Chettiar v. Ramanathan Chettiar, AIR 1940 PC 173: (1939-40) 67 IA 350; Ganeshmul Sait v. Mohd. Ismail Sahib, AIR 1944 Mad 353: ILR 1944 Mad 960: (1944) 1 Mad LJ 446 (FB); Arvapalli Ramrao v. Kanumariapudi Ranganayakulu, AIR 1964 AP 1: (1963) 2 ALT 153: (1963) 2 AnWR 205 (FB).

<sup>134</sup>      R. 56.

<sup>135</sup>      1962 All NR (HC) 18.



## 1. GENERAL

## 2. NATURE AND SCOPE

1	S. 51(c).	1	General	63	7.	Opportunity to judgment-debtor	
2	See supra, "Mode of	2	Nature and scope	63		of satisfying decree	6
3	For detailed discussio	3	When arrest and detention may be	63	8.	Power and duty of court	3
4	Ss. 55-59.		ordered?	63	9.	Recording of reasons	3
5	Or. 21 Rr. 30-41.	4	Who cannot be arrested?:	63	1	Period of detention: Section 58	3
			Sections 56,58,135,135-A	63	0	Release of judgment-debtor:	3
					1		

1	S. 51(c).	1	General	<i>63</i> <i>2</i>	7.	Opportunity to judgment-debtor	
2	See supra, "Mode of €	2	Nature and scope	<i>63</i> <i>2</i>		of satisfying decree	<i>63</i> <i>2</i>
3	For detailed discussio	3	When arrest and detention may be		8.	Power and duty of court	<i>63</i> <i>2</i>
4	Ss. 55-59.		ordered?	<i>63</i> <i>2</i>	9.	Recording of reasons	<i>63</i> <i>2</i>
5	Or. 21 Rr. 30-41.	4	Who cannot be arrested?:		1	Period of detention: Section 58	<i>63</i> <i>2</i>
			Sections 56,58,135,135-A	<i>63</i> <i>2</i>	1	Release of judgment-debtor:	<i>63</i> <i>2</i>
		5	Procedure	<i>63</i> <i>2</i>		Sections 58-59	<i>63</i> <i>2</i>
		6	Notice: Order 21 Rules 37 & 40	<i>63</i> <i>2</i>	1	Rearrest of judgment-debtor	<i>63</i> <i>2</i>

### 3. WHEN ARREST AND DETENTION MAY BE ORDERED?

Where the decree is for payment of money, it can be executed by arrest and detention of the judgment-debtor.<sup>6</sup> Likewise, in case of a decree for specific performance of a contract or for injunction, a judgment-debtor can be arrested and detained.<sup>7</sup> Again, where a decree is against a Corporation, it can be executed with the leave of the court by detention in civil prison of its directors or other officers.<sup>8</sup>

### 4. WHO CANNOT BE ARRESTED?: SECTIONS 56, 58, 135, 135-A

The following classes of persons cannot be arrested or detained in civil prison:

- (i) a woman;<sup>9</sup>
- (ii) judicial officers, while going to, presiding in, or returning from their courts;<sup>10</sup>
- (iii) the parties, their pleaders, mukhtars, revenue agents and recognised agents and their witnesses acting in obedience to a summons, while going to, or attending or returning from the court;<sup>11</sup>
- (iv) members of legislative bodies;<sup>12</sup>
- (v) any person or class of persons, whose arrest, according to the State Government, might be attended with danger or inconvenience to the public;<sup>13</sup>
- (vi) a judgment-debtor, where the decretal amount does not exceed rupees two thousand.<sup>14</sup>

### 5. PROCEDURE

A judgment-debtor may be arrested at any time and on any day in execution of a decree.<sup>15</sup> After his 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 prevents access thereto.

- 6 R. 30.
- 7 R. 32.
- 8 R. 32.
- 9 S. 56.
- 10 S. 135(1).
- 11 S. 135(2).
- 12 S. 135-A.
- 13 S. 55(2).
- 14 S. 58(1-A).
- 15 S. 55.

Again, where the room is in the actual occupancy of a pardanashin woman who is not the judgment-debtor, reasonable time and facility should be given to her to withdraw therefrom.

No order of detention of the judgment-debtor shall be made where the decretal amount does not exceed rupees two thousand.<sup>15</sup> No judgment-debtor may be arrested unless and until the decree-holder pays into court the subsistence allowance as fixed by the court.<sup>17</sup>

Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released at once.<sup>18</sup>

In an application for the arrest and detention of the judgment-debtor in prison, the decree-holder must state or must file an affidavit stating the grounds on which arrest is sought.<sup>19</sup> No order of detention can be passed where the total amount of the decree does not exceed two thousand rupees. The burden is very heavy on the decree-holder to prove that the circumstances specified in the Proviso to Section 51 exist.<sup>20</sup>

The court must record reasons for the committal of the judgment-debtor to civil prison. In absence of reasons, the order is liable to be set aside.<sup>21</sup> Again, a decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman,<sup>22</sup> or a minor, or a legal representative of a deceased judgment-debtor.<sup>23</sup>

6. NOTICE: ORDER 21 RULES 37 & 40

Where the decree is for payment of money and the application is made for arrest and detention of the judgment-debtor, the court shall, instead of issuing a warrant for arrest, issue a notice calling upon the judgment-debtor to appear and show cause why he should not be committed to civil prison in execution of the decree.<sup>24</sup>

The purpose of issuing notice is to afford protection to honest debtors incapable of paying dues for reasons beyond their control.<sup>25</sup>

The provision for issuing notice and affording opportunity to the judgment-debtor to show cause recognizes a rule of natural justice that no person should be condemned unheard.<sup>26</sup> It has an impact on

<sup>16</sup> S. 58(1-A).

<sup>17</sup> R. 39.

<sup>18</sup> See *infra*, "Release of judgment-debtor".

<sup>19</sup> R.11-A.

<sup>20</sup> *I.K. Merchants Ltd. v. Indra Prakash*, AIR 1973 Cal 306 at p. 314.

<sup>21</sup> *Ibid*, see also *P.G. Ranganatha v. Mayavaram Financial Corpn.*, AIR 1974 Mad 1.

<sup>22</sup> S. 56.

<sup>23</sup> Ss. 50, 52.

<sup>24</sup> R. 37(1).

<sup>25</sup> *Jogendra Missir v. Ramnandan Singh*, AIR 1968 Pat 218 at pp. 221-22.

<sup>26</sup> *Jolly George Varghese v. Bunk of Cochin*, (1980) 2 SCC 360; AIR 1980 SC 470; *Ram Narayan v. State of U.P.*, (1983) 4 SCC 276; AIR 1984 SC 1213; *Mayadhar Bhoi v. Moti Dibya*, AIR 1984 Ori 162; (1984) 58 Cut LT 7; (1984) 1 Ori LR 503.

human dignity. An order of arrest or detention without issuing notice or affording an opportunity to show cause is bad in law.<sup>27</sup>

The court, however, should not issue a notice mechanically. "The high value of human dignity and the worth of the human person enshrined in Article 21 read with Articles 14 and 19" must always be kept in mind.<sup>28</sup>

Where the judgment-debtor appears before the court in obedience to such notice, and if the court is satisfied that he is unable to pay the decretal amount, the court may reject the application for arrest.<sup>29</sup> On the other hand, where the judgment-debtor appears but fails to show cause to the satisfaction of the court against the arrest and detention, the court may, subject to the provisions of the Code, make an order of detention.<sup>30</sup>

The primary object of Rule 40 read with Rule 37 of Order 21 and Section 51 of the Code is to protect honest but indigent and poor judgment-debtors, who have no sufficient means to pay decretal dues.

Where the judgment-debtor does not appear in obedience to the notice, the court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.<sup>31</sup>

Where a money decree has remained unsatisfied for a period of thirty days, the court may, on the application of the decree-holder, require the judgment-debtor to make an affidavit stating the particulars of his assets. The person disobeying the order may be detained up to three months.<sup>32</sup>

7.      OPPORTUNITY TO JUDGMENT-DEBTOR OF SATISFYING DECREE

Proviso to sub-rule (3) of Rule 40 affords judgment-debtor an opportunity of satisfying the decree.

8. POWER AND DUTY OF COURT

The provision relating to arrest and detention of the judgment-debtor protects and safeguards the interests of the decree-holder.<sup>33</sup> If the

27      Ibid, see also Parol Abu Packer v. Pokkyarath Sivasankara, AIR 1952 Mad 161; Joseph K. Mathai v. Luckose Kurian, AIR 1979 Ker 235; Azeez Ahmed v. State Bank of India, 1995 Mad LJ 446; Subhash Chand v. Central Bank of India, AIR 1999 MP 195.

28      Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360: AIR 1980 SC 470; Mayadhar Bhoi v. Moti Dibya, supra; Xavier v. Canara Bank Ltd., 1969 KLT 927.

29      R. 40(1), (3); see also supra, Jolly George Varghese v. Bank of Cochin.

30      R. 40(3).

31      Rr. 37(2), 38.

32 R. 41(2), (3).

33 Amutya Chandra v. Pashupati Nath, AIR 1951 Cal 48 (FB); T. Kunhiraman v. Pootheri Illath Madhavan, AIR 1957 Mad 761; Ch. Harpal Singh v. Lala Hira Laa, AIR 1955 All 402; Kesava Pillai v. Ouseph Joseph, AIR 1977 Ker 27: ILR (1976) 2 Ker 92:1976 Ker LT 433; K.N.

judgment-debtor has means to pay and still he refuses or neglects to honour his obligations, he can be sent to civil prison.<sup>34</sup> Mere omission to pay, however, cannot result in arrest or detention of the judgment- debtor.<sup>35</sup> Before ordering detention, the court must be satisfied that there was an element of mala fide or bad faith, "not mere omission to pay but an attitude of refusal on demand verging on disowning of the obligation under the decree".

The above principles have been succinctly and appropriately explained by Krishna Iyer, J. in Jolly George Varghese v. Bank of Cochin<sup>36</sup>, in the following words: "The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."<sup>37</sup> (emphasis supplied)

His Lordships ultimately propounded: "It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra narayana, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the covenant. But this is precisely the interpretation we have put on the proviso to Section 51, CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted."<sup>38</sup>

Gangappa v. A.M. Subramanya, AIR 1988 Mad 182; Ellis Stella Beaumont v. English Motor Car Co., AIR 1938 Cal 444 (2).

<sup>34</sup> Ibid, see also Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360: AIR 1980 SC 470; Xavier v. Canara Bank Ltd., 1969 KLT 927; Ganesa v. Chellathai Animal, AIR 1972 AP 292; Shyam Singh v. Collector, Distt. Hamirpur, 1993 Supp (1) SCC 693.

<sup>35</sup> Jolly George Varghese v. Bank of Cochin, supra.

<sup>36</sup> (1980) 2 SCC 360: AIR 1980 SC 470.

<sup>37</sup> Ibid, at p. 368 (SCC): at pp. 475-76 (AIR).

<sup>38</sup> Ibid, at pp. 367-68 (SCC): at p. 475 (AIR).

9. RECORDING OF REASONS

The court is required to record reasons for its satisfaction for detention of the judgment-debtor. Recording of reasons is mandatory. Omission to record reasons by the court for its satisfaction amounts to ignoring a material and mandatory requirement of law.<sup>39</sup> Such reasons should be recorded every time and in every proceeding in which the judgment- debtor is ordered to be detained.<sup>40</sup>

10. PERIOD OF DETENTION: SECTION 58

The period of detention of the judgment-debtor in civil prison shall be

(a) up to three months, where the decretal amount exceeds rupees five thousand; and (b) up to six weeks, where the decretal amount exceeds rupees two thousand but does not exceed rupees one thousand.<sup>41</sup>

Where the decretal amount does not exceed rupees two thousand, no detention can be ordered.<sup>42</sup>

11. RELEASE OF JUDGMENT-DEBTOR: SECTIONS 58-59

A judgment-debtor may be released in the following cases:<sup>43</sup>

- (i) On the amount mentioned in the warrant being paid; or
- (ii) On the decree against him being otherwise fully satisfied; or
- (iii) On the request of the decree-holder; or
- (iv) On the omission by the decree-holder to pay subsistence allowance; (such release, however, does not discharge the judgment-debtor from his debt, but he cannot be rearrested on the same ground);<sup>44</sup>
- (v) On the ground of illness.<sup>45</sup>

12. REARREST OF JUDGMENT-DEBTOR

Normally, a judgment-debtor once released, cannot be rearrested in execution of the same decree.<sup>46</sup> But if the judgment-debtor is released because of a mistake of the jail authorities, he can be rearrested.<sup>47</sup>

<sup>39</sup> P.G. Ranganatha v. Mayavaram Financial Corpn., AIR 1974 Mad 1; K.V. Muthu v. R.S. Mani, AIR 1956 Mad 580; Kota Venkathasubba Rao v. Majeti Sreeramulu, AIR 1949 Mad 470; Londa Abbayee v. Badam Suryanarayana, AIR 1948 Mad 9 (1); Mayadhar Bhoi v. Moti Dibya, AIR 1984 Ori 162: (1984) 58 Cut LT 7: (1984) 1 Ori LR 503; Chandran v. Indian Bank, (1986) 1 Mad LJ 214: (1988) 101 Mad LW 9.

<sup>40</sup> Ibid, see also S.K. Kuttalalingam v. S.V.N. Chinnakannu Pillai, AIR 1952 Mad 18.

<sup>41</sup> S. 58(1).

<sup>42</sup> S. 58(1-A).

<sup>43</sup> Proviso to S. 58(1); see also, Ss. 57, 59.

<sup>44</sup> S. 58(2).

<sup>45</sup> S. 59.

<sup>46</sup> M.H. Aquill v. Union Bank of India, AIR 1985 Kant 120: ILR (1984) 2 Kant 171; Rajendro Narain v. Chunder Mohun, (1895) 23 Cal 128.

<sup>47</sup> Kesar Singh v. Karant Chand, AIR 1937 Lah 253.

Similarly, where the judgment-debtor could not be sent to jail due to non-payment of subsistence allowance by the decree-holder, his rearrest is not unlawful.<sup>48</sup> Again, release of the judgment-debtor on the ground of illness does not debar his rearrest. The total period of actual detention, however, cannot exceed the maximum prescribed in the Code.<sup>49</sup>

<sup>48</sup> Malli K. Dhanalakshmi v. Malli Krishnamurthi, AIR 1951 Mad 756: (1951) 1 Mad LJ 515:1951 Mad WN 220.

<sup>49</sup> Ibid, see also Habib-ul-Rahman v. Ramsahai, ILR (1904) 26 All 317; Bohuru Mal v. Jagan Nath, AIR 1933 Lah 307.

# PART IV

## 7

### Attachment of Property

#### SYNOPSIS

##### 1. GENERAL

A DECREE may also be executed on the application of the decree-holder by attachment and sale or by sale without attachment of property. The Code recognises the right of the decree-holder to attach the property of the judgment-debtor in execution proceedings and lays down the procedure to effect attachment. Sections 60 to 64 and Rules 41 to 57 of Order 21 deal with the subject of attachment of property.

##### 2. NATURE AND SCOPE

The Code enumerates properties which are liable to be attached and sold in execution of a decree.<sup>1</sup> Likewise, it also specifies properties which are not liable to be attached or sold.<sup>2</sup> It also prescribes the

<sup>1</sup> S. 60(1).

<sup>2</sup> Proviso to S. 60(1). For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 889-960.

1	General	<i>63</i> <i>9</i>	(c) Illustration	<i>6</i> <i>4</i> <i>4</i>
2	Nature and scope	<i>63</i>	(d) Object	<i>6</i> <i>4</i>
3	Object	<i>64</i> <i>0</i>	(e) Doctrine explained	<i>6</i> <i>4</i>
4	Property which can be attached:		(f) Notice	<i>6</i> <i>4</i>
	Section 60	<i>64</i> <i>1</i>	(g) Effect of payment	<i>6</i> <i>4</i>
5	Property which cannot be attached:		(h) Failure to pay	<i>6</i> <i>4</i>
	Sections 60 and 61	<i>64</i> <i>1</i>	(i) Costs	<i>6</i> <i>4</i>
6	Modes of attachment: Section 62,		(j) Appeal	<i>6</i> <i>4</i>
	Order 21 Rules 43-54	<i>64</i> <i>2</i>	(k) Wrongful garnishment	<i>6</i> <i>4</i>
7	Precept: Section 46	<i>64</i> <i>3</i>	9. Determination of attachment:	<i>4</i>
	(a) Meaning	<i>64</i> <i>3</i>	Rules 55-58	<i>6</i> <i>4</i>
	(b) Nature and scope	<i>64</i> <i>3</i>	10. Private alienation of property after	
	(c) Object	<i>64</i> <i>3</i>	attachment: Section 64	<i>6</i>
	(d) Limitations	<i>64</i> <i>3</i>	(a) Nature and scope	<i>6</i> <i>4</i>
8	Garnishee Order: Rules 46-A to 46-1	<i>64</i> <i>3</i>	(b) Object	<i>6</i> <i>4</i>
	(a) General	<i>64</i> <i>3</i>	(c) Interpretation	<i>6</i> <i>4</i>
	(b) Meaning	<i>64</i> <i>3</i>	(d) Private transfer: Meaning	<i>6</i> <i>5</i> <i>0</i>



procedure where the same property is attached in execution of decrees by more than one court.<sup>3</sup> The Code also declares that a private alienation of property after attachment is void.<sup>4</sup>

An executing court is competent to attach the property if it is situated within the local limits of the jurisdiction of the court.<sup>5</sup> The place of business of the judgment-debtor is not material.<sup>6</sup>

The provisions of the Code, however, do not affect any special or local law.<sup>7</sup> Attachment and sale under any other statute, therefore, can be made and the judgment-debtor cannot claim benefit under the Code.<sup>8</sup>

### 3. OBJECT

The primary object of attachment of property is to give notice to the judgment-debtor not to alienate the property to anyone as also to the general public not to purchase or in any other manner deal with the property of the judgment-debtor attached in execution proceedings.<sup>9</sup> At the same time, it protects a judgment-debtor by granting exemption to certain properties from attachment and sale.<sup>10</sup>

Keeping in mind the object underlying the provisions, the words "attachment" and "sale" are to be read disjunctively and not conjunctively.<sup>11</sup> Hence, attachment of property is not a condition precedent<sup>12</sup> and sale of property without attachment is merely an irregularity and does not vitiate the sale.<sup>13</sup>

### 4. PROPERTY WHICH CAN BE ATTACHED: SECTION 60

Section 60(1) declares what properties are liable to attachment and sale in execution of a decree, and what properties are exempt therefrom.

3 S. 63.

4 S. 64.

5 M.A.A. Raoof v. K.G. Lakshmipathi, AIR 1969 Mad 268: (1968) 2 Mad LJ 34.

6 Ibid.

7 S. 4; see also Firm Amin Chand Hakam Chand v. Noshah Begum, AIR 1954 Punj 235; State of Punjab v. Dina Nath, (1984) 1 SCC 137: AIR 1984 SC 352.

8 State of Punjab v. Dina Nath, supra; Ramesh Himmatlal v. Harsukh Jadhavji, (1975) 2 SCC 105: AIR 1975 SC 1470.

9 Statement of Objects and Reasons, Gazette of India, dated 1 April 1976, Part II, Section 2, Extra., at p. 804 (8); see also Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534; Hamda Ammal v. Avadiappa Pathar, (1991) 1 SCC 715 at p. 718; Supreme General Films Exchange Ltd. v. Brijnath Singhji, (1975) 2 SCC 530: AIR 1975 SC 1810.

10 Ibid, see also Official Receiver v. Chepur China, AIR 1960 AP 353; Dwarika Prasad v. Damodar Swamp, AIR 1967 All 520:1967 All LJ 139.

11 Amulya Chandra v. Pashupati Nath, AIR 1951 Cal 48 (FB); Nar Singh Datt v. Ram Pratap, AIR 1961 All 436.

12 Krishnamukhlal v. Bhagwan Kashidas, AIR 1974 Guj 1: (1973) 14 Guj LR 280; Karnataka Bank Ltd. v. K. Shamanna, AIR 1972 Mys 321; Janki Vallabh v. Moolchand, AIR 1974 Raj 168.

13 Haji Rahim Bux & Sons v. Firm Samiullah & Sons, AIR 1963 All 320.

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.<sup>14</sup> The section is not exhaustive.<sup>15</sup> Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence if it is saleable otherwise,<sup>16</sup> (emphasis supplied)

##### 5. PROPERTY WHICH CANNOT BE ATTACHED: SECTIONS 60 AND 61

The proviso to sub-section (1) of Section 60 declares that the properties specified therein are exempt from attachment and sale in the execution of a decree.<sup>17</sup> The list enumerates certain properties such as necessary wearing apparel, cooking vessels, bedding, tools of artisans, implements of husbandry, houses of agriculturists, wages, salaries, pensions and gratuities, compulsory deposits, right to future maintenance, etc. The exemptions listed in the proviso are cumulative and the judgment-debtor may claim the benefit of more than one clause if he is qualified to do so.<sup>18</sup>

There was a conflict of judicial opinion as to whether a judgment- debtor can waive the benefit conferred on him by the proviso. One view was that since it was intended for the benefit of the judgment- debtor he can waive it.<sup>19</sup> Another view was that it was based on public policy and, therefore, cannot be waived by him.<sup>20</sup>

<sup>14</sup> Srimant Appasaheb Tuljaram v. Balchandra Vithalrao, AIR 1961 SC 589: (1961) 2 SCR 163; State of Punjab v. Dina Nath, (1984) 1 SCC 137: AIR 1984 SC 3352; Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534.

<sup>15</sup> Ramesh Himmatlal v. Harsukh Jadhavji, (1975) 2 SCC 105: AIR 1975 SC 1470.

<sup>16</sup> Ibid, at p. 114 (SCC): at p. 1477 (AIR). For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 889-960.

<sup>17</sup> Proviso to S. 60(1); see also, S. 61; see further supra, State of Punjab v. Dina Nath; Calcutta Dock Labour Board v. Sandhya Mitra, (1985) 2 SCC 1 at p. 4: AIR 1985 SC 996 at pp. 997-98; Union of India v. Jyoti Chit Fund and Finance, (1976) 3 SCC 607: AIR 1976 SC 1163; see also, Law Commission of India, 54th Report at p. 4.

Municipal Corpn. of Rangoon v. Ram Behari, AIR 1939 Rang 432; Ram Singh v. Bherulal, AIR 1982 MP 95. Radhey Shyam v. Punjab National Bank, (2009) 1 SCC 376. For detailed discussion and case law, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 889-960.

<sup>19</sup> Rajindar Kumar v. Chetan Lal, AIR 1940 Lah 65; Uzir Biswas v. Haradeb Das, AIR 1920 Cal 424; Bala Prasad v. Ajodhya Prasad, AIR 1952 Pat 278; Mahadeo Agrahri v. Dhaunkal Mal, AIR 1946 All 432; K. Santha Kumari v. K. Suseela Devi, AIR 1969 AP 355; Ganpatrao Nagoba v. A.V. Zinzarde, AIR 1948 Nag 392; Chedalavada Venkayya v. Payadi Tatayya, AIR 1945 Mad 276.

<sup>20</sup> Union of India v. Jyoti Chit Fund and Finance, (1976) 3 SCC 607: AIR 1976 SC 1163; M. and S.M. Railway v. Rupchand Jitaji, AIR 1950 Bom 155; Ram Naresh v. Ganesh Mistri, AIR 1952 All 680; Dupagunta Subramaniam v. Gouinda Petar Satyanadham, AIR 1942 Mad 391;

By the Amendment Act of 1976, new sub-section (1-A) has been inserted on the recommendation of the Law Commission.<sup>21</sup> This new sub-section now specifically provides that any agreement to waive the benefit of any exemption under Section 60 shall be void. Section 61 empowers the State Government to exempt agricultural produce from attachment or sale. This provision is intended to enable an agriculturist to continue agricultural operations even after execution of a decree.<sup>22</sup>

6. MODES OF ATTACHMENT: SECTION 62, ORDER 21 RULES 43-54

Rules 43 to 54 of Order 21 lay down the procedure for attachment of different types of movable and immovable properties. These provisions may be explained by the following chart:

Indersy v. Parasuram, 1961 RLW 261; Gowranna v. Basavana Gowd, AIR 1975 Kant 84; Prem Nath v. Nand Lal, AIR 1982 All 489; Duggirala Balarama v. Arokapudi Jagannadha, AIR 1983 AP 136.

- 21 Law Commission's Fifty-fourth Report at p. 50.
- 22 Azmat Ali v. Raj Ditta, 1969 All LJ 1045; Vasu v. Narayanan, AIR 1962 Ker 261; Narsingh v. Kamandas, AIR 1980 MP 37 (FB).
- 23 Rr. 42, 43; see also Teeka v. State of U.P., AIR 1961 SC 803: (1962) 1 SCR 75.
- 24 R.43-A.
- 25 R. 46(1)(c).
- 26 R. 51.

	<i>Type of Property</i>	<i>Mode of Attachment</i>
1	Movable property (other than agricultural produce) in possession of the judgment- debtor;	—By actual seizure thereof. But if such property is perishable, or the expense of keeping it is likely to exceed its value, it may be sold. <sup>23</sup>
2	Movable property consisting of livestock, agricultural implements or other articles which cannot conveniently be attached;	—By leaving the same in the custody of a respectable person as the "custodian". <sup>24</sup>
3	Movable property not in possession of the judgment- debtor;	—By an order prohibiting the person in possession thereof from giving it to the judgment-debtor <sup>25</sup>
4	Negotiable instrument neither deposited in a court nor in the custody of a public officer;	—By actual seizure and bringing it into court. <sup>26</sup>

27 R. 46(l)(a).  
28 R. 46(l)(b).  
29 R. 47.  
30 Rr. 47 and 48-A.  
31 R. 49.  
32 R. 52; see also Kanha-

	<i>Type of Property</i>	<i>Mode of Attachment</i>
5	Debt not secured by a negotiable instrument;	—By an order prohibiting the creditor from recovering the debt and the debtor from paying the debt. <sup>27</sup>
6	Share in the capital of a corporation;	—By an order prohibiting the person in whose name the share stands from transferring it or receiving dividend thereon. <sup>28</sup>
7	Share or interest in movable property belonging to the judgment-debtor and another as co-owners;	—By a notice to the judgment-debtor prohibiting him from transferring or charging it. <sup>29</sup>
8	Salary or allowance of a public servant or a private employee;	—By an order that the amount shall (subject to the provisions of Section 60), be withheld from such salary or allowances either in one payment or by monthly instalments. <sup>30</sup>
9	Partnership property;	—By making an order:  charging the interest of the partner in the partnership property; appointing a receiver of the share of the partner in profits; directing accounts and inquiries; and ordering sale of such interests. <sup>31</sup>
10	Property in custody of court or public officer;	—By notice to such court or officer, requesting that such property, and any interest or dividend thereon, may be held subject to the order of the court. <sup>32</sup>

33 R.53(l)(a).  
34 R.53(l)(b).  
35 R. 53(4).  
36 R. 44.  
37 R. 45.  
38 Mahabir Salt v. Emperor,  
39 R. 54; see also M. Marath  
Ramalingam Tibrewal, AIR 1

Gupta v. N.L. Anand, (1994) 1 SCC 131; Satyanarayana Bajoria v.

	Type of Property	Mode of Attachment
1 1.	(a) Decree for payment of money or sale in enforce-ment of a mortgage or charge—	
	(a) passed by the court ex-ecuting the decree;	—By an order of such court. <sup>33</sup>
	(b) passed by another court;	—By issuing a notice to such court re-questing it to stay execution thereof. <sup>34</sup>
	(ii) Decree other than that mentioned above;	—By issuing a notice (a) to the decree- holder prohibiting him from transfer-ring or charging it in any way; (b) to the executing court from executing it until such notice is cancelled. <sup>35</sup>
1 2.	Agricultural produce;	—By (i) affixing a copy of the warrant (a) in case of growing crop, on land on which such crop has grown; and (b) in case of ready crop, the place at which it is lying; and (ii) also by affixing a copy on the house in which the judgment- debtor ordinarily resides, carries on business or personally works for gain, or last resided, carried on business or personally worked for gain. <sup>36</sup>
		—Where application is for the attach-ment of growing crop, it shall specify the time at which is likely to be har-vested. <sup>37</sup> (The object is to enable the court to make necessary arrangements for the custody of the crop.) <sup>38</sup>
1 3.	Immovable property;	—By an order prohibiting the judg- ment-debtor from transferring or charging it in any manner and all persons from taking any benefit from such transfer or charge. <sup>39</sup>

No dwelling house may be entered after sunset and before sunrise. No outer door of it may be broken open, unless it is in the occupancy of the judgment-debtor and he refuses or prevents access thereto. Where a dwelling house is in actual occupation of a pardanashin woman, reasonable time and facility must be given to her to withdraw.<sup>40</sup> Section 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several courts.

7. PRECEPT: SECTION 46

(a) Meaning

"Precept" means "a command", "an order", "a writ" or "a warrant".<sup>41</sup>

(b) Nature and scope

A precept is an order or direction given by the 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 the 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.<sup>42</sup>

(c) Object

The principal object of attachment by precept is to enable the decree-holder to obtain an interim attachment of the property of the judgment-debtor situate within the jurisdiction of another court where it is apprehended that the decree-holder may otherwise be deprived of the fruits of the decree<sup>43</sup>

Thus, 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.

(d) Limitations

An order of precept is merely a step taken to facilitate execution, and not an order transferring a decree for execution.<sup>44</sup> It is for this reason that the effect of the attachment in pursuance of the precept is, as a

<sup>40</sup> S. 62.

<sup>41</sup> Concise Oxford English Dictionary (2002) at p. 1125.

<sup>42</sup> S. 46(1).

<sup>43</sup> Gurdial Singh v. Khazan Chand, AIR 1936 Lah 486; Kapoorchand v. Revati Prasad, AIR 1956 MB 208; Radheshyam v. Devendra, AIR 1952 Pat 213: ILR 1952 Mad 56 (FB); Karri Venkata Reddi v. Central Bank of India, AIR 1990 AP 81.

<sup>44</sup> Rai Kissenji v. Sri Kissen, AIR 1940 Cal 26; Champalal v. Mohanlal, AIR 1959 MP 397; Rampalli Ramachandrudu v. Bakraj Gulabchand, AIR 1952 Mad 826.

general rule, limited to two months unless the case is covered by the proviso.<sup>45</sup>

An order of permanent attachment is, therefore, illegal.<sup>46</sup> Moreover, this section applies to matters which arise after a decree has been passed. Hence, it cannot be invoked in aid of an application for attachment before judgment under Order 38 Rule 5.<sup>47</sup> Again, no attachment can be effected under this section where the property is situate outside India.<sup>48</sup>

#### 8. GARNISHEE ORDER: RULES 46-A TO 46-1

##### (a) General

Rules 46-A to 46-1 of Order 21, as inserted by the Code of Civil Procedure (Amendment) Act, 1976 lay down procedure in garnishee cases.

Garnishee proceeding is a 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). By this process, an executing court may order a third party to pay to the judgment-creditor (decree-holder) the debt from him to the judgment-debtor. The payment made by the garnishee pursuant to the order passed by the executing court is a valid discharge to him against his decree-holder.

##### (b) Meaning

"Garnishee" means a judgment-debtor's debtor. He is a person who is liable to pay a debt to a judgment-debtor or to deliver any movable property to him.

"Garnisher" (Garnishor) is a judgment-creditor (decree-holder) who initiates garnishee proceedings to reach judgment- debtors money or property held or possessed by third party (garnishee). "Garnishment" is a proceeding by which the decree-holder seeks to get the property of the judgment-debtor. "Garnishee proceeding" is a judicial proceeding in which a judgment-creditor (decree- holder) prays to executing court to direct third party who is a debtor of the judgment-debtor to pay the amount to the garnisher (decree-holder). "Garnishee order" is an order passed by a court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.<sup>49</sup>

<sup>45</sup> Proviso to S. 46(2). *Hindustan Bicycles v. Nath Bank*, AIR 1957 AP 209.

<sup>46</sup> *Gurdiyal Singh case*, supra.

<sup>47</sup> *Chimandas v. Mahadevappa Firm*, AIR 1961 AP 417.

<sup>48</sup> *Mela Mal v. Bishan Das*, AIR 1931 Lah 723.

<sup>49</sup> *Chamber's 21st Century Dictionary* (1997) at p. 550; *A Concise Dictionary of Law* (1983) at p. 158; *Halsbury's Laws of England* (4th Edn.) Vol. 17 at p. 325, para 525; *Corpus Juris Secundum*, Vol. 38, paras 1-2 at pp. 199-208; *Words and Phrases* (Permanent Edn.) at pp. 121-34.

## (c)      Illustration

Suppose A owes rupees 1000 to B and B owes rupees 1000 to C. By a garnishee order, the court may require A not to pay money owed by him to B, but instead to pay to C, since B owes the said amount to C, who has obtained the order.

## (d)      Object

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

## (e)      Doctrine explained

Rules 46-A to 46-I have been newly introduced in the Code by the Amendment Act of 1976. They lay down the procedure in garnishee cases. The Court may, in the case of a debt (other than a debt secured by a mortgage or charge) which has been attached under Rule 46, upon the application of the attaching creditor, issue a notice to the garnishee liable to pay such debt, calling upon him either to pay into court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

The order contemplated by Rule 46-A is discretionary and the court may refuse to pass such order if it is inequitable. The discretion, however, must be exercised judicially. Where the court finds that there is a bona fide dispute against the claim and the dispute is not false or frivolous, it should not take action under this rule.<sup>50</sup>

If money is payable to the judgment-debtor on certain contingencies, the garnishee cannot be asked to make payment unless those contingencies have taken place.

Similarly, garnishee proceedings cannot be taken in respect of a debt which cannot be attached under the Code.<sup>51</sup> Where the garnishee disputes his liability, the court must raise an issue, and determine the liability of the garnishee.<sup>52</sup>

## (f)      Notice

Rule 46-A requires a notice to be issued to a garnishee before a garnishee order is passed against him. If such notice is not issued and opportunity of hearing is not afforded before passing an order, the order would be null and void. In the eye of the law, there is no existence of

<sup>50</sup>      Mackinnon Mackenzie & Co. (P) Ltd. v. Anil Kumar Sen, AIR 1975 Cal 150.

<sup>51</sup>      Kazim Jawaz Jung v. Mir Mohd. Ali, AIR 1972 AP 70.

<sup>52</sup>      R. 46-C; Mackinnon Mackenzie & Co. (P) Ltd. v. Anil Kumar Sen, supra; see also, Mulla, Civil Procedure Code (1996) Vol. II at p. 1749.



such an order and any step taken pursuant to or in enforcement of such an order would also be void.<sup>53</sup>

(g) Effect of payment

The payment made by the garnishee into the court pursuant to such notice shall be treated as a valid discharge to him as against the judgment-debtor. The Court may direct that such amount may be paid to the decree-holder towards the satisfaction of the decree and costs of the execution.<sup>54</sup>

(h) Failure to pay

Where neither the garnishee makes the payment into the court, as ordered, nor appears and shows any cause in answer to the notice, the court may order the garnishee to comply with such notice as if such order were a decree against him.<sup>55</sup>

(i) Costs

The costs of garnishee proceedings are at the discretion of the court.<sup>56</sup>

(j) Appeal

Orders passed in garnishee proceedings are appealable as "decrees".<sup>57</sup>

(k) Wrongful garnishment

A wrongful garnishment may give rise to an action for damages.<sup>58</sup>

9. DETERMINATION OF ATTACHMENT: RULES 55-58

An attachment under the Code will be determined in the following circumstances:

(i) Where the decretal amount is paid or the decree is otherwise satisfied;<sup>59</sup>

(ii) Where the decree is reversed, or is set aside;<sup>60</sup>

(iii) Where the court upholds objection against the attachment and makes an order releasing the property;<sup>61</sup>

<sup>53</sup> Surinder Nath v. Union of India, 1988 Supp SCC 626 at pp. 634-35: AIR 1988 SC 1777 at p. 1781; For detailed discussion of natural justice see, Author's, Lectures on Administrative Law (2008) Lecture VI.

<sup>54</sup> Rr. 46-E, 46-F, 46-G.

<sup>55</sup> Rr. 46-B, 46-H; see also State Bank of Bikaner and Jaipur v. District & Sessions Judge, AIR 2005 Raj 246.

<sup>56</sup> R. 46-G.

<sup>57</sup> R. 46-H.

<sup>58</sup> Halsbury's Laws of England (4th Edn.) Vol. 17, para 537 at pp. 335-36.

<sup>59</sup> R. 55 (a), (b).

<sup>60</sup> R. 55(c).

<sup>61</sup> R. 58(3).

(iv) Where after the attachment the application for execution is dismissed;62

(v) Where the attaching creditor withdraws attachment;63

(vi) Where the decree-holder fails to do what he is bound to do under the decree;64

(vii) Where the attachment is ordered before judgment and the defendant furnishes the necessary security;65

(viii) Where there is agreement or compromise between the parties;66

(ix) Where the attaching creditor abandons the attachment.67

10. PRIVATE ALIENATION OF PROPERTY AFTER ATTACHMENT:

#### SECTION 64

(a) Nature and scope

Section 64 (1) enacts that a private alienation of property after attachment is void as against claims enforceable under the attachment.68 The alienation, however, is not absolutely void against all the world, but is void against the claims enforceable under the attachment.

Sub-section (2) of Section 64, as inserted by the Code of Civil Procedure (Amendment) Act, 2002 clarifies that the section will not apply to a transfer of property in pursuance of a contract entered into and registered before the attachment.69

(b) Object

The primary object of this provision is to prevent fraud on decree- holders and to keep intact the rights of attaching creditors and of those creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor.70 It is, therefore, immaterial

62 R. 57; see also *Nancy John v. Prabhati Lal*, (1987) 4 SCC 78: AIR 1987 SC 2061.

63 *Behari Lal v. Saral Kumar*, AIR 1965 Cal 163; *Pritam Chand v. Rulda Maingal*, AIR 1960 Punj 4; *Chamiyappa Tharagan v. M.S. Rama Iyer*, AIR 1921 Mad 30.

64 *Baba Punjaji Gujar v. Kisan Narayan Wani*, AIR 1938 Bom 18; *Datar Singh v. Khan Chand*, AIR 1934 Lah 697; *Mohd. Gaffar Baig v. Mohd. Abdul Khaleel*, AIR 1957 AP 991.

65 Or. 38 R. 9.

66 *Behari Lal v. Saral Kumar*, AIR 1965 Cal 163; *Parma Nand v. Tharu Lal*, AIR 1937 Lah 169.

67 *Ramkrishna Dass v. Surfunnissa Begum*, ILR (1880) 6 Cal 129 (PC); *Peetiyakkal Vatakka Purayil v. Marakkarakath Ahammad*, AIR 1915 Mad 61: 25 IC 906.

68 *Marathachalam Pillai v. Padmavathi Ammal*, (1971) 3 SCC 878; *Balkrishan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534; *Om Prakash v. Ganga Sahai*, (1987) 3 SCC 553: AIR 1988 SC 108; *Nancy John v. Prabhati Lal*, *supra*.

69 S. 64(2); see also, C.K. Thakker, *Code of Civil Procedure (Lawyers' Edn.)* Vol. I at pp. 972-89.

70 *Official Receiver v. Chandra Shekhar*, AIR 1977 All 77 at pp. 78-79; *Nana Rao v. Arunachalam*, AIR 1940 Mad 385 (FB); *Kali Kumar v. Kali Prasanna*, AIR 1917 Cal 561.

for the application of Section 64 whether the decree had or had not been passed before the time when the transfer was effected or whether the transferee acted in good faith or not.<sup>71</sup> But if the sale deed was executed prior to attachment before judgment, it can be registered subsequently and will prevail over attachment.<sup>72</sup>

(c) Interpretation

The provision interferes with the rights of the owner in alienating his property and, hence, it should be construed strictly.<sup>73</sup> Again, as the provision is for the benefit of attaching creditor, he can waive the benefit.<sup>74</sup>

(d) Private transfer: Meaning

A "private transfer" means a voluntary transfer such as sale, mortgage, lease, gift, etc. and not a transfer by operation of law such as sale under a decree passed by a competent court.<sup>75</sup> Finally a private transfer in contravention of Section 64 is not wholly void against all the world but is void only against claims enforceable under the attachment and only to the extent necessary to meet those claims.<sup>76</sup>

<sup>71</sup> Ibid, see also Supreme General Films Exchange Ltd. v. Brijnath Singhji, (1975) 2 SCC 530: AIR 1975 SC 1810; Shivlingappa Bin v. Chanbasappa Bin, ILR (1906) 30 Bom 337.

<sup>72</sup> Hamda Ammal v. Avadiappa Pathar, (1991) 1 SCC 715; Vannarakkal Kallalathil v. Chandramaath Balakrishnan, (1990) 3 SCC 291.

<sup>73</sup> Manuswami v. Pandurang, AIR 1978 AP 47; Supreme General Films Exchange Ltd. v. Brijnath Singhji, (1975) 2 SCC 530: AIR 1975 SC 1810.

<sup>74</sup> Radha Mohan v. Wahidan, AIR 1934 Pat 685; Subbayya v. Kandi Subba Reddi, AIR 1927 Mad 648.

<sup>75</sup> Supreme General Films Exchange Ltd. v. Brijnath Singhji, supra.

<sup>76</sup> Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534; Nancy John v. Prabhati Lal, supra; Rushi Mahakur v. Dibya Shankar, AIR 1988 Ori 145.

# PART IV

## 8 Questions to be determined by Executing Court

### SYNOPSIS

#### 1. GENERAL

SECTION 47 is one of the most important provisions in the Code relating to execution. It applies only to matters arising subsequent to the passing of a decree; and deals with objections to execution, discharge and satisfaction of a decree. It lays down the principle that matters relating to the execution, discharge or satisfaction of a decree arising between the parties, or their representatives, should be determined in execution proceedings and not by a separate suit.

#### 2. SECTION 47

Section 47 of the Code reads as under:

"(1) 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, shall be determined by the court executing the decree and not by a separate suit.

(2) \* \* \*

1 S. 47; see also Merla Ramanna v. Nallaparaju, AIR 1956 SC 87 at p. 91: (1955) 2 SCR 938; M.P. Shreevastava v. Veena, AIR 1967 SC 1193 at p. 1195: (1967) 1 SCR 147; Nandarani Mazumdar v. N.L. Anand, (1994) 1 SCC 131:1993 AIR SCW 3458.

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(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—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) 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."

### 3. OBJECT

The underlying object of this provision is to provide cheap and expeditious remedy for determination of certain questions in execution proceedings without recourse to a separate suit and to prevent needless and unnecessary litigation.<sup>2</sup> Section 47, therefore, must be construed liberally.<sup>3</sup>

Like Section 11, Section 47 has been enacted with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expenses or delay which a fresh trial might entail.<sup>4</sup> The rule of res judicata deals with the finality of a decision of a court on matters actually or constructively in issue before it and bars a fresh trial of any kind of such questions in subsequent proceedings between the parties; while Section 47 deals with the enforcement of such decisions and enacts that the questions specified in the section shall be tried in execution and not by a separate suit. In other words, where there is an executable decree, no suit lies for the enforcement thereof, or for the determination of the questions specified in Section 47.<sup>5</sup>

<sup>2</sup> Prosunno Commar v. Kasi Das, (1895) 19 Cal 683 at p. 689 (PC); (1891-92) 19 IA 166; Amir Chand v. Bakshi, (1916) 30 MLJ 238 (PC); Chowdhry Wahid Ali v. Jumaee, (1873) 11 Beng LR149 at p. 155 (PC); 18 Suth WR185; Ramchandra Spg. & Wvg. Mills v. Bijli Cotton Mills Ltd., AIR 1967 SC 1344; (1967) 2 SCR 301; Harnandrai v. Debidutt, (1973) 2 SCC 467; AIR 1973 SC 2423; Gangabai Gopaldas Mohata v. Fulchand, (1997) 10 SCC 387; AIR 1997 SC 1812.

<sup>3</sup> Harnandrai v. Debidutt, (1973) 2 SCC 467; AIR 1973 SC 2423; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131; Ramchandra Spg. & Wvg. Mills v. Bijli Cotton Mills Ltd., AIR 1967 SC 1344; (1967) 2 SCR 301.

<sup>4</sup> Prosunno Commar v. Kasi Das (ibid); Kayem Biswas v. Bahadur Khan, AIR 1925 Cal 1258.

<sup>5</sup> Sasi Sekhareshwar v. Lalit Mohan, AIR 1925 PC 34; Bommadevara Naganna v. Ravi Venkatappayya, (1922-23) 50 IA 301; AIR 1923 PC 167; Abdul Hamid v. Dhani Dusadh, AIR 1938 Pat 41; M.P. Shreevastava v. Veena, AIR 1967 SC 1193; (1967) 1 SCR 147.

4. NATURE AND SCOPE The scope of Section 47 is very wide. 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.<sup>6</sup> 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.<sup>7</sup> It does not matter whether such questions arise before or after the decree has been executed.<sup>8</sup> The provision is not ultra vires Article 14 of the Constitution.<sup>9</sup>

5. CONDITIONS

In order that this section may apply, the following conditions must be satisfied<sup>10</sup>:

(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.

Both the above conditions must be satisfied cumulatively.<sup>11</sup>

<sup>6</sup> Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 SC 376:1955 SCR 1369; M. P. Shreevastava v. Veena, AIR 1967 SC 1193: (1967) 1 SCR 147; Deshpande v. Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131.

<sup>7</sup> Prosunno Commar v. Kasi Das, supra; Ganapathy Mudaliar v. Krishnamachariar, (1917-18) 45 IA 54: AIR 1917 PC 121; Harnandrai v. Debidutt, (1973) 2 SCC 467: AIR 1973 SC 2423.

<sup>8</sup> Merla Ramanna v. Nallaparaju, supra; Imdad Ali v. Jagan Lal, ILR (1895) 17 All 478; Gopal Rai v. Rambhanjan Rai, AIR 1922 Pat 166; Sansar Chand v. Sham Lal, AIR 1957 Punj 307.

<sup>9</sup> Ganga Bai v. Vijay Kumar, (1974) 2 SCC 393: AIR 1974 SC 1126; Rami Manprasad v. Gopichand, (1973) 4 SCC 89: AIR 1973 SC 566; Anant Mills Co. Ltd. v. State of Gujarat, (1975) 2 SCC 175: AIR 1975 SC 1234; Vijay Prakash v. Collector of Customs, (1988) 4 SCC 402: AIR 1988 SC 2010; Masomat Narmada Devi v. Ram Nandan Singh, AIR 1987 Pat 33 (FB).

<sup>10</sup> Merla Ramanna v. Nallaparaju, AIR 1956 SC 87: (1955) 2 SCR 938; Arokiasamy v. Martial Margaret, AIR 1982 Mad 93; Hamidgani Annual v. Ammasahib Ammal, AIR 1941 Mad 898: (1941) 2 Mad LJ 622 (FB).

<sup>11</sup> Arokiasamy v. Martial Margaret, AIR 1982 Mad 93; Merla Ramanna v. Nallaparaju, supra.

(1) Parties or their representatives

The first condition for the applicability of Section 47 is that the question to be determined by the court must be one arising between the parties to the suit or their representatives.

The expression "parties to the suit" does not mean de facto parties on record, or parties on opposite sides as plaintiff and defendant, but means parties opposing each other.<sup>12</sup> Thus, in a partition suit, parties who are co-defendants are often arrayed against each other; and therefore, a question between them relating to execution falls within Section 47.<sup>13</sup> On the other hand, questions arising between the parties who are not opposed to each other or between a party and a stranger do not fall within this provision.<sup>14</sup> A purchaser of a property at a sale in execution of a decree, though a stranger to a suit, is deemed to be a party to the suit in which the decree has been passed.<sup>15</sup> Whether a person is or is not a party to the suit should be decided not on the basis whether he is a party to the decree but whether he is a party to the suit in which the decree is passed.<sup>16</sup>

The term "representative" in Section 47 includes not only "legal representatives" in the sense of heirs, executors or administrators as defined in Section 50 of the Code, but also a "representative-in-interest", i.e. any transferee of interest of the decree-holder or the judgment-debtor who is bound by the decree.<sup>17</sup> Whether a person is a "representative" or not can be decided by applying two tests: (1) Whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by an act of the parties or by operation of law, vested in the person who is sought

<sup>12</sup> Shriram Nathuji v. Coop. Society Chandur No. 55, AIR 1949 Nag 398; Bathai Bagyalakshmi Ammal v. Thoppai Bappu Aiyar, AIR 1946 Mad 90; Sundar Das v. Bishan Das, AIR 1936 Lah 116; Amiran v. Kaniz Aisha, AIR 1934 Pat 627; Mohd. Akhtar Ali v. Badrudin, AIR 1973 Pat 187; Gopi Narain Khanna v. Babu Bansidhar, (1904-05) 32 IA 123 (PC).

<sup>13</sup> Ibid, see also Syed Saeed Ahmed v. Syed Raza Hussain, AIR 1933 All 57; Gopi Narain Khanna v. Babu Bansidhar, (1904-05) 32 IA 123 (PC); Kalipada Mukerji v. Basanta Kumar, AIR 1932 Cal 126.

<sup>14</sup> Bhai Ishar Das v. Govindi, AIR 1975 Raj 45; Krishna Pillai v. Lekshmi Amma, AIR 1966 Ker 18; Lakhan Sahu v. Surji Telin, AIR 1962 Pat 341; Jasraj Multan Chand v. Kamruddin, AIR 1971 MP 184; Dada v. Yesu, AIR 1923 Bom 450.

<sup>15</sup> Expln. II(a); see also Ameena Bi v. Kuppuswami Naidu, (1993) 2 SCC 405: AIR 1993 SC 1628.

<sup>16</sup> Sistla Saraswatamma v. Paruvada Maki Naidu, AIR 1940 Mad 881; Samhut Rai v. Sambaran Rai, AIR 1944 Pat 105.

<sup>17</sup> Ishan Chunder v. Beni Madhub, (1897) 24 Cal 62; Ajodhya Roy v. Hardwar Roy, (1909) 1 IC 213 (Cal); Kailash Chandra v. Gopal Chandra, AIR 1926 Cal 798 at p. 808 (FB); Gulzari Lal v. Madho Ram, (1904) 26 All 447 (FB); Jagdish Lal v. M.E. Periera, AIR 1977 Del 12 at pp. 17-18; Gauri Dutt v. D.K. Dowering, AIR 1934 Pat 413; Thondam Annamalai v. Tiruttani Ramaswami, AIR 1941 Mad 161; Gangabai Gopaldas Mohata v. Fulchand, (1997) 10 SCC 387: AIR 1997 SC 1812.

to be treated as a representative; and (2) If there has been devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree.<sup>18</sup> Where during the execution proceedings a question arises as to whether any person is or is not the representative of a party, such question must be determined by the executing court itself.<sup>19</sup>

(2) Execution, discharge or satisfaction of decree

The second condition for the applicability of this section is that the question must relate to the execution, discharge or satisfaction of the decree.

Though the expression "questions relating to the execution, discharge or satisfaction of the decree" has not been defined in the Code, it covers question of executability or non-executability of a decree.<sup>20</sup>

The following questions are held to be questions relating to the execution, discharge or satisfaction of decrees: (i) whether a decree is executable;<sup>21</sup> (ii) whether the property is liable to be sold in execution of the decree;<sup>22</sup> (iii) whether the decree is fully satisfied;<sup>23</sup> (iv) whether the execution of the decree was postponed;<sup>24</sup> (v) whether an application to set aside sale is maintainable;<sup>25</sup> (vi) whether the sale in execution is warranted by the terms of the decree;<sup>26</sup> (vii) whether a particular property is or is not included in the decree;<sup>27</sup> (viii) whether a party is or is not entitled to restitution of property;<sup>28</sup> (ix) whether a person is or is not a "representative" of a party;<sup>29</sup> (x) whether the decree-holder is in a position to carry out his part of the decree;<sup>30</sup> (xi) whether the decree-holder is entitled to mould relief in accordance with the change

<sup>18</sup> Ajodhya Roy v. Hardwar Roy, (1909) 1 IC 213 (Cal): 9 Cal LJ 485; Jagdish Lal v. M.E. Periera, AIR 1977 Del 12.

<sup>19</sup> Sub-s. (3) of S. 47.

<sup>20</sup> Union of India v. S.B. Singh, AIR 1988 All 225; see also supra, Chap. 2.

<sup>21</sup> Jai Narain v. Kedar Nath, AIR 1956 SC 359:1956 SCR 62; Topanmal v. Kundomal, AIR 1960 SC 388.

<sup>22</sup> Merla Ramanna v. Nallaparaju, supra; Pannalal v. Naraini, AIR 1952 SC 170:1952 SCR 544.

<sup>23</sup> Jai Narain v. Kedar Nath, supra; B.V. Patankar v. C.G. Sastry, AIR 1961 SC 272: (1961) 1 SCR 591.

<sup>24</sup> Moti Lal Banker v. Maharaj Kumar Mahmood Hasan Khan, AIR 1968 SC 1087: (1968) 3 SCR 158.

<sup>25</sup> Merla Ramanna v. Nallapraju, supra.

<sup>26</sup> Ibid, see also Pannalal v. Naraini, supra.

<sup>27</sup> Ibid, see also infra, Chaps. 8 and 9.

<sup>28</sup> B.V. Patankar v. C.G. Sastry, AIR 1961 SC 272: (1961) 1 SCR 591; Mahijibhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477: (1965) 2 SCR 436;

Ashalata Debi v. Jadu Nath Roy, AIR 1954 SC 409: (1955) 1 SCR 150.

<sup>29</sup> See supra, "Parties or their representatives".

<sup>30</sup> Jai Narain v. Kedar Nath, supra.



of circumstances;<sup>31</sup> (xii) whether the decree has been adjusted outside the court;<sup>32</sup> (xiii) whether the decree has been validly assigned;<sup>33</sup> (xiv) whether the auction-purchaser is entitled to recover possession;<sup>34</sup> (xv) the question regarding identity of property;<sup>35</sup> (xvi) the question regarding attachment, sale or delivery of property;<sup>36</sup> etc.

Before the Amendment Act of 1976, there was a difference of opinion amongst different High Courts as to whether the question of delivery of possession of the property to be given to an auction-purchaser fell under Section 47. Of course, in the case of *Harnandrai v. Debidutt*<sup>37</sup>, the Supreme Court had taken the view that such question relates to the execution, discharge or satisfaction of the decree. At the recommendation of the Law Commission<sup>38</sup>, clause (b) to Explanation II has now been inserted, which in express terms provides that all questions relating to delivery of possession of the property to a purchaser at the sale in execution of a decree shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree.

The following questions, on the other hand, are not questions relating to the execution, discharge or satisfaction of decrees: (i) whether the decree is fraudulent or collusive;<sup>39</sup> (ii) whether the decree has become inexecutable by a compromise subsequent to the passing of the decree in the previous suit;<sup>40</sup> (iii) a question relating to the territorial or pecuniary jurisdiction of the court which passed the decree;<sup>41</sup> (iv) a question relating to correctness or validity of the decree, except where the decree is a nullity;<sup>42</sup> (v) an order of restoration of execution of application dismissed without going into its merits;<sup>43</sup> (vi) an order reopening or refusing to reopen a decree;<sup>44</sup> (vii) an order granting or refusing to grant instalments;<sup>45</sup> (viii) a claim by an auction-purchaser for

- <sup>31</sup> Haji Sk. Subhan v. Madhorao, AIR 1962 SC 1230:1962 Supp (1) SCR 123.  
<sup>32</sup> M.P. Shreevastava v. Veena, AIR 1967 SC 1193: (1967) 1 SCR 147.  
<sup>33</sup> Chandrika Misir v. Bhaiya Lal, (1973) 2 SCC 474: AIR 1973 SC 2391.  
<sup>34</sup> Harnandrai v. Debidutt, *infra*.  
<sup>35</sup> Jai Narain v. Kedar Nath, *supra*; K.L. Selected Coal Concern v. S.K. Khanson, (1971) 3 SCC 965: AIR 1971 SC 437.  
<sup>36</sup> Pannalal v. Naraini, *supra*; B.V. Patankar v. C.G. Sastry, *supra*; Balak Singh v. Ahmad Ullah Khan, (1969) 2 SCC 39: AIR 1969 SC 1270.  
<sup>37</sup> (1973) 2 SCC 467 at p. 471: AIR 1973 SC 2423 at p. 2446.  
<sup>38</sup> Law Commission's Twenty-seventh Report at p. 108.  
<sup>39</sup> Jalandhar Thakur v. Jharula Das, AIR 1914 PC 72: (1913-14) 41 IA 267; Hitendra Singh v. Maharajadhiraj Sir Rameswar Singh, AIR 1925 Pat 625; Dhaniram v. Luchmeswar Singh, ILR 23 Cal 639; Karamat Ali v. Sogra, AIR 1962 Pat 434.  
<sup>40</sup> Raj Lakshmi v. Banamali Sen, AIR 1953 SC 33:1953 SCR 154.  
<sup>41</sup> Hira Lal v. Kali Nath, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.  
<sup>42</sup> See *supra*, Chap. 2.  
<sup>43</sup> Keshardeo v. Radha Kissen, AIR 1953 SC 23:1953 SCR 136.  
<sup>44</sup> Promode Nath v. Raseshwari Dassi, AIR 1941 Cal 530.  
<sup>45</sup> State of Bombay v. L.D. Narayanpure, AIR 1960 Bom 334.

actual possession;<sup>46</sup> (ix) a pre-decree arrangement between the parties;<sup>47</sup> (x) an order appointing or refusing to appoint a Commissioner for effecting partition in a partition suit;<sup>48</sup> (xi) a question relating to the amount of mesne profits;<sup>49</sup> (xii) a question relating to maladministration by the executors of the deceased judgment-debtor;<sup>50</sup> (xiii) an order fixing or refusing to fix upset price of the property sought to be sold in execution;<sup>51</sup> (xiv) a question of return of movables not covered by the decree;<sup>52</sup> (xv) a question regarding compensation for wrongs committed by the officers of the court in execution of the decree;<sup>53</sup> (xvi) a question regarding contribution amongst judgment-debtors etc.<sup>54</sup>

#### 6. POWERS OF EXECUTING COURT

An executing court has plenary power to determine all questions relating to execution of a decree.<sup>55</sup> The section, however, applies only to matters arising subsequent to the passing of the decree. It covers all questions which arise before as well as after the decree has been executed.<sup>56</sup> For the said purpose, the court can treat a suit as an execution application or an execution application as a suit in the interests of justice. When such power is exercised, normally the relevant date would be the date on which the original proceeding was instituted and not the date of conversion.<sup>57</sup> An executing court can mould relief in the light of changed circumstances.<sup>58</sup>

#### 7. DUTIES OF EXECUTING COURT

An executing court cannot go behind the decree. It has to execute the decree as it is. It cannot question correctness or otherwise of the decree.<sup>59</sup> But where the terms of the decree are vague or ambiguous, it is

<sup>46</sup> Harnandrai v. Debidutt, *supra*.

<sup>47</sup> K. Radhakrishna v. N. Rajagopal Pillai & Co., AIR 1972 Mad 107.

<sup>48</sup> Srinivasa Mudali v. Ramasamy Mudali, AIR 1916 Mad 809.

<sup>49</sup> Sinnapappal v. Subbana Goundan, AIR 1958 Mad 414.

<sup>50</sup> M.P. Shreevaslava v. Veena, AIR 1967 SC 1193: (1967) 1 SCR 147.

<sup>51</sup> Edara Pattabhi Srirama v. Thadikammal Veerabhadra, AIR 1973 AP 24.

<sup>52</sup> Niyaz Bi v. Amdumiyar, AIR 1949 Nag 375.

<sup>53</sup> Panchoo Jolaha v. Mohd. Ismail, AIR 1949 All 263; Mana Devi v. Malki Ram, AIR 1961 All 84.

<sup>54</sup> Ram Saran v. Janki Pande, ILR (1896) 18 All 106; Gadicherla China v. Gadicherla Seetayya, (1898) 21 Mad 45; Haragobind Das v. Issuri Dasi, ILR (1888) 15 Cal 187.

<sup>55</sup> M.P. Shreevastava v. Veena, AIR 1967 SC 1193: (1967) 1 SCR 147.

<sup>56</sup> Merla Ramanna v. Nallaparaju, AIR 1956 SC 87 at p. 91: (1955) 2 SCR 938.

<sup>57</sup> Jugalkishore v. Raw Cotton Co. Ltd., AIR 1955 SC 376:1955 SCR 1369; Sukan Chand v. Prakash Chand, (1969) 1 SCWR 837; Shri Jagadguru Gurushiddaswami G.G. Murusavirmath v. D.M.D. Jain Sabha, AIR 1953 SC 514:1954 SCR 235.

<sup>58</sup> Ynshpal Singh v. ADJ, (1992) 2 SCC 504.

<sup>59</sup> C.F. Angadi v. Y.S. Hirannayya, (1972) 1 SCC 191: AIR 1972 SC 239; Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670: AIR 1970 SC 1475. For

the duty of the executing court to interpret the decree with a view to find out and ascertain the meaning of the terms used.<sup>60</sup> Again, where there is inherent lack of jurisdiction on the part of the court passing the decree, the executing court can refuse to execute the decree.<sup>61</sup>

8. OBJECTION TO VALIDITY OF DECREE

A court executing a decree cannot go behind the decree. But an objection as to its validity can be raised in execution proceedings if such objection appears on the face of the record. If the objection requires examination or investigation of facts, the executing court cannot entertain such objection.<sup>62</sup>

9. GENERAL PRINCIPLES<sup>63</sup>

10. BAR OF SUIT

Section 47 of the Code bars a suit in respect of any objection in relation to execution proceedings. The bar is, however, limited to questions relating to the execution, discharge or satisfaction of the decree and not to issues which are totally different. If the case is not covered or the objection does not fall within four corners of Section 47, the bar will not operate and a suit would lie. Whether a subsequent suit is barred under Section 47 of the Code depends upon the nature of the decree which is to be executed and the relief claimed in the suit.<sup>64</sup>

11. APPEAL

Before the Amendment Act of 1976, the determination of a question under Section 47 was deemed to be a decree within the meaning of Section 2(2) of the Code<sup>65</sup> and was, therefore, subject to first appeal under Section 96 and also a second appeal under Section 100. Sub-section (2)

detailed discussion, see *supra*, Chap. 2.

<sup>60</sup> *V. Ramaswami v. Kailasa Thevar*, AIR 1951 SC 189: 1951 SCR 292; *Bhavan Vaja v. Solanki Hanuji Khodaji*, (1973) 2 SCC 40: AIR 1972 SC 1371. For detailed discussion, see *supra*, Chap. 2.

<sup>61</sup> *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; *SBI v. Indexport Registered*, (1992) 3 SCC 159: AIR 1992 SC 1740. For detailed discussion, see *supra*, Chap. 2.

<sup>62</sup> *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman*, (1970) 1 SCC 670: AIR 1970 SC 1475; *Sushil Kumar v. Gobind Ram*, (1990) 1 SCC 193; *Sabitri Devi v. Sarat Chandra Rout*, (1996) 3 SCC 301; *Urban Improvement Trust v. Gokid Narnin*, (1996) 4 SCC 178: AIR 1996 SC 1819; For detailed discussion and case law, see, C.K. Thakker, *Code of Civil Procedure (Lawyers' Edn.)* Vol. I at pp. 769-74.

<sup>63</sup> For detailed discussion, see *supra*, Chap. 2.

<sup>64</sup> *Jai Narain v. Kedar Nath*, AIR 1956 SC 359: 1956 SCR 62; *Jamaluddin v. Asimullah*, AIR 1974 All 69; *Kuttan Sudhakaran v. Padmavathi Amma*, AIR 1987 Ker 94; *Balak Singh v. Ahmad Ullah Khan*, (1969) 2 SCC 39: AIR 1969 SC 1270.

<sup>65</sup> *Shakuntala Devi v. Kuntal Kumari*, AIR 1969 SC 575 at p. 577: (1969) 1 SCR 1006. See also *supra*, Pt. I, Chap. 2.

of Section 47 as it stood before the Amendment Act of 1976 empowered the court to treat an application under Section 47 as a suit, or a suit as an application. The deletion of the word and figure "Section 47" from the definition of decree in Section 2(2) has now radically changed the position. The determination of any question under Section 47 is no longer deemed to be a decree within the meaning of Section 2(2) and is, therefore, not appealable under Section 96 or Section 100 of the Code. Sub-section (2) of Section 47 has, consequently, been omitted by the Amendment Act of 1976.<sup>66</sup> There is, however, difference of opinion as to whether even after the Amendment Act of 1976, a determination of a question under Section 47 would still be a decree or not. On the one hand, the High Court of Patna<sup>67</sup> has taken the view that by the Amendment Act of 1976, only the statutory fiction "a determination of a question under Section 47 shall be deemed to be a decree" has been omitted, still, however, if an order passed by a court satisfies the essential ingredients of Section 2(2), it would amount to a decree. By the amendment the statutory fiction disappears. It cannot now be said that the determination of any question under Section 47 is a decree. "Nevertheless, if an order passed by a court satisfies the essential characteristics of a decree, as now defined, the mere fact that the order was passed in exercise of powers under Section 47 of the Code would not be of consequence."<sup>68</sup> (emphasis supplied) A similar view was taken by the High Court of M.P.<sup>69</sup> On the other hand, the High Courts of Allahabad<sup>70</sup>, Andhra Pradesh<sup>71</sup>, Bombay<sup>72</sup>,

- <sup>66</sup> Sub-s. (2) of S. 47 prior to the Amendment Act of 1976 read as under:  
"The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under the section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees."
- <sup>67</sup> Parshava Properties Ltd. v. A.K. Bose, AIR 1979 Pat 308, [overruled in Masomat Narmada Devi v. Ram Nandan Singh, AIR 1987 Pat 33:1986 Pat LR 1067:1986 BLJR 799 (FB).]
- <sup>68</sup> Ibid, at p. 310 per Sarwar Ali, A.C.J.; see also Rai Mathura Prasad v. Bihar Hindu Religious Trust Board, AIR 1984 Pat 227.
- <sup>69</sup> Chuluram v. Bhagatram, AIR 1980 MP 16; Sitaram v. Chaturu, 1981 Jab LJ 171, [overruled in Babulal v. Ramesh Babu, AIR 1990 MP 317 (FB)].
- <sup>70</sup> Pratap Narain v. Ram Narain, AIR 1980 All 42 (FB).
- <sup>71</sup> Marriddi Janikamma v. Hanumantha Vajjula, AIR 1980 AP 209; Challa Ramamurty v. Pasumarti Adinarayana Sons, AIR 1985 AP 42.
- <sup>72</sup> Rameshkumar v. Rameshwar, AIR 1983 Bom 378.

Gauhati<sup>73</sup>, Gujarat<sup>74</sup>, Kerala<sup>75</sup>, Madhya Pradesh<sup>76</sup>, Madras<sup>77</sup>, Orissa<sup>78</sup>, Patna<sup>79</sup>, Punjab<sup>80</sup> and Rajasthan<sup>81</sup> have taken the view that after the Amendment Act of 1976, an order passed under Section 47 would not amount to a "decree" under Section 2(2). It is submitted that the latter view appears to be correct for three reasons: firstly, as stated in the Statement of Objects and Reasons, the said provision was mainly responsible for delay in the execution of decrees, and the Joint Committee, therefore, recommended to omit the determination of a question under Section 47 from the definition of a decree in Section 2(2);<sup>82</sup> secondly, the omission of sub-section (2) of Section 47 is made in pursuance of the legislative policy that all questions between the parties to the suit in which the decree was passed and their representatives should be disposed of under Section 47 and not by a separate suit. The result is that a determination of any question within this section would no longer be regarded as a decree<sup>83</sup>, and thirdly, wherever any order is intended to be made appealable as a decree, a specific provision is made to that effect in the Code itself.<sup>84</sup> It follows, therefore, that the deletion of such a provision in the definition

<sup>73</sup> Tapan Chandra v. Dulal Chandra, AIR 1980 Gau 3.  
<sup>74</sup> Mohanlal v. Bai Maniben, (1979) 20 Guj LR 711; Hasumatiben v. Ambalal, AIR 1982 Guj 324; (1981) 1 Guj LH 337; (1982) 2 Guj LR 346; John Mithalal v. Dineshbhai, (1997) 2 Guj LH 506.  
<sup>75</sup> Mohd. Khan v. State Bank of Travancore, AIR 1978 Ker 201 (FB); Kuriakose v. P.K. Narayanan Nair, AIR 1981 Ker 18.  
<sup>76</sup> Babulal v. Ramesh Babu, AIR 1990 MP 317 (FB).  
<sup>77</sup> Visalakshi v. Muthiah Chettiar, (1983) 2 MLJ 447.  
<sup>78</sup> Sarabai Agarwalla v. Haradhan Mohapatra, AIR 1982 Ori 9; Dhusasan Nayak v. Dhadi Nayak, AIR 1983 Ori 127; Bhima Das v. Ganeswar Mahapatra, AIR 1984 Ori 229.  
<sup>79</sup> Masomat Narmada Devi v. Ram Nandan Singh, AIR 1987 Pat 33; 1986 Pat LR 1067; 1986 BLJR 799 (FB).  
<sup>80</sup> Ram Niwas v. Mithan Lal, AIR 1979 P&H 262; Jagat Ram v. Jagjit Singh, AIR 1984 P&H 281.  
<sup>81</sup> Mohan Das v. Kamla Devi, AIR 1978 Raj 127; Kashiram v. Hansraj, AIR 1983 Raj 145.  
<sup>82</sup> "The Committee note that according to the definition of the expression 'decree' given in the Code, the determination of any question under S. 47 amounts to a decree and, as such, an appeal and second appeal would lie against such determination. The Committee is of the view that this provision of the Code is mainly responsible for the delay in the execution of decrees. The Committee, therefore, felt that the definition of the term 'decree' should be amended so that the determination of the question under S. 47 may not amount to a decree." Report of the Joint Committee; see, Gazette of India, Extra., dt. 1-4-1976, Pt. II, S. 2 at pp. 804-05.  
<sup>83</sup> The omission of sub-s. (2) has been made in consequence of the change made in the definition of the word "decree" in S. 2(2), the result of which is that a determination of any question within this section would no longer be regarded as a decree. "It would be incongruous after that change to permit the court to convert an application into a suit and order payment of court fees and yet say that a determination therein is not a decree." Mulla, Civil Procedure Code (1995) Vol. 1 at p. 388.  
<sup>84</sup> Or. 21 Rr. 43-A(2)(c), 46-B, 46-C, 46-E, 46-H, 50(3), 58(4), 98, 100 (103).

of "decree" in sub-section (2) of Section 2 indicates the intention of the legislature not to make an order under Section 47 appealable as a decree. However, if a decree is passed prior to passing of the Amendment Act of 1976, a right can be said to have accrued in favour of a party to file an appeal against such a decree even after the Amendment Act of 1976 came into force.<sup>85</sup>

#### 12. REVISION

Since after the Amendment Act of 1976 an order under Section 47 does not amount to a decree, it is not appealable under Section 96 and Section 100. A revision application under Section 115 of the Code is, therefore, maintainable provided the conditions laid down in Section 115 are satisfied.<sup>86</sup> No writ petition, however, would be maintainable.<sup>87</sup>

#### 13. PENDING MATTERS

Section 97 of the Amendment Act of 1976 (Repeal and Savings) declares that the amendment made in Section 2(2) will not affect pending appeals and they will be dealt with as if the amendment had not come into force.<sup>88</sup>

<sup>85</sup> Pratap Narain v. Ram Narain, AIR 1980 All 42 (FB); Challa Ramamurty v. Pasumarti Adinarayana Sons, AIR 1985 AP 42; Rameshkumar v. Rameshwar, AIR 1983 Bom 378; Syndicate Bank v. Rallies India Ltd., AIR 1979 Del 40; Chuluram v. Bhagatram, AIR 1980 MP 16; Nanda Kishore v. Mahabir Prasad, AIR 1978 Ori 129; Bhima Das v. Ganeswar Mahapatra, AIR 1984 Ori 229; Mohan Das v. Kamla Devi, AIR 1978 Raj 127. For detailed discussion, see, C.K. Thakker, Code of Civil Procedure (Lawyers' Edn.) Vol. I at pp. 785-88.

<sup>86</sup> For detailed discussion of "Revisional jurisdiction", see *supra*, Pt. III, Chap. 9.

<sup>87</sup> Ghan Shyam Das v. Anant Kumar Sinha, (1991) 4 SCC 379: AIR 1991 SC 2251.

<sup>88</sup> Section 97(2)(a); see also Garikapati Veeraya v. N. Subbiah Chaudhry, AIR 1957 SC 540:1957 SCR 488.

# PART IV

## 9

### Adjudication of Claims

#### SYNOPSIS

1.	NATURE AND SCOPE			
(a)	Position prior to Amendment Act, 1976			
BEFORE the amendment in the Code in 1976, the executing court used to deal with investigation of claims and objections "summarily". The scope of such inquiry was very limited and confined to possession <sup>1</sup> and it was open to the aggrieved party to institute a suit. <sup>2</sup>				
(b)	Position after Amendment Act, 1976			
Pursuant to the recommendation of the Law Commission <sup>3</sup> amendments have been made in the Code expressly providing that all questions (including questions of title) are to be settled "finally" (and not summarily) in execution proceeding itself and not by a separate suit. <sup>4</sup> A provision has also been made that the court should not entertain an objection or claim if before the claim is preferred or objection is raised against attachment, the property is sold, or the court considers that the claim or objection had been raised to de-				
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11th Report, Vol. 1 at p. 198.

Where the court entertains a claim or objection it must investigate fully and not summarily and adjudicate upon all questions, including the questions of right, title and interest in the property under attachment.

The court shall, in accordance with such determination—(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 favour of any person; or (d) pass such order as in the circumstances of the case it deems fit.<sup>6</sup>

2.      SCHEME

Where any property is attached in execution of a decree, it is always open to the parties, their representatives or third parties to raise objection against such attachment.

If the objection is raised by a party or his representative, the question falls under Section 47 of the Code and should be decided by the executing court and not by a separate suit.

If, on the other hand, such objection is raised by a third party, two courses are open to him. Firstly, he may straightway file a suit claiming appropriate relief. Secondly, he may file an application under Order 21 Rule 58 of the Code to the executing court.

Where the executing court entertains a claim or objection, it will hold a full-fledged enquiry into the right, title and interest of the claimant or objector and record a finding either upholding the claim or objection or rejecting it. The remedy available to the aggrieved party is to prefer an appeal against the order and not to file a suit.

3.      OBJECT

Rules 58 to 63 of Order 21 deal with adjudication of claims to and objections to attachment of property. Where the property is attached in execution of a decree, there may be objections to such attachment either by a party or his representative or by a third party. Since all questions arising between the parties to the suit in which the decree under execution has been passed, or their representatives relating to the execution, discharge or satisfaction of the decree are to be determined by the court executing the decree and not by a separate suit<sup>7</sup>, the executing court has to investigate the claims and settle them "finally" in execution proceedings, to avoid protracted litigation.<sup>8</sup> Detailed provisions, therefore, have been made in the Code.

<sup>6</sup>      R. 58(3).

<sup>7</sup>      S. 47.

<sup>8</sup>      Statement of Objects and Reasons, Gazette of India, dt. 8-4-1974, Pt. II, S. 2, Extra., at p. 324.



4. SECTION 47 AND ORDER 21 RULE 58: DISTINCTION

Both Section 47 and Order 21 Rule 58 of the Code are similar in certain aspects. Both of them relate to execution proceedings. Both enact that all questions covered by them should be decided by executing court. Both the provisions expressly bar filing of a suit.

In spite of these similarities, there is essential distinction between the two. Whereas Section 47 applies to parties to the suit (or their representatives), Order 21 Rule 58 applies to third parties (or their representatives). Section 47 not only bars a suit but also bars an appeal. Order 21 Rule 58 bars a suit but not an appeal. On the contrary, sub-rule (4) of Rule 58 expressly states that the order passed by the executing court "shall have the same force and be subject to the same conditions as to appeal (or otherwise) as if it were a decree". Finally, bar of suit under Section 47 is absolute and unqualified, while bar under Order 21, Rule 58 is conditional and qualified.<sup>9</sup>

5. WHO MAY APPLY?

Any person who at the time of attachment of property has some right, title or interest in or possessed of the property attached, may lodge a claim or raise an objection against the attachment.<sup>10</sup>

6. WHERE APPLICATION LIES?

A claim petition may be filed in the court which has attached the property. Where a special statute confers exclusive jurisdiction on a particular court, a petition can only be filed in that court. Thus, in a case of claim by or against a Bank in liquidation, a petition may be instituted in the High Court under the Banking Regulation Act, 1949.<sup>11</sup>

7. STAY OF SALE

Where before the claim was preferred or the objection was raised, the property attached has already been advertised for sale, the Court may

(a) if the property is movable, postpone the sale; or (b) if the property is immovable make an order that the property shall not be sold or that it may be sold but the sale shall not be confirmed.<sup>12</sup>

8. SUIT

Sub-rule (5) of Rule 58 declares that where a claim preferred or objection raised is not entertained by the executing court on the ground that

<sup>9</sup> See also *supra*, "Scheme", "Suit", *infra*.

<sup>10</sup> *Union of India v. Jardine Henderson Ltd.*, (1979) 2 SCC 258: AIR 1979 SC 972.

<sup>11</sup> *Alphonse Ligouri v. Court Liquidator*, 1967 KLT 1102; *Comrade Bank Ltd. v. Jyoti Bala Dassi*, AIR 1962 Cal 86: 66 CWN 761.

<sup>12</sup> R. 51; see also Or. 21 R. 59; *Ganpat Singh v. Kailash Shankar*, (1987) 3 SCC 146 at p. 156: AIR 1987 SC 1443 at p. 1449.

(i) the property was sold before the claim was preferred or objection was raised; or (ii) claim or objection was designedly or unnecessarily delayed, it is open to the aggrieved party to file a suit to establish his right.<sup>13</sup>

9. APPEAL

An order passed by the executing court in adjudication of claims and objections shall have the same force and is subject to the same conditions as to appeal or otherwise as if it were a decree.<sup>14</sup>

10. REVISION

An order of adjudication passed under Rule 58 of Order 21 is treated as "decree" and appealable. No revision, therefore, lies against such order.<sup>15</sup> But where the executing court refuses to entertain claim or objection against attachment of property under proviso to sub-rule (1) of Rule 58, an aggrieved party's remedy is to file a suit and not revision.<sup>16</sup>

11. PENDING MATTERS

Section 97 of the Amendment Act, 1976 declares that the provisions of Rules 58 and 59 (as amended) would not apply to pending proceedings.<sup>17</sup>

<sup>13</sup> R. 85(5); see also *Sawai Singhai Nirmal Chand v. Union of India*, AIR 1966 SC 1068; (1966) 1 SCR 986.

<sup>14</sup> R. 58(4).

<sup>15</sup> See *supra*, "Appeal".

<sup>16</sup> See *supra*, "Suit".

<sup>17</sup> S. 97(2), Code of Civil Procedure (Amendment) Act, 1976.

PART IV  
10  
Sale of Property

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## 1.      GENERAL

AS ALREADY seen, a decree may be executed by attachment and sale or by sale without attachment of any property. In Chapter 7 we have discussed the provisions regarding attachment of property. In the present chapter let us study the material provisions relating to sale and delivery of properties. Sections 65 to 73 and Rules 64 to 94 of Order 21 deal with the subject relating to sale of movable and immovable properties.

## 2.      SALE OF PROPERTY: GENERAL: RULES 64-73

## (a)      Power of court: Rules 64-65

Rule 64 provides that any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree shall be sold, and the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

This rule enjoins that in all execution proceedings the court has to enquire whether sale of part of the property would be sufficient to satisfy the decree. This is not just a discretion but an obligation and a mandate of the legislature which cannot be ignored. The sale held in contravention of this mandatory requirement is illegal and without jurisdiction.<sup>1</sup>

A duty is thus cast upon the court to sell such property or a portion thereof as necessary to satisfy the decree.<sup>2</sup> "It is a mandate of the Legislature which cannot be ignored."<sup>3</sup> Rule 65 enacts that every sale in execution of a decree shall be conducted by an officer of the court by public auction.

## (b)      Proclamation of sale: Rules 66-67

After the property is attached and ordered to be sold by public auction, the first step to be taken by the court is to cause a proclamation of the intended sale to be made in the language of such court.<sup>4</sup> Such proclamation shall be drawn up after notices to the decree-holder and the judgment-debtor and shall state the following details:

<sup>1</sup>      Ambati Narasayya v. M. Subba Rao, 1989 Supp (2) SCC 693 at pp. 694-65; AIR 1990 SC 119 at pp. 120-21; Takkaseela Pedda v. Padmavathamma, (1977) 3 SCC 337 at p. 340; AIR 1977 SC 1789 at p. 1791; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131; 1993 AIR SCW 3458; Lal Chand v. ADJ, (1997) 4 SCC 356; AIR 1997 SC 2106; S. Mariyappa v. Sidappa, (2005) 10 SCC 235; Balakrishnan v. Malaiyandi Konar, (2006) 3 SCC 49; AIR 2006 SC 1458.

<sup>2</sup>      Ibid, see also Amiya Prosad v. Bank of Commerce Ltd., (1996) 7 SCC 167; AIR 1996 SC 1762; S.S. Dayananda v. K.S. Nagesh Rao, (1997) 4 SCC 451.

<sup>3</sup>      Ambati Narasayya v. M. Subba Rao, *supra*.

<sup>4</sup>      R. 66(1); Desh Bandhu Gupta v. N.L. Anand, *supra*, at p. 143.

- (i) time and place of sale;
- (ii) property or a part thereof to be sold;
- (iii) revenue, if any, assessed upon the property;
- (iv) encumbrance, if any, to which the property is liable;
- (v) amount to be recovered;
- (vi) such other particulars which the court considers material for a purchaser to know in order to judge the nature and value of the property.<sup>5</sup>

Service of notice on a judgment-debtor is a fundamental step in execution and, unless it is waived, it must be complied with. Absence of notice causes irreparable injury to the judgment-debtor and sale without such notice will be a nullity.<sup>6</sup>

It is the duty of the court to see that the requirements of Rule 66 are complied with.<sup>7</sup> It is also desirable that every proclamation of sale shall be made by beat of drum or other customary mode and a copy of the proclamation must be affixed on a conspicuous part of the property and of the courthouse and also in the Collector's Office if the property is land paying revenue.<sup>8</sup> Such proclamation should also be published in the Official Gazette or in a local newspaper, or in both, if the court so directs.<sup>9</sup>

The object of issuing a proclamation is twofold; firstly, it protects the interests of the intending purchasers by giving them all material information regarding the property to be sold; and secondly, it protects the interests of the judgment-debtor by facilitating the fetching of proper market price for his property and by preventing it from being knocked down at public auction for a price much below the market price.<sup>10</sup>

A sale conducted without publication of proclamation is not merely an irregularity but a nullity.<sup>11</sup> It is incumbent on the court to be scrupulous to the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual manner.<sup>12</sup> Thus, when the sale was notified in the village by beat of drum and people started coming thereafter and several persons participated

- <sup>5</sup> R. 66(2).
- <sup>6</sup> *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131.
- <sup>7</sup> *Shalimar Cinema v. Bhasin Film Corpn.*, (1987) 4 SCC 717 at p. 719; AIR 1987 SC 2081 at p. 2082.
- <sup>8</sup> R. 67(1); *Desh Bandhu Gupta v. N.L. Anand*, *supra*, at p. 143.
- <sup>9</sup> R. 67(2).
- <sup>10</sup> *Kummathi Narayanappa v. Talari Akkulappa*, AIR 1965 AP 215 at p. 217; *Desh Bandhu Gupta v. N.L. Anand*, *supra*, at pp. 143-44 (SCC).
- <sup>11</sup> *A. Venkatachalam v. E.M. Zackria*, 1987 Supp SCC 124; *Desh Bandhu Gupta v. N.L. Anand*, *supra*, at pp. 143-46.
- <sup>12</sup> *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131.

in the bid including the decree-holder, the procedure was held to be illegal.<sup>13</sup>

(c) Time of sale: Rule 68

Unless the property ordered to be sold is perishable or the expense of keeping it in custody is likely to exceed its value<sup>14</sup>, no sale without the consent in writing of the judgment-debtor can take place before fifteen days in case of immovable property and before seven days in case of movable property from the date of proclamation in the courthouse.<sup>15</sup>

(d) Adjournment of sale: Rule 69(1), (2)

The court may, at its discretion, adjourn any sale to a specified day and hour. But if such sale is adjourned for more than thirty days, a fresh proclamation should be made unless the judgment-debtor waives it.<sup>16</sup>

(e) Stoppage of sale: Rule 69(3)

Every sale shall be stopped if, before the property is knocked down, the debt and costs are tendered to the officer conducting the sale, or paid into the court.<sup>17</sup>

(f) Default by purchaser: Rule 71

Any deficiency of price on resale necessitated by the purchaser's default shall be recoverable from the defaulting purchaser.<sup>18</sup> This provision is salutary and has been enacted with a view to minimize the hardship of the judgment-debtor or decree-holder resulting from the auction- purchaser's default. It also seeks to provide an expeditious remedy to the aggrieved party (judgment-debtor or decree-holder), who has suffered due to the default of the auction-purchaser. Therefore, if resale is not ordered because of the default of the auction-purchaser, Rule 71 will not apply.<sup>19</sup>

Though the provisions of Rule 71 are of summary nature, principles of natural justice apply to them. Before the auction-purchaser is held liable under this rule, he must be given notice and opportunity

<sup>13</sup> Lal Chand v. ADJ, (1997) 4 SCC 356: AIR 1997 SC 2106.

<sup>14</sup> R. 43.

<sup>15</sup> R. 68.

<sup>16</sup> R. 69(1), (2).

<sup>17</sup> R. 69(3); see also R. 59; Radhey Shyam v. Shyam Behari, (1970) 2 SCC 405: AIR 1971 SC 2337.

<sup>18</sup> R. 71.

<sup>19</sup> Gopal Krishan Das v. Sailendra Nath, (1975) 1 SCC 815 at p. 821: AIR 1975 SC 1290 at p. 1294; Ramagirji Neelakantagirji v. Annavajihala Venkatachallam, AIR 1925 PC 61; Annavajhula Venkatachellamayya v. Ramagirjee Neelakanta, AIR 1919 Mad 1014: (1918) 41 Mad 474: 43 IC 685 (FB).

of hearing to show cause why an order adverse to him should not be passed.<sup>20</sup>

(g) Restrictions to bid: Rules 72-73

(a) A decree-holder cannot, without the express permission of the court, purchase the property sold in execution of his own decree.<sup>21</sup> When he does so with the permission of the court, he is entitled to a set-off, but if he does so without such permission, the court has a discretion to set aside the sale upon the application by the judgment-debtor, or any other person whose interests are affected by the sale.<sup>22</sup>

This provision is intended to safeguard the interests of the judgment-debtor.<sup>23</sup> Such permission, therefore, should be cautiously granted after considering all the attending circumstances.<sup>24</sup> The court will have to be satisfied that without granting permission to the decree-holder, an advantageous sale cannot otherwise be had.<sup>25</sup>

Even though there is no express requirement for issue of notice to the judgment-debtor in Rule 72 before granting permission to the decree-holder, since it vitally affects the rights of the judgment-debtor, the rules of natural justice require that a notice should be given to him.<sup>26</sup> The decision to grant permission is administrative and not judicial. It is, therefore, not necessary for the court to pass a speaking order or to record reasons in support of grant of leave to the decree-holder to bid. But the order must reflect application of mind by the executing court.<sup>27</sup>

For getting a sale set aside it is not sufficient to show that there was an illegality or irregularity in the conduct of the sale, the applicant has to show that substantial injury has been caused to him as a result of non-issuance of the notice.<sup>28</sup>

<sup>20</sup> Annabhajjala Venkatachellamayya v. Ramagirjee Neelakanta, *supra*. For detailed discussion of natural justice, see, Author's, Lectures on Administrative Law (2008) Lecture VI.

<sup>21</sup> R. 72(1); see also Manilal Mohanlal v. Sardar Sayed Ahmed, AIR 1954 SC 349 at p. 351: (1955) 1 SCR 108.

<sup>22</sup> R. 72(2), (3).

<sup>23</sup> Sivathi Ammal v. Arulayee Ammal, AIR 1974 Mad 34 at p. 35: (1973) 2 Mad LJ 325.

<sup>24</sup> S.K.M. Mohd. Mustafa v. Udaianachi Ammal, AIR 1966 Mad 348: (1966) 1 Mad LJ 373.

<sup>25</sup> Sivathi Ammal v. Arulayee Ammal, *supra*.

<sup>26</sup> G. Subramania Mudaliar v. Ideal Finance Corpn., AIR 1977 Mad 358 at pp. 361-63; Jaswantlal Natvarlal v. Sushilaben Manilal, 1991 Supp (2) SCC 691: AIR 1991 SC 770. For a detailed discussion regarding "natural justice", see, Author's Lectures on Administrative Law (2008) Lecture VI.

<sup>27</sup> S.K.M. Mohd. Mustafa v. Udaianachi Ammal, AIR 1966 Mad 348: (1966) 1 Mad LJ 373. (But see *supra*, D.S. Chohan v. State Bank of Patiala.)

<sup>28</sup> Jaswantlal Natvarlal v. Sushilaben Manilal, 1991 Supp (2) SCC 691 at pp. 692-93: AIR

Where the auction-purchaser is a stranger or an outsider, sale by public auction would normally protect him even if the decree is finally set aside. This is based on the doctrine of justice and equity.<sup>29</sup> But where the auction-purchaser is the decree-holder himself, he would not be entitled to any relief since he was aware of all the proceedings.<sup>30</sup>

An order setting aside or refusing to set aside sale is appealable.<sup>31</sup>

(b) A mortgagee of immovable property cannot, without the leave of the court, purchase the property sold in execution of a decree on the mortgage.<sup>32</sup> This is a mandatory requirement.<sup>33</sup> When such leave is granted to the mortgagee decree-holder, the court shall fix a reserve price so that the mortgagee may not take undue advantage by purchasing the mortgaged property at a lower price and then pursuing other remedies to recover the balance of the amount of the decree.<sup>34</sup>

(c) Any officer or other person having any duty to perform in connection with any execution sale, cannot, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold in execution.<sup>35</sup> In that case, sale will be hit by Section 64.

### 3. SALE OF MOVABLE PROPERTY: RULES 74-78

#### (a) General

Rules 74 to 78 of Order 21 deal with sale of movable property. Rules 74 and 75 relate to sale of agricultural produce and growing crops. These rules should be read with other relevant provisions of the Code. For instance, Section 2(13) defines "movable property" as inclusive of "growing crops". Section 61 empowers the State Government to exempt a portion of agricultural produce from attachment and sale from execution. Rules 44 and 45 of Order 21 provide for attachment of agricultural produce. Rule 76 covers negotiable instruments and shares. Sale of movable property should be held by public auction (Rule 77). A sale of movable property will not be set aside on the ground of irregularity in publishing or conducting the sale (Rule 78). On payment of

<sup>29</sup> Janak Raj v. Gurdial Singh, AIR 1967 SC 608; (1967) 2 SCR 77; Chinnammal v. P. Arumugham, (1990) 1 SCC 513; AIR 1990 SC 1828; Padanathil Ruqmini v. P.K. Abdulla, (1996) 7 SCC 668; AIR 1996 SC 1204.

<sup>30</sup> Ibid, see also Binayak Swain v. Ramesh Chandra, AIR 1966 SC 948; Maqbool Alam v. Khodaija, AIR 1966 SC 1194; (1966) 3 SCR 479; Sardar Govindrao v. Devi Sahai, (1982) 1 SCC 237; AIR 1982 SC 989.

<sup>31</sup> Or. 43 R. 1(j).

<sup>32</sup> R. 72-A.

<sup>33</sup> D.S. Chohan v. State Bank of Patiala, (1997) 10 SCC 65; (1997) 67 DLT 365 (SC); P. Rami Reddy v. P. Sundara Reddy, AIR 1986 AP 29 at p. 31.

<sup>34</sup> Statement of Objects and Reasons; see also, Law Commission's Fifty-fourth Report at pp. 183-84.

<sup>35</sup> R. 73.



price, sale of movable property becomes absolute and no confirmation of sale is necessary (Rule 77).

(b) Place of sale

Sale of all movable properties in execution of a decree should ordinarily be held at some place within the jurisdiction of the court ordering such sale.<sup>36</sup>

(c) Agricultural produce: Rules 74-75

In the case of agricultural produce, the sale shall be held on or near the land on which the crop is standing or where the crop has been harvested, at or near the place where the crop is lying.<sup>37</sup> The court may, however, direct the sale to be held at the nearest place of public resort, if it is of the opinion that the produce may fetch a better price.<sup>38</sup> Such sale shall be postponed by the court, if (i) fair price is not offered; or (ii) the owner thereof applies for such postponement.<sup>39</sup>

Where the property to be sold is growing crop, no sale shall be held until the crop is harvested.<sup>40</sup> Where such crop cannot be stored, the purchaser may enter the field for cutting and harvesting it.<sup>41</sup>

(d) Negotiable instruments and shares: Rule 76

In the case of a negotiable instrument or a share in a corporation, the court has power to order sale through a broker instead of by public auction<sup>42</sup> On such sale, the purchaser acquires a title.<sup>43</sup>

(e) Payment of price: Rule 77

The price of the property shall be paid at the time of sale.<sup>44</sup> On payment of price, the sale becomes absolute.<sup>45</sup> Confirmation of sale by the court is not necessary as in the case of sale of immovable property.<sup>46</sup> In case of default by the purchaser in payment of price, the property will

<sup>36</sup> Lakshmibai v. Santapa Revapa Shintre, ILR (1889) 13 Bom 22 at pp. 24-25.

<sup>37</sup> R. 74(1); see also Lakshmibai v. Santapa Revapa Shintre (ibid.).

<sup>38</sup> Proviso to R. 74(1).

<sup>39</sup> R. 74(2).

<sup>40</sup> R. 75(1).

<sup>41</sup> R. 75(2).

<sup>42</sup> R. 76; see also Seth Banarsi Dass v. District Magistrate and Collector, Meerut, (1996) 2 SCC 689: AIR 1996 SC 2311.

<sup>43</sup> Balkrishan Gupta v. Swadeshi Polytex Ltd., (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534; Seth Banarsi Dass v. District Magistrate and Collector, Meerut, supra.

<sup>44</sup> R. 77(1). See also Thacker's Press & Directories Ltd. v. Metropolitan Bank Ltd., 67 Cal WN 350.

<sup>45</sup> R. 77(2).

<sup>46</sup> R. 92. See also Sebastian v. Official Receiver, 1968 KLJ 381; Lokman Chhabilal Jain Bani v. Motilal Tulsiram Agarwala, AIR 1939 Nag 269; Dharm Singh v. Ram Bhejamal, AIR 1930 Lah 236; Habib Sheikh v. State of U.P., AIR 2005 All 270.

forthwith be resold<sup>47</sup> and the defaulting purchaser would be liable for the deficiency in price on such resale.<sup>48</sup>

(f) Irregularity in sale: Rule 78

Rule 78 provides that a sale of movable property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale<sup>49</sup>

Violation of provisions relating to the sale of movable property does not ipso facto make the sale void. The petitioner has to show that substantial injury has been sustained by him.<sup>50</sup> But where objections have been raised by the judgment-debtor which may go to the root of the matter, they must be decided prior to the holding of the auction-sale. Failure to do so would vitiate the sale.<sup>51</sup>

Any person sustaining any injury by reason of any irregularity in the sale at the hands of any other person may sue him for compensation, or, if such person is the purchaser, for recovery of the specific property and for compensation in default of such recovery.<sup>52</sup> Again, an application to set aside a sale of movable property lies where the court had no jurisdiction to order the sale.<sup>53</sup> Similarly, the provision does not curtail inherent powers of the court where it is satisfied that the orders had been obtained by practising fraud on the court. In such cases, it is not open to anyone to contend that the court has become functus officio. The court retains jurisdiction to recall orders.<sup>54</sup>

4. SALE OF IMMOVABLE PROPERTY: RULES 82-94

(a) General

Rules 82 to 94 of Order 21 deal with sale of immovable property. Rule 83 enables the executing court to postpone sale to enable the judgment-debtor to raise decretal dues by private alienation. Rules 84 and

85 provide for payment of purchase money by auction-purchaser. Rule

86 covers cases of default by auction-purchaser in making requisite payment and resale of property. Rules 89 to 91 and 93 deal with setting aside sale and effect thereof. Rules 92 and 94 provide for confirmation

47 R. 77(1).

48 R. 71.

49 *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300: (1964) 6 SCR 1001; *Sebastian v. Official Receiver*, supra; *Dharm Singh v. Ram Bhejamal*, supra.

50 *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691: AIR 1991 SC 770.

51 *Seth Banarsi Dass v. District Magistrate and Collector, Meerut*, (1996) 2 SCC 689 at pp. 693-94: AIR 1996 SC 2311.

52 *Dhirendra Nath v. Sudhir Chandra*, supra; *Balkrishan Gupta v. Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534.

53 *Nemi Chand v. Dhanmukh Dass*, ILR (1953) 3 Raj 288; *Prafulla Chandra v. Calcutta Credit Corpn.*, AIR 1965 Ass 21.

54 *Baidyanath Dubey v. Deonandan Singh*, 1968 SCD 275: (1967) 2 SCWR 727.

of sale and issuance of sale-certificate. Section 65 declares the effect of sale.

(b) Courts competent to order sale: Rule 82

Any court other than a Court of Small Causes may order sale of immovable property in execution of a decree.<sup>55</sup>

(c) Postponement of sale: Rule 83

The court may postpone sale to enable the judgment-debtor to raise the decretal amount by private alienation, such as, sale, mortgage, charge, lease, etc.<sup>56</sup> The chief object of this provision is to prevent sale of the property of the judgment-debtor in cases where the decree can be satisfied by private alienation of such property.

Postponement of sale is at the discretion of the court and cannot be claimed by the judgment-debtor as of right.<sup>57</sup> Therefore, an application for postponement of sale will not be allowed where the judgment-debtor had sufficient time to pay the decretal amount,<sup>58</sup> or where by private alienation the decree will not be satisfied in full.<sup>59</sup>

Since the rule is for the benefit of the decree-holder, it does not empower the court to grant permission to the judgment-debtor to sell the property privately for discharging other debts of the judgment-debtor.<sup>60</sup> Again, this provision applies only before the sale has taken place and not afterwards.<sup>61</sup> Further, such postponement of sale must only be for a reasonable period.<sup>62</sup> Finally, a sale privately effected is not a complete transaction unless and until it is sanctioned and confirmed by the court.<sup>63</sup>

(d) Deposit and payment of price: Rules 84-87

Immediately after the sale of immovable property, the person declared to be the purchaser of the property must deposit 25 per cent of the purchase money, unless such requirement is dispensed with

<sup>55</sup> R. 32; see also *Jibon Krishna v. New Beerbhum Coal Co. Ltd.*, AIR 1960 SC 297: (1960) 2 SCR 198.

<sup>56</sup> R. 83.

<sup>57</sup> *N.K.R.R.M. Chetty Firm v. M. Subraya Mudaliar*, AIR 1925 Rang 271; *Ramanath Panda v. Damodar Sahu*, AIR 1950 Ori 230; *Bishenmun Singh v. Land Mortgage Bank*, (1884-85) 12 IA 7: (1884) 11 Cal 224 (PC); *K.T. Thomas v. Indian Bank*, 1984 Supp SCC 703.

<sup>58</sup> *Kora Lal v. Punjab National Bank Ltd.*, AIR 1921 Lah 384; *Banarsi Das v. Gopi Chand*, AIR 1924 Lah 132.

<sup>59</sup> *Gurusami v. Venkatasami*, ILR (1891) 14 Mad 277; *Banarsi Das v. Gopi Chand* (ibid.).

<sup>60</sup> *Ravi Nagabhushanam v. Neti Gopala Krishna*, AIR 1969 AP 184 at p. 187.

<sup>61</sup> *N.K.R.R.M. Chetty Firm v. M. Subraya Mudaliar*, supra; *K.M.Sr.K. Lankaram v. O.K.S. Sundaragopala*, AIR 1941 Mad 208; *Bhiku Mal v. Firm Ram Chandar Babu Lal*, AIR 1946 Lah 134 (FB).

<sup>62</sup> *Gurusami v. Venkatasami*, supra; *Mohinee v. Rama Kant*, (1871) 15 WR 322.

<sup>63</sup> Second Proviso to R. 83(2).

by the court.<sup>64</sup> The provision regarding the deposit is mandatory and non-compliance with it will make the sale a nullity.<sup>65</sup> In case of failure on the part of the purchaser to deposit the amount, the property will forthwith be resold<sup>66</sup> and the defaulting purchaser will be liable for the deficiency in price.<sup>67</sup> The balance of the purchase money must be paid by the purchaser within fifteen days from the date of the sale<sup>68</sup> In case of default in payment of price by the auction-purchaser, the amount of deposit can be forfeited and the property shall be resold after issuing a fresh notification,<sup>69</sup> unless the judgment-debtor satisfies the decree by making payment before resale. Failure to deposit the purchase price is not a mere irregularity in the sale and it cannot be averted on the plea that such shortfall had been occasioned by a mistake of the court in calculating the amount.<sup>70</sup> The provisions indicate responsibility of the decree-holder and it is not open to him to claim that he was misled by the court in the specification of the amount. The blame, if any, for the mistake lies squarely on the decree-holder. "A mistake for which the decree-holder himself is responsible cannot furnish a ground to the decree-holder to aver the adverse consequences on him of his failure to comply with the mandatory requirement."<sup>71</sup> The provisions requiring the auction-purchaser to deposit the balance amount within fifteen days of the sale is also mandatory and non-compliance with the same vitiates the sale.<sup>72</sup> The court has no jurisdiction to extend the time for the payment of the balance price.<sup>72</sup> In case of default of such payment, the court has discretion to forfeit the deposit.<sup>72</sup> The court must order resale of the property. This is an imperative obligation on the part of the court.<sup>72</sup> A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property.<sup>72</sup> The ambit and scope of the provisions of Rules 84 to 86 of Order 21 have been very succinctly and appropriately explained by the Supreme

- <sup>64</sup> R. 84; see also *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349 at pp. 351- 52: (1955)1 SCR 108.  
<sup>65</sup> *Manilal Mohanlal v. Sardar Sayed Ahmed* (ibid.); *Sardara Singh v. Sardara Singh*, (1990) 4 SCC 90 at p. 96.  
<sup>66</sup> R. 84(1).  
<sup>67</sup> R. 71.  
<sup>68</sup> R. 85.  
<sup>69</sup> Rr. 86, 87.  
<sup>70</sup> *Balram v. Ilam Singh*, (1996) 5 SCC 705: AIR 1996 SC 2781.  
<sup>71</sup> Ibid, at p. 713 (SCC): at p. 2785 (AIR).  
<sup>72</sup> *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349: (1955) 1 SCR 108.

Court in *Manilal Mohanlal v. Sardar Sayed Ahmed*<sup>73</sup> in the following words:

"Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of the opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete imllity,"<sup>74</sup> (emphasis supplied)

(e) Bid by co-owner: Rule 88

Where property sold is a share of undivided immovable property of two or more persons, a co-sharer has a right of pre-emption. The object of this provision is to enable co-sharers in the undivided immovable property to keep strangers out if they so desire.<sup>75</sup>

(f) Setting aside sale: Rules 89-92

Rules 89 to 92 deal with setting aside of sale. When a property is sold in execution of a decree, an application for setting aside sale may be made under these provisions by the persons affected and the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation.<sup>76</sup> But an application to set aside sale of immovable property cannot be made on any other ground not covered by Rules 89 to 91.<sup>77</sup> In other words, the provisions of Rules 89 to 91 of Order 21 as to setting aside execution sale are exhaustive.

(I) On deposit: Rule 89

(i) Nature and scope.—Rule 89 of Order 21 provides for setting aside execution sale on payment of five per cent of purchase price to the

<sup>73</sup> AIR 1954 SC 349: (1955) 1 SCR 108.

<sup>74</sup> Ibid, at pp. 351-52 (AIR); see also *Sardara Singh v. Sardara Singh*, (1990) 4 SCC 90; *Rao Mahmood Ahmad v. Ranbir Singh*, 1995 Supp (4) SCC 275: AIR 1995 SC 2195.

<sup>75</sup> R. 88; see also *Munnalal v. Gopilal Nathuram*, AIR 1940 Nag 337:1940 Nag LJ 453.

<sup>76</sup> Art. 127, Limitation Act, 1963; see also *Mohan Lal v. Hari Prasad*, (1994) 4 SCC 177 at pp. 179-80.

<sup>77</sup> *Ganpat Singh v. Kailash Shankar*, (1987) 3 SCC 146 at p. 155: AIR 1987 SC 1443 at p. 1449; *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608 at p. 609: (1967) 2 SCR 77.

auction-purchaser and entire amount specified in the proclamation for sale to the decree-holder.

(ii)      Object.—Rule 89 deals with the setting aside of sale on the deposit of the amount specified in the proclamation of sale. The underlying object of this rule is to give a judgment-debtor the "last chance" of getting the sale set aside before it is confirmed by the court.<sup>78</sup> It is intended to afford an opportunity to the judgment-debtor, even after the property is sold, to satisfy the claim of the decree-holder and to compensate the auction-purchaser by paying him five per cent of the purchase money.<sup>79</sup> The rule being in the nature of a concession must be strictly complied with.<sup>80</sup> The words "on his depositing in court" show that deposit is a condition precedent to the making of an application to set aside a sale.<sup>81</sup>

(iii)      Who may apply?—Any person claiming any interest as existing at the time of the sale or at the time of making an application can avail of the benefit of Rule 89. The expression "interest" has a very wide import and should be construed liberally so as to enable a party having any inchoate right to apply under this rule.<sup>82</sup>

Thus, the following persons are entitled to apply under Rule 89:

- (i)      a judgment-debtor;
- (ii)      a co-sharer in the property;
- (iii)      a member of a Joint Hindu Family;
- (iv)      receiver;
- (v)      a creditor of judgment-debtor;
- (vi)      a beneficial owner;
- (vii)      a lessee;
- (viii)      a mortgagee;
- (ix)      a person in possession of the property;
- (x)      a benamidar, transferee, etc.

In case of manifest illegality in conducting the sale, the court can take proceedings suo motu and set aside the sale even after the expiry of the period of limitation prescribed therefor.<sup>83</sup>

(iv)      Conditions.—The provisions of Rule 89 are not intended to defeat the claim of the decree-holder or the auction-purchaser, unless the

<sup>78</sup>      Mohan Manucha v. Manzoor Ahmad, AIR 1943 PC 29 at p. 31 (per Sir George Rankin); T.L. Jagannatha v. B.H. Krishna, AIR 1962 Mad 99: (1961) 2 Mad LJ 509.

<sup>79</sup>      Tribhovandas v. Ratilal, AIR 1968 SC 372 at p. 375: (1968) 1 SCR 455; Himmatbhai v. Rikhilal, (1978) 2 SCC 160: AIR 1978 SC 918; Challamane Huchha Gowda v. M.R. Tirumala, (2004) 1 SCC 453.

<sup>80</sup>      T.L. Jagannatha v. B.H. Krishna, supra; Nanhelal v. Umrao Singh, AIR 1931 PC 33: (1930-31) 58 IA 50:130 IC 686.

<sup>81</sup>      P.K. Unni v. Nirmala Industries, (1990) 2 SCC 378 at p. 381: AIR 1990 SC 933.

<sup>82</sup>      Onkar Nath v. Ramanand Prasad, AIR 1970 Pat 368.

<sup>83</sup>      Nani Gopal Paul v. T. Prasad Singh, (1995) 3 SCC 579: AIR 1995 SC 1971.

decree is simultaneously satisfied.<sup>84</sup> Rule 89, therefore, requires that two primary conditions relating to deposit must be fulfilled, namely, (i) the applicant must deposit in the court for payment to the auction- purchaser five per cent of the purchase money; and (ii) he must also deposit the amount specified in the proclamation of sale, less any amount received by the decree-holder since the date of proclamation of sale for payment to the decree-holder.<sup>85</sup>

As stated above, the rule is in the nature of a concession shown in favour of the judgment-debtor and, hence, the requirements thereof must be strictly complied with. The provision of the rule regarding the two deposits is mandatory and in case of failure to comply with any of them no sale can be set aside.<sup>86</sup> Such deposit must be unconditional and not under protest.<sup>87</sup> Further, it must be in cash and not by cheque or Government promissory note.<sup>88</sup>

(v) Limitation.—An application to set aside a sale must be made within a period of sixty days from the date of the sale.<sup>89</sup> The executing court has no jurisdiction to entertain an application for setting aside a sale after the prescribed period by invoking Section 148 of the Code or by applying Section 5 of the Limitation Act.<sup>90</sup>

(vi) Notice.—Before an order setting aside a sale is made, notice of the application must be given to all persons likely to be affected by the order thereon.<sup>91</sup> Since the object of giving notice is to give an opportunity of hearing to the interested party, if he is aware of the application, the absence of a formal notice does not vitiate the proceedings<sup>92</sup>

(vii) Appeal—An order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable.<sup>93</sup>

(II) For irregularity or fraud: Rule 90

(i) Nature and scope.—A sale of immovable property in execution can be set aside also on the ground of material irregularity or fraud in

<sup>84</sup> Tribhovandas v. Ratilal, AIR 1968 SC 372 at p. 375: (1968) 1 SCR 455.

<sup>85</sup> Tribhovandas v. Ratilal, *supra*.

<sup>86</sup> Ibid, see also *supra*, P.K. Unni v. Nirmala Industries.

<sup>87</sup> L.A. Krishna Ayyar v. Arunachalam Chettiar, AIR 1935 Mad 842 (FB); T.L. Jagannatha v. B.H. Krishna, AIR 1962 Mad 99; Nurjahan Khatun v. Asia Khatun, AIR 1932 Cal 216; Narayan Vasudevacharya v. Amgauda Malagauda, AIR 1921 Bom 169.

<sup>88</sup> Ismail Ali v. F.M. Visvanadan, AIR 1915 LB 97 (1); T.L. Jagannatha v. B.H. Krishna, *supra*; Rahim Bux v. Nundo Lal, ILR (1887) 14 Cal 321.

<sup>89</sup> Art. 127, Limitation Act, 1963; see also Kishori Devi v. Ram Narain, (1969) 1 SCWR 133.

<sup>90</sup> Mohan Lal v. Hari Prasad, (1994) 4 SCC 177 at pp. 179-80; P.K. Unni v. Nirmala Industries, *supra*.

<sup>91</sup> Proviso to R. 92(2).

<sup>92</sup> Charn Chandra Ghosh v. Rai Behari Lal, AIR 1925 Cal 157; Kanda Veloo v. Kumaran Govindan, AIR 1953 TC 529.

<sup>93</sup> Or.43 R. 1 (J).

publishing or conducting the sale, provided the applicant proves that he has sustained substantial injury by reason of such irregularity or fraud.<sup>94</sup> The pre-sale illegalities committed in the execution are amenable to the remedy under Section 47. Post-sale irregularities causing substantial injury to the judgment-debtor are covered under Rule 90 of Order 21.<sup>95</sup>

(ii) Who may apply?—The following persons have been judicially held entitled to apply under this rule:

- (i) the decree-holder;
- (ii) the auction-purchaser;
- (iii) any person entitled to share in a rateable distribution of assets;
- (iv) any person whose interests are affected by the sale, e.g. a judgment-debtor, legal representatives of a deceased judgment-debtor, a real owner of the property sold in execution of a decree against his benamidar; where the judgment-debtor is a minor, his guardian; where the judgment-debtor is a ward of court, court of wards; a purchaser from the judgment-debtor pendente lite, etc.

(iii) Grounds.—"Before a sale can be set aside under this rule, it must be shown that:

- (1) there has been a material irregularity or fraud in publishing and conducting the sale; and
- (2) substantial injury has been caused to the applicant.<sup>96</sup>

(1) Material irregularity

The expression "material irregularity" in Rule 90 refers to an irregularity on the part of the court or its officers in the procedure to be followed before the property is put up for sale.<sup>97</sup> The following irregularities have been held to be material irregularities within the meaning of Rule 90:

- (i) omission to issue notice under Rule 22;
- (ii) omission to publish sale proclamation under Rule 66;

<sup>94</sup> R. 90; see also *Lakshmiratan Engg. Works Ltd. v. Commr. (Judicial), Sales Tax*, AIR 1968 SC 488 at p. 492: (1968) 1 SCR 505; *Hindusthan Commercial Bank Ltd. v. Punnu Sahu*, (1971) 3 SCC 124: AIR 1970 SC 1384; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131 at p. 150; *Prakash Kaur v. Sandhooran*, (1993) 3 SCC 312.

<sup>95</sup> *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131 at p. 150:1993 AIR SCW 3458.

<sup>96</sup> *Laxmi Devi v. Mukand Kanwar*, AIR 1965 SC 834 at p. 837: (1965) 1 SCR 726; *Desh Bandhu Gupta v. N.L. Anand*, *supra*; *Satyanarayana Bajoria v. Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB); *Kadiyala Rama Rao v. Gutala Kahna Rao*, (2000) 3 SCC 87.

<sup>97</sup> *Ukaippaligal Munnai (Firm) v. V. Ganesan*, (1966) 2 MLJ 90; *Margaret A. Skinner v. Empire Store*, (1976) 78 PLR 64; *Mahadeo Ram v. Mohan Vikram Sah*, AIR 1933 Pat 435; *Ghisulal v. Sukanraj*, 1963 Raj LW 99.



- (iii) omission to mention prior encumbrances in proclamation under Rule 66;
  - (iv) omission to state the revenue or rent payable on the land;
  - (v) omission to beat drum;
  - (vi) omission to give survey number of the property;
  - (vii) omission to hold sale at stated time and place;
  - (viii) sale after an order of stay of execution;
  - (ix) sale after satisfaction of the decree;
  - (x) default in payment of deposit under Rule 84 or balance of purchase price under Rule 85, etc.
- The following irregularities, on the other hand, have been held not to be material irregularities under Rule 90:

- (i) absence of, or defect in attachment;<sup>98</sup>
- (ii) omission to mention exact time of sale in sale proclamation;
- (iii) omission to record reasons for adjournment of sale;
- (iv) omission to specify share of the judgment-debtor in the property;
- (v) omission to give notice to a receiver when he is not in possession of property;
- (vi) omission to send a copy of the decree to the executing court;
- (vii) misdescription of the property in sale proclamation when the parties knew the property to be sold;
- (viii) omission to mention value of the property;
- (ix) omission to issue a fresh proclamation after sale is adjourned;
- (x) any other ground which the applicant could have taken on or before the sale proclamation was drawn up,<sup>99</sup> etc.

There is a distinction between irregularity and material irregularity in conducting the sale and it must be established that by reason of illegality or irregularity in conducting the sale, the judgment-debtor has sustained substantial injury.<sup>100</sup>

Rule 22-A of Order 21 declares that where any property is sold in execution of a decree, the sale shall not be set aside merely on the ground that the judgment-debtor had died between the date of issuance of proclamation of sale and the

<sup>98</sup> Expln. to R. 90; see also *Dhirendra Nath v. Sudhir Chandra*, AIR 1964 SC 1300: (1964) 6 SCR 1001; *S.A. Sundararajan v. A.P.V. Rajendran*, (1981) 1 SCC 719: AIR 1981 SC 693; *Satyanarayana Bajoria v. Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB); *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131:1993 AIR SCW 3458.

<sup>99</sup> Sub-r. (3) of R. 90; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

<sup>100</sup> *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131:1993 AIR SCW 3458.

date of sale and the legal representatives of such judgment- debtor were not brought on record. The court may, however, set aside such sale if it is satisfied that the legal representatives of the judgment-debtor were prejudiced.<sup>101</sup>

(2)      Fraud

"Fraud" means that "which is dishonest and morally wrong".<sup>102</sup> Such fraud must be in publishing or conducting the sale. Fraud must be established beyond reasonable doubt by clear and cogent evidence; general and vague allegations and suspicious circumstances are not enough.<sup>103</sup> Though the onus of proving fraud is on the party alleging it, it is open to a court to draw an inference of fraud from the established facts taken together as a whole.<sup>104</sup>

It is, however, not necessary that the auction-purchaser should also be a party to the fraud. It is sufficient if fraud on the part of the decree-holder is established. A mere understanding between intending purchasers agreeing not to bid against one another is not by itself objectionable and unlawful. But if such an agreement has been arrived at with a dishonest intention and oblique motive with a view to prevent the best price from being obtained, it would be fraudulent and invalid.<sup>105</sup>

As held by the Privy Council,<sup>106</sup> wherever a sale is impeached on the ground of fraud, a difference must be made between an innocent purchaser and one tainted by fraud which has brought about the execution sale. "The question is, in the former case, which of the two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing. A Court exercising equitable jurisdiction may withhold its hands in the one case and yet set aside the sale with or without terms in the other."<sup>107</sup>      (emphasis supplied)

<sup>101</sup>      Mobarak Ali v. Dinabandhu Sahu, AIR 1953 Ori 296; Yeturu Dasaratharami v. Yeturu Pajjamma, AIR 1979 AP 111.

<sup>102</sup>      Paresh Nath v. Hari Charm, ILR (1911) 38 Cal 622 at p. 626.

<sup>103</sup>      Satish Chandra v. Kumar Satish Kantha, AIR 1923 PC 73: 171 IC 391: (1924) 39 Cal LJ 165 (PC); Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd., AIR 1940 PC 98; A.L.N. Narayanan Chettyar v. High Court Rangoon, AIR 1941 PC 93; Brajabala Das v. Radha Kamal Das, AIR 1969 Ori 63; A.V. Papayya Sastry v. Govt. of A.P., (2007) 4 SCC 221: AIR 2007 SC 1546.

<sup>104</sup>      Ibid.

<sup>105</sup>      Mohd. Mira Ravuthar v. Savvasi Vijaya, ILR (1900) 23 Mad 227 at pp. 233-34 (PC); Ram Rijhan v. Razia Begam, AIR 1943 Pat 88 at p. 96.

<sup>106</sup>      Lalla Bunseedhur v. Koonwur Bindeseree Dutt, (1866) 10 Moo IA 454 (PC).

<sup>107</sup>      Ibid, at p. 474.

In the leading case of *Satish Chandra v. Kumar Satish Kantha*<sup>108</sup> the Privy Council rightly observed:

"Charges of fraud and collusion...must, no doubt, be proved by those who make them, proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling article or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape."<sup>109</sup>  
(emphasis supplied)

(3) Substantial injury

A sale cannot be set aside by mere irregularity or fraud in publishing or conducting the same. The applicant must also prove that he had sustained substantial injury by reason of such irregularity or fraud.<sup>110</sup> Mere loss is not enough, it must be substantial. Mere inadequacy of price is not a good ground to set aside a sale. A court sale is a forced sale and, notwithstanding the competitive element of public auction, the best price is often not forthcoming. The judge must keep a certain margin for this factor. The court must apply its mind to all material factors bearing on the reasonableness of the price and conduct the sale.<sup>111</sup> If the price is substantially inadequate, there is both material irregularity and injury.<sup>112</sup> Since the burden of proving substantial injury is on the applicant, it should be alleged in the application.<sup>113</sup>

Sometimes, however, there may not be express allegations and the same may appear to be implicit from all the facts and

<sup>108</sup> AIR 1923 PC 73;171 IC 391: (1924) 39 Cal LJ 165 (PC).

<sup>109</sup> Ibid, at p. 76 (AIR): at p. 171 (CLJ) (per Lord Atkinson).

<sup>110</sup> *Laxmi Devi v. Mukand Kanwar*, AIR 1965 SC 834 at p. 837: (1965) 1 SCR 726; *Jaswantlal Natvarlal v. Sushilaben Manilal*, 1991 Supp (2) SCC 691 at pp. 692-93: AIR 1991 SC 770 at p. 771.

<sup>111</sup> *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608: (1967) 2 SCR 77; *Navalkha & Sons v. Ramanya Das*, (1969) 3 SCC 537: AIR 1970 SC 2037; *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, (1974) 2 SCC 213: AIR 1974 SC 1331; *Desh Bandhu Gupta v. N.L. Anand*, (1994) 1 SCC 131:1993 AIR SCW 3458.

<sup>112</sup> *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd.*, supra, at pp. 219-20 (SCC); *Desh Bandhu Gupta v. N.L. Anand*, supra, at p. 150 (SCC).

<sup>113</sup> *Putti Kondala Rao v. Vellamanchili Sitarattamma*, (1976) 1 SCC 712 at p. 715: AIR 1976 SC 737 at p. 739.

circumstances alleged.<sup>114</sup> Whether or not the injury suffered by the applicant is substantial depends upon the facts of each case.<sup>115</sup> It should not be confined to pecuniary loss and, therefore, mere inadequacy of price is no proof of substantial injury though it is one of the relevant factors to be considered.<sup>116</sup>

(iv)      Limitation<sup>117</sup>

(v)      Notice<sup>118</sup>

(vi)      Appeal<sup>119</sup>

(III)     Judgment-debtor having no saleable interest: Ride 91

(i)      Nature and scope.—Rule 91 enables the auction-purchaser to apply for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property. This provision is an exception to the general rule of caveat emptor (let the buyer beware).<sup>120</sup>

(ii)      Object.—The rule is intended for the protection of an innocent auction-purchaser; and it cannot, therefore, be invoked where the purchaser knew at the time of sale that the judgment-debtor had no saleable interest in the property.<sup>121</sup>

(iii)     Who may apply?—It is only the auction-purchaser who can apply under this rule.<sup>122</sup> A decree-holder auction-purchaser can also apply<sup>123</sup> A judgment-debtor cannot apply under this rule.<sup>124</sup>

(iv)      Saleable interest.—The expression "no saleable interest" means no saleable interest at all.<sup>125</sup>

<sup>114</sup>      Laxmi Devi v. Mukand Kanwar, *supra*, at pp. 838-39 (AIR); Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd., (1974) 2 SCC 213 at pp. 219-20: AIR 1974 SC 1331 at pp. 1334- 35.

<sup>115</sup>      Laxmi Devi v. Mukand Kanwar, *supra*, at pp. 838-39 (AIR); Putti Kondala Rao v. Vellamanchili Sitarattamma, *supra*.

<sup>116</sup>      Radhey Shyam v. Shyam Behari, (1970) 2 SCC405: AIR 1971 SC2337; Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd., *supra*; Navalkha & Sons v. Ramanya Das, (1969) 3 SCC 537 at pp. 540-41: AIR 1970 SC 2037 at p. 2039.

<sup>117</sup>      See *supra*, under that head.

<sup>118</sup> See *supra*, under that head.

<sup>119</sup>      See *supra*, under that head.

<sup>120</sup>      Ahmedabad Municipal Corpn. v. Haji Abdulgafur, (1971) 1 SCC 757 at pp. 759-60: AIR 1971 SC 1201 at pp. 1202-03.

<sup>121</sup>      Kumarasami Chetti v. T.R. Subramania, AIR 1952 Mad 671; Baijnath Marwari v. Bhutto Krishna Ray, AIR 1933 Pat 684:145 IC 929.

<sup>122</sup>      Kumarasami Chetti v. T.R. Subramania (*ibid.*).

<sup>123</sup>      Ram Gopal v. Ram Kunwar, AIR 1935 All 910; Muthukumarasamia v. Muthusami, AIR 1927 Mad 394; T. Keshavan v. Bipathumma, AIR 1935 Mad 340.

<sup>124</sup>      Umed v. Jas Ram, ILR (1907) 29 All 612.

<sup>125</sup>      Munna Singh v. Gajadhar Singh, ILR (1883) 5 All 577 (FB); Ahmedabad Municipal Corpn. v. Haji Abdulgafur, *supra*, at p. 759 (SCC): at p. 1202 (AIR).

Hence, where the judgment-debtor has some saleable interest, however small it may be, this rule does not apply and the sale cannot be set aside on the ground that the judgment-debtor did not have full saleable interest in the property.<sup>126</sup>

(v) Limitation<sup>127</sup>

(vi) Notice<sup>128</sup>

(vii) Appeal<sup>129</sup>

(g) Effect of setting aside sale: Rule 93

Where a sale of immovable property has been set aside, the purchaser is entitled to refund of the purchase money paid by him with or without interest as ordered by the court.<sup>130</sup> An application under this rule can be filed within three years from the date of the order setting aside the sale.<sup>131</sup>

(h) Confirmation of sale: Rule 92

No sale of immovable property shall become absolute until it is confirmed by the court. Where no application to set aside the sale is made under Rule 89, 90 or 91 or where such application is made and is disallowed by the court, the court shall make an order confirming the sale, and thereupon the sale shall become absolute.<sup>132</sup>

Once the order is made under Rule 92 confirming the sale, the title of the auction- purchaser relates back to the date of sale.<sup>133</sup>

While confirming a sale, the court must adopt a practical and realistic approach. It may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation and several other factors dependent on the facts of each case.

<sup>126</sup> Ram Coomar v. Shushee Bhooshun, (1883) 9 Cal 626; Ouseph Ouseph v. Devasia Chacko, AIR 1953 Trav-Co 619; Narasingi Vannechand v. Suyadevara Narasayya, AIR 1945 Mad 363.

<sup>127</sup> See supra, under that head.

<sup>128</sup> See supra, under that head.

<sup>129</sup> See supra, under that head.

<sup>130</sup> R. 93; see also Hindi Pracharak Prakashan v. G.K. Bros., 1993 Supp (1) SCC 419; AIR 1990 SC 2221; Chinnammal v. P. Arumugham, (1990) 1 SCC 513; AIR 1990 SC 1828.

<sup>131</sup> Art. 137, Limitation Act, 1963.

<sup>132</sup> R. 92(1). See also Janak Raj v. Gurdial Singh, AIR 1967 SC 608; (1967) 2 SCR 77; Navalkha & Sons v. Ramanya Das, supra; Sardar Govindrao v. Devji Sahai, (1982) 1 SCC 237; AIR 1982 SC 989; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131; Municipal Corpn. of Delhi v. Pramod Kumar, (1991) 1 SCC 633; AIR 1991 SC 401; Challamane Huchha Gowda v. M.R. Tirumala, (2004) 1 SCC 453; M.V. Janardan Reddy v. Vijaya Bank, (2008) 7 SCC 738.

<sup>133</sup> S. 65; see also Sagar Mahila Vidyalaya v. Pandit Sadasiv Rao, (1991) 3 SCC 588 at pp. 595-98; AIR 1991 SC 1825.

No speaking order is necessary. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise a new threat to a certainty of court sales will be introduced,<sup>134</sup> (emphasis supplied)

Proviso to sub-rule (1) of Rule 92 as added by the Amendment Act of 1976 enacts that where a claim against an attachment in execution of a decree has been made but the property attached has been sold pending the determination of such claim, the sale should not be confirmed by the court before the final disposal of such claim.<sup>135</sup>

(i) Certificate of sale: Rule 94

After the sale has become absolute, the court shall grant a certificate in favour of the purchaser. It shall bear the date on which the sale became absolute and also specify the property sold and the name of the purchaser.<sup>136</sup> Such certificate is conclusive in nature.<sup>137</sup>

Issuance of a certificate is merely a formal declaration by the court and neither extinguishes nor creates any title. The object of such a certificate is to avoid any controversy regarding the identity of the property sold and the purchaser thereof and the date when the sale became absolute.<sup>138</sup> Issuance of a certificate is a ministerial act.<sup>139</sup>

(j) Effect of sale: Section 65

After the sale has become absolute, the property shall be deemed to have vested in the purchaser from the date when it is sold and not from the date when the sale becomes absolute.<sup>140</sup> In other words, the purchaser's title relates back to the date of the sale and not the confirmation of sale.<sup>141</sup>

<sup>134</sup> Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd., (1974) 2 SCC 213 at p. 220: AIR 1974 SC 1331 at p. 1335; Desh Bandhu Gupta v. N.L. Anand, (1994) 1 SCC 131: 1993 AIR SCW 3458.

<sup>135</sup> Statement of Objects and Reasons, Law Commission's Fifty-fourth Report at p. 207.

<sup>136</sup> R.94 See also supra Sardar Govindrao v. Devi Sahai; Desh Bandhu Gupta v. N.L. Anand.

<sup>137</sup> P. Udayani Devi v. V.V. Rajeshwara, (1995) 3 SCC 252.

<sup>138</sup> Municipal Corpn. of Delhi v. Pramod Kumar, (1991) 1 SCC 633 at p. 636: AIR 1991 SC 401.

<sup>139</sup> Sagar Mahila Vidyalaya v. Pandit Sadasiv Rao, (1991) 3 SCC 588 at p. 598: AIR 1991 SC 1825.

<sup>140</sup> S. 65. See also S. 66.

<sup>141</sup> Janak Raj v. Gurdial Singh, AIR 1967 SC 608: (1967) 2 SCR 77.

PART IV  
11  
Delivery of Property  
SYNOPSIS

1. GENERAL  
RULES 79 to 81 lay down mode of procedure for delivery of movable property Likewise, Rules 95 and 96 prescribe mode of delivery of immovable property  
Section 74 and Rules 97 to 106 deal with resistance or obstruction to delivery of possession to decree-holders and auction- purchasers.  
Prior to Amendment Act, 1976, Rules 97 to 103 (like Rules 58 to 63) of Order 21 enabled the executing court to investigate claims and objections "summarily". But  
the position has been radically changed after the Amendment Act, 1976. Now the executing Court undertakes (i) full and complete inquiry into the right, title and  
interest of the parties to the proceeding or their representatives, and (ii) the orders passed in such inquiry amount to "decree" under Section 2(2) of the Code.  
2. DELIVERY OF PROPERTY: RULES 79-81, 95 AND 96  
Delivery of property in execution of decrees may be effected in the following manner:

1	General	686	(e) Hearing of application:	
2	Delivery of property: Rules 79-81, 95 and 96	686	Rules 105 and 106	68
3	Resistance to delivery of possession: Rules 97-103	688	(f) Inquiry and adjudication: Section 74, Order 21	
	(a) Nature and scope	688	Rules 97-101	60
	(b) Rules 97 to 106: Scheme	688	(g) Transferee pendente lite: Rule 102	60
	(c) Application by decree-holder or auction-purchaser: Rule 97	689	(h) Appeal: Rule 103	60
	(d) Application by any other person: Rule 99	689	(i) Pendency of suit: Rule 104	69

	<i>Kinds of Property</i>	<i>Mode of Delivery</i>
(a)	<i>Movable property:</i>	
	(i) Movable property actually seized;	By delivering it to the purchaser. <sup>1</sup>
	Movable property in possession of any person other than the judgment-debtor;	By giving notice to the person in possession prohibiting him from delivering possession to any person except the purchaser. <sup>2</sup>
	Debt not secured by a negotiable instrument;	By an order prohibiting the creditor from receiving the debt or any interest thereon and the debtor from paying it to any person except the purchaser. <sup>3</sup>
	(iv) Share in a corporation;	By an order prohibiting <i>(a)</i> the shareholder from transferring it to any person except the purchaser, or receiving dividend or interest thereon; and <i>(b)</i> the officers of the corporation from permitting such transfer or making payment to any person except the purchaser. <sup>4</sup>
	(v) Negotiable instruments and shares;	By executing a document or making an endorsement in the prescribed form transferring in favour of the purchaser. <sup>5</sup>
	Any other property not otherwise provided for;	By an order vesting such property in the purchaser. <sup>6</sup>
(b)	<i>Immovable property:</i>	
	Immovable property occupied by the judgment-debtor or any person claiming under him;	By putting the purchaser in possession and removing any person who refuses to vacate it. <sup>7</sup>
	Immovable property occupied by a tenant or other person;	By affixing a copy of the sale certificate in a conspicuous place on the property and proclaiming to the occupant that the interest of the judgment-debtor has been transferred to the purchaser. <sup>8</sup>



[Part IV

3. RESISTANCE TO DELIVERY OF POSSESSION: RULES 97-103

(a) Nature and scope

Section 74 and Rules 97 to 103 of Order 21 deal with resistance to delivery of possession to decree-holders or auction-purchasers. The general scheme of these rules has been altered on the lines of the amendments made in Rules 58-63. These amendments carry out the recommendations made by the Law Commission.<sup>9</sup>

The important changes are: (i) the executing court should undertake a full and complete inquiry and not merely a summary inquiry; and

(ii) the orders passed in such inquiry are to be treated as decrees under Section 2(2).<sup>10</sup>

(b) Rules 97 to 106: Scheme

After the Amendment Act, 1976, scheme relating to resistance to delivery of possession of property to decree-holder or auction-purchaser is as under:

Rule 97 enables the decree-holder or auction-purchaser to apply to executing court if he is resisted or obstructed in obtaining possession of such property by "any person". The court on receipt of such application proceeds to adjudicate it. Rule 101 requires the court to make full- fledged inquiry and determine all questions relating to right, title and interest in the property arising between the parties to the proceeding or their representatives. The court will then pass an order upon such adjudication (Rule 98). Rule 99 permits any person other than the judgment-debtor who is dispossessed by the decree-holder or auction- purchaser to make an application to executing court complaining such dispossession. The court on receipt of such application proceeds to adjudicate it (Rule 100). Rule 103 declares that an order passed under Rule 98 or 100 would be deemed to be a decree. Rule 104 saves pending proceedings. Rule 102 clarifies that Rules 98 and 100 do not apply to transferee pendente lite (as the doctrine of lis pendens applies to such cases). Rule 105 empowers executing court to dismiss an application for default or to pass ex-parte order thereon. Rule 106 authorises executing court to set aside orders passed under Rule 105 on sufficient cause being shown for non-appearance at the time of hearing of application. Parliament has thus conferred very wide and extensive powers on the executing court and Rules 97 to 106 are in the nature of "complete Code" dealing with all issues relating to resistance or obstruction to delivery of possession to decree-holders or auction-purchasers.

<sup>9</sup> Law Commission's Fourteenth Report at pp. 453-54 and Law Commission's Twenty-seventh Report at pp. 208-09.

<sup>10</sup> Statement of Objects and Reasons; see also Noorduddin v. Dr. K.L. Anand, (1995) 1 SCC 242; Babulal v. Raj Kumar, (1996) 3 SCC 154: AIR 1996 SC 2050.

(c) Application by decree-holder or auction-purchaser: Rule 97 Where a decree-holder or auction-purchaser of immovable property is resisted or obstructed by any person in obtaining possession of such property, he may make an application to the court complaining of such resistance or obstruction.<sup>11</sup>

(d) Application by any other person: Rule 99

Where any person other than the judgment-debtor is dispossessed of immovable property by the decree-holder or auction-purchaser, he may make an application to the court complaining of such dispossession.<sup>12</sup>

(e) Hearing of application: Rules 105 and 106

Rules 105 and 106 are new. Rule 105 empowers the court to dismiss an application for default of appearance by the applicant or to pass ex parte order when the opposite party does not appear in spite of notice to him. Rule 106 enables the court to set aside orders passed under Rule 105, if the party adversely affected by such order shows sufficient cause for his non-appearance when the application was called on for hearing.

(f) Inquiry and adjudication: Section 74, Order 21 Rules 97-101

The court shall on receipt of an application under Rule 97 proceed to adjudicate upon the application in accordance with Rule 101.<sup>13</sup> The court will hold a full-fledged inquiry and determine all questions including the questions relating to right, title or interest in the property arising between the parties to the proceeding or their representatives.<sup>14</sup>

In accordance with such determination the court shall, either

(a) allow the application of the decree-holder or auction-purchaser directing that the applicant be put into possession of the property; or

(b) dismiss the application; or (c) pass such order as it deems fit.<sup>15</sup> Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall order the applicant to be put into possession of property and if the applicant is resisted or obstructed even thereafter in obtaining possession, the court may at the instance of the applicant order the obstructor to be detained in civil prison up to 30 days.<sup>16</sup>

11 R. 97(1).

12 R. 99.

13 R. 97(2).

14 R. 101.

15 R. 98(1).

16 S. 74, R. 98(2).

Similarly, on receipt of an application under Rule 99, the court shall proceed to adjudicate upon the application in accordance with Rule 101 and in accordance with such determination either (a) allow the application directing that the applicant be put into possession of the property; or (b) dismiss the application; or (c) pass such order as it deems fit.<sup>17</sup>

(g) Transferee pendente lite: Rule 102

Rule 102 provides that nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

The Explanation as added by the Amendment Act of 1976 now makes it clear that the "transfer" referred to in Rule 102 includes voluntary as well as involuntary transfer.<sup>18</sup>

(h) Appeal: Rule 103

An order passed under Rule 98 or 100 shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.<sup>19</sup>

(i) Pendency of suit: Rule 104

Rule 104 has been inserted to save pending suits in which orders under Rule 101 or 103 were passed. It enacts that every order under Rule 101 or 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceedings in which such order is made, if in such suit the party against whom the order is made has sought to establish a right which he claims to the present possession of the property.

<sup>17</sup> R. 100.

<sup>18</sup> R. 102; see also *Usha Sinha v. Dim Ram*, (2008) 7 SCC 144.

<sup>19</sup> R. 103.

# PART IV

## 12 Distribution of Assets

### SYNOPSIS

#### 1. GENERAL

SECTION 73 of the Code provides for rateable distribution of proceeds of execution sale among two or more decree-holders. It provides that where the assets are held by a court and before the receipt of such assets, several decree-holders have applied to the court for execution of a decree for payment of money against the same judgment-debtor and have not obtained satisfaction, the assets, after deducting the costs of realisation, shall be rateably distributed among them.1

It allows filing of a suit for refund of assets wrongly distributed.2

The provision also confers priority of Government debts over private debts.3

1 S. 73(1).

2 S. 74(2).

3 S. 74(3).

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## [PART IV

## 2. NATURE AND SCOPE

The rule enunciated in the section (Section 73) is a rule of procedure and provides cheap, speedy and expeditious mode of execution. It neither enlarges nor curtails substantive rights of the decree-holder.<sup>4</sup>

In *Shankar Sarup v. Mejo Mal*,<sup>5</sup> the Privy Council observed that the court distributing the assets is acting in administrative rather than in a judicial manner. It is merely a distributive agency and does not adjudicate rights between the parties.

## 3. ILLUSTRATIONS

Let us understand the principle by considering some cases on the point:

1. A obtains a decree against J in court C for Rs 10,000 and applies to the court for execution of his decree by attachment and sale of J's property. The property of J is attached. Thereafter B also obtains a decree against J in the same court for Rs 5000 and applies to that court for execution of his decree by attachment and sale of the same property attached in execution of A's decree. The property is thereafter sold by the court in execution of A's decree for Rs 7500. Under this section the said amount of Rs 7500 will be rateably distributed between both the decree-holders. A will be paid Rs 5000 and B will be paid Rs 2500.

2. In the above illustration, instead of A, the Government obtains a decree against J and the property is attached. Thereafter, B also obtains a decree against J. The property is sold in execution. The Government is entitled to recover its dues by claiming priority over B's dues. But if before the Government applies for payment, the amount is taken away by B, no priority can be claimed thereafter by Government.

## 4. OBJECT

The provision seeks to place all decree-holders on an equal footing regardless of priority in attachment or making of application for rateable distribution. It intends to secure equitable disposition of assets of the judgment-debtor among rival decree-holders without taking recourse to separate and independent proceedings.<sup>6</sup>

<sup>4</sup> *Hoti Lal v. Chatura Prasad*, AIR 1941 All 110; 1941 All LJ 137 (FB); *Himatmal Devchand v. Abdul Hakke*, AIR 1945 Bom 76; *Ramzan Khan v. Seth Hiralal*, AIR 1961 Raj 118; ILR 1960 Raj 1510; *Hasoon Arra v. Jawadoonnissa*, ILR (1879) 4 Cal 29; *Gobardhan Dass v. Jang Bahadur*, AIR 1926 Oudh 616.

<sup>5</sup> (1900-1901) 28 IA 203; ILR (1901) 23 All 313 (PC).

<sup>6</sup> *Supra*, n. 4; see also *Excise and Taxation Officer v. Gauri Mal Butali Trust*, AIR 1961 Punj 292; ILR 1960 Punj 809; *Commercial & Industrial Bank Ltd. v. Mir Sarfaraz Ali*, AIR 1956 Hyd 65; ILR 1956 Hyd 79 (FB); *Mohd. Jan v. Haji Abdul Sattar*, AIR 1971 Del 132.

The underlying object of this section is twofold; firstly, to prevent unnecessary multiplicity of execution proceedings; and secondly, to secure equitable distribution of property by placing all the decree- holders on the same footing.<sup>7</sup>

#### 5. CONDITIONS

To entitle a decree-holder to claim a rateable distribution under this section, the following conditions must exist:

- (1) The applicant for rateable distribution must have obtained a decree and applied for execution of the decree to the appropriate court;
- (2) Such application should have been made prior to the receipt of the assets by the court;
- (3) The assets of which a rateable distribution is claimed must be assets held by the court;
- (4) The attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money; and
- (5) Such decrees should have been obtained against the same judgment-debtor.<sup>8</sup>

#### 6. INTERPRETATION

Since Section 73 aims to secure equitable justice, it should be interpreted liberally. The court should consider the substance of the matter rather than the form of application.<sup>9</sup>

#### 7. ASSETS AVAILABLE FOR RATEABLE DISTRIBUTION: ILLUSTRATIVE CASES

The following assets were held to be available for rateable distribution under Section 73:

- (i) Sale proceeds realised from auction-sale;
- (ii) Sale proceeds in the hands of decree-holder-purchaser;
- (iii) Deposit made by a defaulting purchaser;
- (iv) Salary of government servant under attachment;
- (v) Money deposited by surety to release attachment;

<sup>7</sup> Bithal Das v. Nand Kishore, ILR (1901) 23 All 106 at p. 110; Hoti Lal v. Chatura Prasad, *supra*; Suraj Lal v. Krishna Das Padrama Raj Krishna Sugar Works Ltd., AIR 1961 All 371; Mohd. Jan v. Haji Abdul Sattar, AIR 1971 Del 132.

<sup>8</sup> PL. CT. PL. Palaniappa v. A.R.M.A.L.A. Muthu Veerappa, AIR 1966 Mad 406 at p. 407; V.T. Veerappa Chettiar v. P.S. Palaniappa Chettiar, AIR 1973 Mad 313 at p. 315; Biswambar v. Aparna Charan, AIR 1935 Cal 290 (FB); Kancharla Suryavathi v. Thota Suryakantham, AIR 1984 AP 277.

<sup>9</sup> Hoti Lal v. Chatura Prasad; Himatmal Devchand v. Abdul Hakke; Hasoon Arra v. Jawadoonnissa; Ramzan Khan v. Seth Hiralal; Gobardhan Dass v. Jang Bahadur; Bithal Das v. Nand Kishore, *supra*.

- (vi) Money paid in garnishee proceedings;
- (vii) Money paid in execution proceedings;
- (viii) Money paid under prohibitory order;
- (ix) Money paid to avoid attachment;
- (x) Money realised in execution of decree, etc.

8. ASSETS NOT AVAILABLE FOR RATEABLE DISTRIBUTION: ILLUSTRATIVE CASES

The following assets were, on the other hand, not held available for rateable distribution under this rule;

- (i) Deposit of earnest money;
- (ii) Money paid for removal of attachment;
- (iii) Money paid privately by judgment-debtor to decree-holder;
- (iv) Money paid by judgment-debtor to get himself relieved;
- (v) Money paid to decree-holder by surety;
- (vi) Money paid in court towards a decree against third party;
- (vii) Money paid as security;
- (viii) Money paid for a specific purpose, e.g. to avert arrest;
- (ix) Money deposited to set aside sale;
- (x) Money realised under attachment before judgment, etc.

9. COST OF REALISATION

The costs of realisation of assets should be paid in priority to other debts.<sup>10</sup>

10. MODE OF DISTRIBUTION

Rateable distribution should be made according to the amount due to each decree-holder at the time of the distribution of assets. Such order can be enforced by summary process of execution.<sup>11</sup>

11. SUIT FOR REFUND

Sub-section (2) of Section 73 enacts that a suit lies for refund of assets wrongly distributed. Hence, any person who is entitled to all or any of the assets which have been paid to a person not entitled to them, may sue for the refund of the assets.<sup>12</sup> The cause of action for such suit

- <sup>10</sup> Proviso (c) to S. 73(1); see also *M.L. Abdul Jabbar v. M.V. Venkata Sastri & Sons*, (1969) 1 SCC 573: AIR 1969 SC 1147.
- <sup>11</sup> *Coop. Society, Central Bank v. Ganpat*, AIR 1935 Nag 214; *Kesheorao Balwantrao v. Mulchand Shekulal*, AIR 1937 Nag 383.
- <sup>12</sup> *Shankar Sarup v. Mejo Mal*, (1900-1901) 28 IA 203: ILR (1901) 23 All 313 (PC); *K. Srinivasa v. Noor Mohd. Rowther*, AIR 1970 Mad 504.

arises when the amount is actually paid.<sup>13</sup> The period of limitation for such suit is three years from the date of payment.<sup>14</sup>

## 12. PRIORITY OF GOVERNMENT DEBTS

### (a) Nature and scope

Sub-section (3) of Section 73 confers priority of government debts over private debts. It is thus in the nature of a proviso to the rule in the main provision.<sup>15</sup> It recognizes the English Common Law doctrine that Crown debts are entitled to priority.<sup>16</sup>

### (b) Object

The basic object of priority of government debts is that as a Sovereign, the State should be able to discharge its primary functions, for which it must get necessary funds. If priority is not granted to Government, it may not be able to perform those functions.<sup>17</sup>

In *Excise and Taxation Officer v. Gauri Mal Butali Trust*<sup>18</sup>, the High Court of Punjab stated:

"The Common Law doctrine, that if the debts due to the Crown are of equal degree to the debts due to a private citizen, then the Crown must have priority against the private citizen, is a part of the law of this country. The preferential rights of the State in a democratic socialist republic are necessary, and *raison d'être* for such a privileged status given to the State, in view of its functions and duties, has to continue "<sup>19</sup> (emphasis supplied)

<sup>13</sup> *Ram Chandra v. Raghunath Saran*, AIR 1918 All 327; *Hart v. Tarn Prasanna Mukherji*, (1885) 11 Cal 718.

<sup>14</sup> Art. 62, Limitation Act, 1963; see also *Shankar Sarup v. Mejo Mal*, supra; *S.T. Pankajammal v. S. Sumbandamurthi Mudaliar*, AIR 1960 Mad 263; *Baiznath Lala v. Ramdas*, AIR 1915 Mad 405; *Sukh Raj Shah v. Pir Gauhar Shah*, AIR 1940 Pesh 36.

<sup>15</sup> *State of U.P. v. Kotak & Co.*, AIR 1973 All 230.

<sup>16</sup> *Henley & Co., In re*, (1878) 9 Ch D 469 (CA); *Builders Supply Corpn. v. Union of India*, AIR 1965 SC 1061: (1965) 2 SCR 289; *Collector of Aurangabad v. Central Bank of India*, AIR 1967 SC 1831: (1967) 3 SCR 585; *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40: AIR 1985 SC 407; *Kotak & Co. v. State of U.P.*, (1987) 1 SCC 455: AIR 1987 SC 738; *Lakshman Swarup v. Union of India*, (1997) 7 SCC 245. For detailed discussion, see, C.K. Thakker, *Code of Civil Procedure* (Lawyers' Edn.) Vol. I at pp. 1048-58.

<sup>17</sup> *Builders Supply Corpn. v. Union of India*, supra; *Murli Tahilram v. T. Asoomal & Co.*, AIR 1955 Cal 423: (1955) 59 CWN 701; *Bank of India v. John Bowman*, AIR 1955 Bom 305: ILR 1955 Bom 654; *Excise and Taxation Officer v. Gauri Mal Butali Trust*, AIR 1961 Punj 292: ILR 1960 Punj 809; *Collector v. Central Bank*, supra.

<sup>18</sup> AIR 1961 Punj 292: ILR 1960 Punj 809.

<sup>19</sup> *Ibid*, at p. 295 (AIR) (per Tek Chand, J.).



(c) Constitutional validity

The provision relating to priority of government debts cannot be held ultra vires, arbitrary, discriminatory or unreasonable, violative of Article 14 or Article 19 of the Constitution.<sup>20</sup>

(d) Procedure

The Government must make an application under Section 73(3) before the assets are paid over to the decree-holder.<sup>21</sup> If, however, the State does not choose to apply to the court for payment of its dues from the amount lying as deposit in the court and allows the amount to be taken away by some other decree-holder, it cannot, thereafter, make an application for payment of its dues from the sale proceeds since there is no amount left with the court to be paid to the State.<sup>22</sup> (emphasis supplied)

(e) Determination of claim

As soon as the question of rateable distribution is determined, the rights of the parties are crystallised. Nothing further remains to be done thereafter except to carry out the order for distribution made by the court. If the State lays its claim after an order is made by the court, it will be of no avail as the property has gone beyond the reach of the State, it having ceased to be the property of the judgment-debtor against whom the State had a claim. No question of priority can arise in that situation, the State having missed the bus.<sup>23</sup>

But if the State had already affected an attachment of the property, which was sold even before its sale, the State would be entitled to recover the sale proceeds from whoever has received the amount from the court by filing a suit.<sup>24</sup> The prior attachment fastens itself to the proceeds of a sale pursuant to the later attachment.<sup>25</sup> The prior attachment affected by the State similarly fastens itself to the sale proceeds taken away by the decree-holder. The State is, therefore, entitled to recover the amount from the decree-holder who has taken away the amount.<sup>26</sup>

<sup>20</sup> Murli Tahilram v. T. Asoomal & Co., AIR 1955 Cal 423 at p. 428-29: (1955) 59 CWN 701; New South Wales Taxation Commr. v. Palmer, 1907 AC 179 (PC); Builders Supply Corpn. v. Union of India, supra; Collector, Tiruchirapalli v. Trinity Bank, AIR 1962 Mad 59 (FB).

<sup>21</sup> State of U.P. v. Kotak & Co., AIR 1973 All 230; Somasundaram Mills (P) Ltd. v. Union of India, AIR 1970 Mad 190; Union of India v. Somasundram Mills (P) Ltd., (1985) 2 SCC 40: AIR 1985 SC 407; Basanta Kumar v. Panchu Gopal, AIR 1956 Cal 23.

<sup>22</sup> Union of India v. Somasundram Mills (P) Ltd., (1985) 2 SCC 40 at p. 42: AIR 1985 SC 407.

<sup>23</sup> Kotak & Co. v. State of U.P., (1987) 1 SCC 455 at p. 458: AIR 1987 SC 738.

<sup>24</sup> Union of India v. Somasundram Mills (P) Ltd., (1985) 2 SCC 40 at p. 42: AIR 1985 SC 407.

<sup>25</sup> Zumberlal v. Sitaram, AIR 1937 Nag 80 (per Vivian Bose, J.).

<sup>26</sup> Union of India v. Somasundram Mills (P) Ltd., (1985) 2 SCC 40 at p. 43: AIR 1985 SC 407 at p. 409.

(f)      Commercial activities of Government

The modern State is no more a "police State". It has increased its powers and functions. It has enlarged its activities. It has chosen to engage itself in acquiring and holding property, in doing business, in running commercial undertakings, in providing transport and in a thousand other ways in doing the work which in the recent past was done by private citizens. In such activities, the doctrine of priority of Crown debts should not be invoked.<sup>27</sup>

(g)      Waiver

Though commencing as an attribute of monarchical Government, the doctrine of Crown prerogative has been accepted in democratic countries as well. It is, however, open to the State to divest itself of that right by waiver. Similarly, it may be abrogated by a statute.<sup>28</sup>

(h)      Conclusions

It is submitted that the following observations of Leach, C.J. in *Manickam v. ITO, Madras*<sup>29</sup> lay down correct law on the point. Speaking for the Full Bench of the High Court of Madras, the learned Chief Justice stated:

"It cannot be denied that the Crown had the right of priority in payment of debts due to it. It is a right which has always existed and has been repeatedly recognised in India. If the Crown is entitled as it is, to prior payment over all unsecured creditors, the position of secured creditor does not rise. I see no reason why the Crown should not be allowed to apply to the Court for an order directing its debt to be paid out of moneys in Court belonging to the debtor, without having to file a suit. Of course, it must be debt which is not disputed or is indisputable."<sup>30</sup>

13.      APPEAL

Prior to the amendment of the definition of decree in Section 2(2) by the Amendment Act of 1976, an order made under this Section was appealable as a "decree" where the conditions of Section 47 were satisfied.<sup>31</sup> However, after deletion of the word and figure "Section 47"

<sup>27</sup>      *Murli Tahilram v. T. Asoomal & Co.*, AIR 1955 Cal 423 at p. 429: (1955) 59 CWN 701.

<sup>28</sup>      *Excise and Taxation Officer v. Gauri Mal Butali Trust*, AIR 1961 Punj 292: ILR 1960 Punj 809.

<sup>29</sup>      AIR 1938 Mad 360: ILR 1938 Mad 744: (1938) 1 Mad LJ 351 (FB).

<sup>30</sup>      *Ibid*, at p. 363 (AIR).

<sup>31</sup>      *Hurmoozi Begum v. Ayasha*, AIR 1921 Pat 401; *Shib Das v. Bulaki Mal & Sons*, AIR 1927 Lah 100; *Bishen Das v. Tulsi Shah & Sons*, AIR 1935 Lah 302; *Satyendra Nath v. Bibhuti Bhusan*, AIR 1963 Cal 104; *Lalchand v. Ramdayal*, AIR 1939 Bom 112; *Dwarkadas v. Jadab Chandra*, AIR 1924 Cal 801; *Union of India v. Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40: AIR 1985 SC 407.

from the definition of "decree" in Section 2(2) by the Amendment Act of 1976, the order passed under Section 73 is not appealable as a decree.<sup>32</sup>

14. REVISION

Since after the Amendment Act of 1976, an order under Section 73 does not amount to a decree and is not appealable, a revision application can be filed against the said order provided the conditions laid down in Section 115 are satisfied.<sup>33</sup>

15. CONCLUDING REMARKS

From the above discussion, it clearly appears that Order 21 of the Code of Civil Procedure contains elaborate and exhaustive provisions for execution of decrees and orders, takes care of different types of situations and provides effective remedies not only to the decree-holders and judgment-debtors but also to objectors and third parties. In exceptional cases, where provisions are rendered ineffective or incapable of giving relief to an aggrieved party, he can file a suit in a civil court.

The discussion can well be concluded with the following observations of Sharma, J. (as he then was) in *Ghan Shyam Das v. Anant Kumar Sinha*:<sup>34</sup>

"The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the judge being entrusted exclusively with administration of justice, is expected to do better."<sup>35</sup>

<sup>32</sup> For detailed discussion, see *supra*, Pt. I, Chap. 2.

<sup>33</sup> *Major S. S. Khanna v. Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409; *Suraj Lal v. Krishna Das Padrama Raj Krishna Sugar Works Ltd.*, AIR 1961 All 371; *Karpaga Nidhi Ltd. v. Vania Vilasa Nidhi Ltd.*, AIR 1925 Mad 587; *Har Narain v. Bird & Co.*, AIR 1936 Oudh 132; *Balakrishna Udayar v. Vasudeva Aiyar*, AIR 1917 PC 71: (1916-17) 44 IA 261. For detailed discussion, see *supra*, Pt. III, Chap. 9.

<sup>34</sup> (1991) 4 SCC 379: AIR 1991 SC 2251.

<sup>35</sup> *Ibid*, at p. 383 (SCC): at p. 2254 (AIR); see also *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513: AIR 1990 SC 1828; *Sardar Govindrao v. Devi Sahai*, (1982) 1 SCC 237: AIR 1982 SC 989; *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608: (1967) 2 SCR 77.

## Part Five Miscellaneous



# PART V

## 1 Transfer of Cases

### SYNOPSIS

#### 1. GENERAL

AS A GENERAL rule, a plaintiff as arbiter litis or dominus litis has a right to choose his own forum where a suit can be filed in more than one court. Normally, this right of the plaintiff cannot be curtailed, controlled or interfered with.<sup>1</sup> But the said right is controlled by the power vested in superior courts to transfer a case pending in one inferior court to another or to recall the case to itself for hearing and disposal.

<sup>1</sup> Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 at p. 668; AIR 1990 SC 1480 at p. 1519; Arvee Industries v. Ratan Lal, (1977) 4 SCC 363 at p. 365: AIR 1977 SC 2429 at p. 2431; Hazara Singh v. State of Punjab, AIR 1965 SC 720: (1964) 4 SCR 1; Union of India v. Shiromani Gurudwara Prabandhak Committee, (1986) 3 SCC 600: AIR 1986 SC 186; Subramaniam Swamy (Dr.) v. Ramakrishna Hegde, (1990) 1 SCC 4: AIR 1990 SC 113; Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167 at p. 169: AIR 1979 SC 468 at p. 469; Kulwinder Kaur v. Kandi Friends Education Trust, (2008) 3 SCC 659: AIR 2008 SC 1333; Durgesh Sharma v. Jayshree, (2008) 9 SCC 648.

1	General	70	1	Calling for remarks	7
.		1	3		0
2	Object	70	1	Application for transfer after	7
3	Nature and scope	2	4	hearing	7
4	Who may apply?: Sections 22 & 23	70	1	Recording of reasons	0
5	Conditions	2	5	Transfer on administrative grounds 709	0
6	To which court application lies	70	6	Transfer: Effect	7
7	Application: Form	3	7	Costs	0
8	Grounds	70	1	Compensation	7
	(a) General rule	4	9	Appeal	0
	(b) Considerations	70	0	Revision	0
	(c) Approach of court	4	2	Transfer allowed: Illustrative cases	7
9	Notice	70	2	Transfer not allowed: Illustrative	1
		5	3	cases	7
1	Hearing of objections	70			1
0	Suo motu transfer	6	2	Concluding remarks	7
1		70	4		1
1	Power and duty of court	6			
2		6			

Sections 22 to 25 enact the law as regards transfer and withdrawal of suits, appeals and other proceedings from one court to another. Sections 22 and 23 enable a defendant to apply for transfer of a suit while Sections 24 and 25 empower certain courts to transfer any suit, appeal or other proceeding either on an application made by any party or by the court suo motu.<sup>2</sup> The provision of Sections 22-25 are exhaustive.<sup>3</sup>

## 2. OBJECT

The primary and paramount object of every procedural law is to facilitate justice. A fair and an impartial trial is a sine qua non and an essential requirement of dispensation of justice. Justice can only be achieved if the court deals with both the parties present before it equally, impartially and even-handedly. Hence, though a plaintiff has the right to choose his own forum, with a view to administer justice fairly, impartially, and even-handedly, a court may transfer a case from one court to some other court.<sup>4</sup>

## 3. NATURE AND SCOPE

Section 22 allows the defendant to make an application for transfer of a suit, whereas Section 23 indicates the court to which such an application can be made. Section 24 embodies general power of transfer of any suit, appeal or other proceeding at any stage either on an application of any party or by a court of its own motion. This power, however, does not authorise a High Court to transfer any suit, appeal or other proceeding from a court subordinate to that High Court to a court not subordinate to that High Court.<sup>5</sup> Section 25 confers very wide, plenary and extensive powers on the Supreme Court to transfer any suit, appeal or other proceeding from one High Court to another High Court or from one civil court in one State to another civil court in another State.<sup>6</sup>

## 4. WHO MAY APPLY?: SECTIONS 22 & 23

Sections 22 and 23 of the Code deal with the right of a defendant to apply for the transfer of a suit. Where the plaintiff has the choice of two or more courts in which he may institute a suit, a defendant, after notice to the other side, may at the earliest opportunity apply to a court to have the suit transferred from the court in which it is filed to another

<sup>2</sup> For detailed discussion, see "Suo motu transfer", *infra*.

<sup>3</sup> *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

<sup>4</sup> *Supra*, n. 1; see also *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676: AIR 1992 SC 1133.

<sup>5</sup> *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

<sup>6</sup> *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

court.<sup>7</sup> In other cases, such application may be filed by any party to the suit, appeal or other proceeding.<sup>8</sup>

## 5. CONDITIONS

Before transfer is ordered under Section 22, two conditions must be satisfied, namely, (i) the application must be made at the earliest possible opportunity and in all cases, where issues are settled, at or before the settlement of issues; and (ii) notice must be given to the other side. The provision as to notice is mandatory. Such notice may be given by the party making an application or by the court.<sup>9</sup>

## 6. TO WHICH COURT APPLICATION LIES

The Code specifies the court to which an application for transfer can be made:

- (1) Where several courts having jurisdiction are subordinate to the same appellate court, an application for transfer can be made to that appellate court;<sup>10</sup>
- (2) Where such courts are subordinate to the same High Court, an application can be made to that High Court;<sup>11</sup> and
- (3) Where such courts are subordinate to different High Courts, an application can be made to the High Court within the local limits of whose jurisdiction, the court in which the suit is instituted is situate;<sup>12</sup>
- (4) The Supreme Court may transfer any suit, appeal or other proceeding from one High Court to another High Court, or from one Civil Court in the State to another Civil Court in any other State.<sup>13</sup>

## 7. APPLICATION: FORM

An application for transfer may be made by a party seeking transfer of a case by filing a petition supported by an affidavit setting forth the grounds of transfer. In an appropriate case, however, an affidavit

<sup>7</sup> Ss. 22 & 23. See also *Manohar Lal v. Seth Hirmlnl*, AIR 1962 SC 527 at p. 536; 1962 Supp (1) SCR 450; *Jagatguru Shri Shankaracharya v. Ramji Tripathi*, AIR 1979 MP 50 at p. 56; *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42 at p. 44; (1974) 1 Del 135; *Shri Seetha Mahalakshmi Rice & Groundnut Oil Mills v. Rajesh Trading Co.*, AIR 1983 Bom 486 at p. 487.

<sup>8</sup> Ss. 24, 25. See also *Lakshmi Narain v. ADJ*, AIR 1964 SC 489; (1964) 1 SCR 362; *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42.

<sup>9</sup> *Manjari Sen v. Nirupam Sen*, AIR 1975 Del 42.

<sup>10</sup> S. 23(1).

<sup>11</sup> S. 23(2).

<sup>12</sup> S. 23(3). This provision, however, has to be read keeping in view a recent decision of the Supreme Court in *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

<sup>13</sup> S. 25; see also, Art. 139-A, Constitution of India; *Durgesh Sharma v. Jayshree* (ibid.).



in support of the application may be dispensed with.<sup>14</sup> But no specific form is prescribed by the Code.

## 8. GROUNDS

### (a) General rule

The plaintiff is dominus litis and as such he has the right to choose his own forum and, normally, this right of the plaintiff cannot be interfered with or curtailed either by the opposite party or by the court.<sup>15</sup>

### (b) Considerations

A court may transfer any suit, appeal or other proceeding keeping in view relevant and germane considerations. There is unanimity of opinion that balance of convenience is of prime consideration for transfer of a suit. The expression "balance of convenience" has inspired profound legal thought and has acquired the gloss of many judicial interpretations. Restated in simple terms it is a question of fact in each case. Balance of convenience is neither the convenience of the plaintiff alone nor of the defendant alone but of both. In determining the balance of convenience for the trial of a suit, the court has to take into consideration (1) convenience or inconvenience of the plaintiff and the right of the plaintiff to choose his own forum; (2) convenience or inconvenience of the defendant; (3) convenience or inconvenience of the witnesses required for a proper trial of the suit; (4) convenience or inconvenience of a particular place of trial having regard to the nature of the evidence on the main points involved in the suit and also having regard to the doctrine of "forum conveniens" and (5) nature of issues in the suit.<sup>16</sup>

<sup>14</sup> Bishen Kaur v. Amar Nath, (1912) 14 IC 561 (Lah); Hardit Singh (Dr.) v. Bhagat Jaswant Singh, AIR 1964 Punj 277.

<sup>15</sup> Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 at p. 668: AIR 1990 SC 1480 at p. 1519; Arvee Industries v. Ratan Lal, (1977) 4 SCC 363 at p. 365: AIR 1977 SC 2429 at p. 2431; Hazara Singh v. State of Punjab, AIR 1965 SC 720: (1964) 4 SCR 1; Union of India v. Shiromani Gurdwara Prabandhak Committee, (1986) 3 SCC 600: AIR 1986 SC 186; Subramaniam Swamy (Dr.) v. Ramakrishna Hegde, (1990) 1 SCC 4: AIR 1990 SC 113; Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167 at p. 169: AIR 1979 SC 468 at p. 469; Pushpa Devi v. Jai Narain, (1992) 2 SCC 676: AIR 1992 SC 1133; Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392: AIR 1995 SC 1219; Kulwinder Kaur v. Kandi Friends Education Trust, (2008) 3 SCC 659: AIR 2008 SC 1333.

<sup>16</sup> Baburam Agarwalla v. Jamunadas Ramji & Co., AIR 1951 Cal 239 at p. 242; Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Guda Vijayalakshmi v. Guda Ramachandra, (1981) 2 SCC 646 at p. 650: AIR 1981 SC 1143 at pp. 1145-46; Murray & Co. (P) Ltd. v. Madanlal Poddar, 1994 Supp (3) SCC 696; Baselius Mar Thoma Mathews v. Paulose Mar Athanasius, (1980) 1 SCC 601 at pp. 603-04: AIR 1979 SC 1909 at p. 1910; Union of India v. Shiromani Gurdwara Prabandhak Committee, (1986) 3 SCC 600 at p. 603: AIR 1986 SC 186; Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167

## (c) Approach of court

The jurisdiction under this section must be exercised with extreme care, caution and circumspection. The search should be for justice and the court must be satisfied that justice could more likely be done between the parties by refusing to allow the plaintiff to continue his suit in the forum of his own choice. A mere balance of convenience in favour of the proceedings in another court, albeit a material consideration, may not always be a sure criterion justifying transfer,<sup>17</sup>

In this jurisdiction, the approach of the court must be pragmatic, not theoretical. The amplitude of the expression "expedient in the interest of justice" furnishes a general guideline for the exercise of the power. Whether it is expedient or desirable in the interest of justice to transfer a case to another court is a question which depends upon the facts of each case.<sup>18</sup> The paramount consideration is the interest of justice and when the ends of justice demand transfer of a case, the court should not hesitate to act.<sup>19</sup>

## 9. NOTICE

When an application for transfer is made under Section 22, notice of such application must be given by the defendant to the other side. The words "after notice to the other parties" indicate that notice must be given prior to the making of application.<sup>20</sup> When an application is made by any party to the proceeding under Section 24, notice must be given by the court to the opposite party before making an order of transfer.

In *Manjari Sen v. Nirupam Sen*<sup>21</sup>, it was also held by the High Court of Delhi that requirement of prior notice cannot be regarded as mandatory unless it has caused prejudice to the other side.

It is, however, submitted that requirement of giving notice must be held to be mandatory. And an order of transfer without notice to the

at p. 171: AIR 1979 SC 468; *G.X. Francis v. Banke Bihari*, AIR 1958 SC 309:1958 Cri LJ 569; *Kulwinder Kaur v. Kandi Friends Education Trust*, supra.

<sup>17</sup> *Indian Overseas Bank v. Chemical Construction Co.*, (1979) 4 SCC 358: AIR 1979 SC 1514.

<sup>18</sup> *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167: AIR 1979 SC 468.

<sup>19</sup> *Ibid*, see also *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600: AIR 1986 SC 186; *Subramaniam Swamy (Dr.) v. Ramakrishna Hegde*, (1990) 1 SCC 4: AIR 1990 SC 113.

<sup>20</sup> *Anjula v. Milan Kumar*, AIR 1981 All 178 at pp. 183-84; *Baijnath Prasad v. Dasrath Prasad*, AIR 1958 Pat 9: ILR 36 Pat 376; *V.S.A. Krishna Mudaliar v. V.S.A. Sabapathi Mudaliar*, AIR 1945 Mad 69 at p. 70: (1945) 1 Mad LJ 14: ILR 1945 Mad 389 (FB).

<sup>21</sup> AIR 1975 Del 42: (1974) 1 Del 135; see also *Anjula v. Milan Kumar*, AIR 1981 All 178.

opposite party must be held to be without jurisdiction and violative of the principles of natural justice and fair play.<sup>22</sup>

But it may also be stated that where a court transfers a case suo motu, non issuance of notice will not make the order non est.<sup>23</sup>

#### 10. HEARING OF OBJECTIONS

The primary object of issuing notice to the opposite party is to afford him an opportunity of raising objections and to give hearing against the proposed action of transfer. The court must decide the application of transfer after hearing the objections of the opposite party.<sup>24</sup>

#### 11. SUO MOTU TRANSFER

Over and above an application by a party to the suit, appeal or other proceeding, a High Court or a District Court has power to transfer a suit, appeal or other proceeding even suo motu.<sup>25</sup>

#### 12. POWER AND DUTY OF COURT

The power to transfer a case is at the discretion of the court. This discretion, like every other discretion, has to be exercised judicially, keeping in mind that the law confers a right on the person initiating the proceedings to choose one of the several forums available to him and, as arbiter litis, he has the right to select his own forum. Normally, such a right should not be interfered with or curtailed.

But it cannot reasonably be contended that the plaintiff making an improper choice of forum is immune and his choice cannot be questioned. A court would be justified in inquiring into the circumstances to ascertain whether the right was exercised by the plaintiff mala fide or for some ulterior motive or in abuse of his position as dominus litis. Exercise of discretion being dependent on facts and circumstances of each case precedents would not be of much assistance.<sup>26</sup> (emphasis supplied)

The power of transfer must be exercised with extreme caution and circumspection and in the interests of justice. The court while deciding the question must bear in mind two conflicting interests; (i) as a

<sup>22</sup> M.S. Nally Bharat Engg. Co. Ltd. v. State of Bihar, (1990) 2 SCC 48: (1990) 2 LLJ 211.

<sup>23</sup> Baijnath Prasad v. Dasrath Prasad, AIR 1958 Pat 9: ILR 36 Pat 376 (para 4); see also infra, "Suo motu transfer".

<sup>24</sup> Furrunjote v. Deon Pandey, (1878) 2 Cal CR 352; Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50:1979 MP LJ 305:1979 Jab LJ 167.

<sup>25</sup> Kulwinder Kaur v. Kandi Friends Education Trust, (2008) 3 SCC 659: AIR 2008 SC 1333; Annamalai Chettiar v. Ramanathan Chettiar, AIR 1936 Mad 55 (FB); B. Sundera Gowda v. Martin D'Souza, AIR 1989 Kant 207; Nirmal Singh v. State of Haryana, (1996) 6 SCC 126: AIR 1996 SC 2759.

<sup>26</sup> Sourindra Narayan v. Rabindra Narayan, AIR 1987Ori 47 (49); Shri Seetha Mahalakshmi Rice & Groundnut Oil Mills v. Rajesh Trading Co., AIR 1983 Bom 486; Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50.

dominus litis the right of the plaintiff to choose his own forum; and (ii) the power and duty of the court to assure fair trial and dispensation of justice. The paramount consideration would be the requirement of justice. And if the ends of justice demand transfer of a case, the court should not hesitate to act. The search must be for justice and the court must be satisfied that justice could more likely to be done between the parties by refusing to allow the plaintiff to continue his suit in the forum of his own choice. The burden of establishing sufficient grounds for transfer is on the applicant. The approach of the court should be pragmatic and not theoretical and the totality of facts and circumstances should be considered.<sup>27</sup>

Again, while dealing with an application or for prayer of transfer, the court should not enter into merits of the matter as it may affect the final out come of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect application of mind by the court and the circumstances which weighed in taking the action. Power of transfer cannot be exercised ipse dixit.<sup>28</sup>

### 13. CALLING FOR REMARKS

When an application for transfer is made by a party and allegations of bias, prejudice or partiality have been levelled against the Presiding Officer of a Court, ordinarily remarks of the judge concerned should be called for before making an order of transfer. In such report, the Presiding Officer will give his version in respect of averments and allegations made against him. But no remarks should be called for, nor should the Presiding Officer of the Court try to justify the correctness of the order passed by him.<sup>29</sup>

In *Kaushalya Devi v. Mool Raj*<sup>30</sup>, in a transfer application of the accused, the Delhi Administration filed an affidavit of the Magistrate against whom the transfer application was made. Over and above, denying the allegations made by the accused, the Magistrate tried to justify his action on merits. The Supreme Court deprecated the action.

Showing concern over the "partisan role" of the Magistrate and deprecating his action, the Supreme Court stated:

<sup>27</sup> *Arvee Industries v. Ratan Lal*, (1977) 4 SCC 363 at p. 365: AIR 1977 SC 2429 at p. 2431; *Laxmibai Gulabrao v. Martand Daulatrao*, (1972) 74 Bom LR 773; *Hazara Singh v. State of Punjab*, AIR 1965 SC 720: (1964) 4 SCR 1; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, (1986) 3 SCC 600: AIR 1986 SC 186; *Subramaniam Swamy (Dr.) v. Ramakrishan Hegde*, (1990) 1 SCC 4: AIR 1990 SC 113; *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167 at p. 169: AIR 1979 SC 468 at p. 469; *Baselius Mar Thoma Mathews v. Paulose Mar Athanasius*, (1980) 1 SCC 601 at p. 604: AIR 1979 SC 1909 at p. 1910.

<sup>28</sup> *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659: AIR 2008 SC 1333.

<sup>29</sup> *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676 at p. 678: AIR 1992 SC 1133.

<sup>30</sup> (1964) 1 Cri LJ 233: (1964) 4 SCR 884.

"A little reflection would have satisfied him of the gross impropriety of his action in making an affidavit like the present. It is an elementary principle of the rule of law that judges who preside over trials, civil or criminal, never enter the arena."<sup>31</sup> (emphasis supplied)

#### 14. APPLICATION FOR TRANSFER AFTER HEARING

It is, no doubt, true that an application for a transfer can be made "at any stage".<sup>32</sup> At the same time, however, as the discretionary power of transfer of a suit, appeal or other proceeding requires to be exercised in the interests of justice, the court may refuse such prayer if it is made mala fide or with a view to obviate an adverse decision after the hearing is over.

In *Gujarat Electricity Board v. Atmaram Sungomal Poshani*<sup>33</sup>, A, an employee of the Electricity Board was transferred, but he did not resume duty at the transferred place. Disciplinary proceedings were, therefore, taken and his services were terminated. A challenged that order by filing a petition which was allowed by the High Court. The Board approached the Supreme Court. The appeal was posted for hearing and the advocates of both the sides were "fully heard". The Court was satisfied that the High Court was in error in granting relief to A. That view was expressed by the judges constituting the Bench and a suggestion was made as to whether A would settle the matter. The matter was adjourned. When again the appeal was posted for hearing, a new advocate stepped in to argue the matter. The Court refused to hear him. Then an application was made by A for transfer of the case to some other Bench expressing his "no confidence" in the Bench which had heard the matter. Describing the prayer as "unusual, uncalled for and unjustified", the Court turned down the request.

#### 15. RECORDING OF REASONS

It is desirable to record reasons in support of an order of transfer.<sup>34</sup> Though omission to record reasons may not make the order ipso facto bad, in a given case, the superior court may not approve such order on the ground that there was non-application of mind by the court before making such order.<sup>35</sup>

<sup>31</sup> Ibid, at p. 237 (Cri LJ).

<sup>32</sup> S. 24(1).

<sup>33</sup> (1989) 2 SCC 602 at p. 606: AIR 1989 SC 1433 at p. 1436: (1989) 10 ATC 396.

<sup>34</sup> *People's Insurance Co. Ltd. v. Sardul Singh*, AIR 1961 Punj 87; *Bishen Kaur v. Amar Nath*, (1912) 14 IC 561 (Lah). *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659.

<sup>35</sup> *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659: AIR 2008 SC 1333.

16. TRANSFER ON ADMINISTRATIVE GROUNDS

Irrespective of the provisions of the Code, a High Court has power to transfer a suit, appeal or other proceeding on administrative grounds also.<sup>36</sup>

17. TRANSFER: EFFECT

Where a suit, appeal or other proceeding is transferred from one court to another, such transfer is not limited to those proceedings. All ancillary and incidental proceedings which may arise out of such suit, appeal, etc. would also be dealt with and decided by transferee court.<sup>37</sup>

18. COSTS

Where an application for transfer is dismissed as frivolous, vexatious or mala fide the court has power to award substantial and exemplary costs to the opposite party.<sup>38</sup>

19. COMPENSATION

The Code states that where an application for transfer is dismissed and the Supreme Court is of the opinion that the application was frivolous or vexatious, it may order the applicant to pay compensation to the opponent as it may consider appropriate in the circumstances of the case.<sup>39</sup> Such sum, however, cannot exceed two thousand rupees.<sup>40</sup>

20. APPEAL

An order of transfer neither affects the merits of the controversy between the parties to the suit, nor terminates or disposes of the suit on any ground and, therefore, an order of transfer is not appealable<sup>41</sup> Similarly, an order of a Single Judge of a High Court transferring a suit is not a "judgment" within the meaning of Letters Patent and, therefore, no letters patent appeal lies against such order.<sup>42</sup>

<sup>36</sup> Ranbir Yadav v. State of Bihar, (1995) 4 SCC 392: AIR 1995 SC 1219; Ritz Hotels v. State, AIR 1955 Kant 149; Kanhu Charan v. Banambar Pradhan, AIR 1986 Ori 213.

<sup>37</sup> Mineral Development Ltd. v. State of Bihar, AIR 1962 Pat 443; Kahan Chand v. Faqir Chand, AIR 1968 P&H 374; Sk. Abu Bakkar v. Parimal Prova Sarkar, AIR 1962 Cal 519.

<sup>38</sup> S. 35-A; see also Kuar Maheshwari Prasad v. Bhaiya Rudra Pratap, AIR 1945 Oudh 233.

<sup>39</sup> S. 25(4).

<sup>40</sup> S. 35-A; see also Kuar Maheshwari Prasad v. Bhaiya Rudra Pratap, AIR 1945 Oudh 233.

<sup>41</sup> Asrumati Debi v. Rupendra Deb, AIR 1953 SC 198 at pp. 200-01: 1953 SCR 1159; Radhey Shyam v. Shyam Behari, (1970) 2 SCC 405: AIR 1971 SC 2337; Shanti Kumar v. Home Insurance Co. of New York, (1974) 2 SCC 387 at p. 389: AIR 1974 SC 1719 at p. 1720.

<sup>42</sup> Asrumati Debi v. Rupendra Deb, AIR 1953 SC 198 at pp. 200-01: 1953 SCR 1159; Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50; Shah Babulal v. Jayaben D. Kania, (1981) 4 SCC 8: AIR 1981 SC 1786.

## 21. REVISION

An order of transfer of a suit, appeal or other proceeding can be said to be a "case decided" within the meaning of Section 115 of the Code and, hence, is open to revision if the conditions laid down in that section are satisfied.<sup>43</sup> Where a case is transferred, ordinarily, a High Court will not entertain a revision petition. But if an order of transfer is passed without issuing a notice to the other side, it is tainted with material irregularity and can be set aside in revision.<sup>44</sup> Similarly, if a court refuses to transfer a suit, appeal or other proceeding on an erroneous view of law that it has no such power, there is failure to exercise jurisdiction vested in the court and the High Court will interfere in revision.<sup>45</sup>

## 22. TRANSFER ALLOWED: ILLUSTRATIVE CASES

The following have been held to be sufficient grounds for transfer:

(i) reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending;<sup>46</sup> (ii) to avoid multiplicity of proceedings or conflicting decisions;<sup>47</sup> (iii) where the judge is interested in one party or prejudiced against the other;<sup>48</sup> (iv) where common questions of fact and law arise between the parties in two suits;<sup>49</sup> (v) where balance of convenience requires, e.g. where the property is situate or parties or their witnesses reside; or the account books are kept, etc.;<sup>50</sup> (vi) where two persons have filed suits against

<sup>43</sup> Kesho Das v. N.C. Goyal Co., AIR 1938 Lah 95; Fatema Begam v. Imdad Ali, AIR 1920 All 249; A.S. De Mello v. New Victoria Mills Co. Ltd., AIR 1926 All 17; M.S. Nally Bharat Engg. Co. Ltd. v. State of Bihar, (1990) 2 SCC 48; (1990) 2 LLJ 211.

<sup>44</sup> Dasarath Prasad v. Baijnath Prasad, AIR 1960 Pat 285.

<sup>45</sup> Dasarath Prasad v. Baijnath Prasad, supra; see also infra, Chap. 9.

<sup>46</sup> Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50; Manak Lal v. Dr. Prem Chand, AIR 1957 SC 425 at p. 429; Kanda v. Harish Kumar, (1993) 1 Raj LR 527; Kiran Ramanlal v. Gulam Kader, 1995 Supp (2) SCC 707; see also, C.K. Thakker, Lectures on Administrative Law (2008) Lecture VI.

<sup>47</sup> Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Guda Vijayalakshmi v. Guda Ramachandra, (1981) 2 SCC 650 at p. 650: AIR 1981 SC 1143 at pp. 1145-46.

<sup>48</sup> Cottle v. Cottle, (1939) 2 All ER 535; Gujarat Electricity Board v. Atmaram Sungomal Poshani, (1989) 2 SCC 602: AIR 1989 SC 1433; see also, C.K. Thakker, Lectures on Administrative Law (2008) Lecture VI.

<sup>49</sup> Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50; Bihar State Food & Supplies Corpn. Ltd. v. Godrej Soap (P) Ltd., (1997) 1 SCC 748; Vatsa Industries Ltd. v. Shankerlal Saraf (1997) 10 SCC 333; Seema Shrinidhi v. Praveen Kumar, (1997) 8 SCC 712; Shakuntala Modi v. Om Prakash, (1991) 2 SCC 706: AIR 1991 SC 1104; Rekha Aggarwal v. Sunil Aggarwal, 1992 Supp (1) SCC 438 (I).

<sup>50</sup> Arvee Industries v. Ratan Lal, (1977) 4 SCC 363: AIR 1977 SC 2429; Jagatguru Shri Shankaracharya v. Ramji Tripathi, AIR 1979 MP 50 at p. 56; Beni Shankar v. Surya Kant, (1981) 3 SCC 627: AIR 1982 SC 52; Subramaniam Swamy (Dr.) v. Ramakrishna Hegde, (1990)

each other in different courts on the same cause of action;<sup>51</sup> (vii) where transfer avoids delay and unnecessary expenses;<sup>52</sup> (viii) where important questions of law are involved; or a considerable section of the public is interested in the litigation;<sup>53</sup> (ix) where transfer prevents abuse of the process of court;<sup>54</sup> (x) where transfer is necessary for only one adjudication of a particular controversy,<sup>55</sup> etc.

23. TRANSFER NOT ALLOWED: ILLUSTRATIVE CASES The following, on the other hand, have been held not to be sufficient grounds for transfer: (i) mere fact that the opposite party is a man of influence in the locality;<sup>56</sup> (ii) mere fact that the court is situate at a long distance from the residence of the applicant;<sup>57</sup> (iii) mere fact that the presiding officer belongs to a community rival to that of the applicant;<sup>58</sup> (iv) mere fact that the judge has decided a similar point in a previous case;<sup>59</sup> (v) mere balance of convenience to the applicant;<sup>60</sup> (vi) refusal to grant adjournment;<sup>61</sup> (vii) prejudice of a judge against a party's pleader not likely to affect the party;<sup>62</sup> (viii) judge making adverse remarks regarding merits of the case;<sup>63</sup> (ix) allegation of apprehension

- 1 SCC 4: AIR 1990 SC 113; Murray & Co. (P) Ltd. v. Madanlal Poddar, 1994 Supp (3) SCC 696; Jaishree Banerjee v. Abhirup Banerjee, (1997) 11 SCC 107.
- 51 G.M. Rajulu v. M. Govindan Nair, AIR 1938 Mad 745; Manjari Sen v. Nirupam Sen, AIR 1975 Del 42.
- 52 Baselius Mar Thoma Mathews v. Paulose Mar Athanasius, (1980) 1 SCC 601 at pp. 603-04: AIR 1979 SC 1909 at p. 1910; Union of India v. Shiromani Gurdwara Prabandhak Committee, (1986) 3 SCC 600: AIR 1986 SC 186; Shiv Kumari v. Ramajor Shitla Prasad, (1997) 2 SCC 452: AIR 1997 SC 1036.
- 53 Arvee Industries v. Ratan Lal, (1977) 4 SCC 363: AIR 1977 SC 2429; SBI v. Sakow Industries Faridabad (P) Ltd., AIR 1976 P&H 321.
- 54 Union of India v. Shiromani Gurdwara Prabandhak Committee, (1986) 3 SCC 600: AIR 1986 SC 186; Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167: AIR 1979 SC 468; G. X. Francis v. Banke Bihari, AIR 1958 SC 309:1958 Cri LJ 569.
- 55 Ibid, Kulwinder Kaur v. Kandi Friends Education Trust, (2008) 3 SCC 659.
- 56 Subramaniam Swamy (Dr) v. Ramakrishna Hegde, (1990) 1 SCC 4: AIR 1990 SC 113; Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167: AIR 1979 SC 468.
- 57 Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 (536): 1962 Supp (1) SCR 450; Arvee Industries v. Ratan Lal, (1977) 4 SCC 363: AIR 1977 SC 2429; Kalpana Deviprakash v. Dr. Deviprakash, (1996) 11 SCC 96.
- 58 Gaja Dhar Parsad v. Sohan Lal, AIR 1934 Lah 762.
- 59 Krishan Kanahya v. Vijay Kumar, AIR 1976 Del 184.
- 60 Indian Overseas Bank v. Chemical Construction Co., (1979) 4 SCC 358: AIR 1979 SC 1514; Subramaniam Swamy (Dr.) v. Ramakrishna Hegde, (1990) 1 SCC 4: AIR 1990 SC 113; Mahabir Prasad v. Jacks Aviation (P) Ltd., (1999) 1 SCC 37 at p. 44.
- 61 B.K. Ghosh v. R.K. Joysurendera Singh, AIR 1956 Mani 21.
- 62 Mula Naramma v. Mula Rengamma, AIR 1926 Mad 359.
- 63 Gujarat Electricity Board v. Atmaram Sungomal Poshani, (1989) 2 SCC 602 at p. 606: AIR 1989 SC 1433 at p. 1436; M.Y. Shareef v. Nagpur High Court, AIR 1955 SC 19 at pp. 24-25: (1955) 1 SCR 757; Krishan Kanahya v. Vijay Kumar, AIR 1976 Del 184; C.V. Xavier



against fair trial without furnishing particulars;<sup>64</sup> (x) on counsel losing temper and using unparliamentary language, the judge ordering adjournment,<sup>65</sup> etc.

#### 24. CONCLUDING REMARKS

As discussed above, the power of transfer must be exercised with due care, caution and circumspection and in the interests of justice.<sup>66</sup> The court while deciding the question must bear in mind two conflicting interests, (i) as a dominus litis the right of the plaintiff to choose his own forum; and (ii) the power and duty of the court to assure a fair trial and dispensation of justice. The paramount consideration would be the requirement of justice. And if the ends of justice demand transfer of a case, the court should not hesitate to act.

At the same time, mere inconvenience of the party or bare and vague allegations by an interested party about insecurity or even a threat to his life are not sufficient to transfer a case. Want of territorial jurisdiction of the court to which the case is transferred, though a relevant factor, is not conclusive and will not be an impediment to the power of the court ordering the transfer.<sup>67</sup> Although discretionary power of transfer cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care and caution.<sup>68</sup>

It is submitted that the following observations of Krishna Iyer, J. in the leading case of *Maneka Sanjay Gandhi v. Rani Jethmalani*<sup>69</sup> lay down correct law on the point and are, therefore, worth quoting:

"Assurance of a fair trial is the first imperative of the dispensation of justice and the criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal service or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise

v. J&J DeChane, AIR 1972 Ker 263; *G. Lakshmi Ammal v. Elumalai Chettiar*, AIR 1981 Mad 24; *Sini (Dr.) v. B. Suresh Jyothi*, AIR 1996 Ker 160.

<sup>64</sup> *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167: AIR 1979 SC 468.

<sup>65</sup> *X v. Y*, AIR 1979 HP 29.

<sup>66</sup> *Kulwinder Kaur v. Kandi Friends Education Trust*, (2008) 3 SCC 659: AIR 2008 SC 1333.

<sup>67</sup> *Arvee Industries v. Ratan Lal*, *supra*; *Union of India v. Shiromani Gurdwara Prabandhak Committee*, *supra*; *Suaramaniam Swamy (Dr.) v. Ramakrishnan Hegde*, *supra*; *Maneka Sanjay Gandhi v. Rani Jethmalani*, *supra*.

<sup>68</sup> *Kulwinder Knur v. Kandi Friends Education Trust*, *supra*.

<sup>69</sup> (1979) 4 SCC 167: AIR 1979 SC 468.

its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case."<sup>70</sup>

<sup>70</sup> Ibid, at p. 169 (SCC): at p. 469 (AIR); see also *Pushpa Devi v. Jai Narain*, (1992) 2 SCC 676: AIR 1992 SC 1133.

# PART V

## 2

### Restitution

#### SYNOPSIS

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1.       RESTITUTION: MEANING

THE EXPRESSION "restitution" has not been defined in the Code, but it is "an act of restoring a thing to its proper owner".<sup>1</sup> "Restitution" means restoring of anything unjustly taken from another. It provides for putting a party in possession of land, tenement or property, who had been unlawfully dispossessed, deprived or disseised of it.

In other words, restitution means restoring to a party the benefit which the other party has received under a decree subsequently held to be wrong.<sup>2</sup> The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of the decree or in direct consequence of the decree.<sup>3</sup>

1       Concise Oxford Dictionary (1990) at p. 1027; Shorter Oxford English Dictionary (1990) Vol. II at pp. 1811-12; Concise Oxford English Dictionary (2002) at p. 1220.

2       Per Subba Rao, J. in Mahijihhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477 at p. 1482: (1965) 2 SCR 436.

3       Zafar Khan v. Board of Revenue, 1984 Supp SCC 505 at pp. 513-14: AIR 1985 SC 39 at p. 46.

## 2. DOCTRINE EXPLAINED

The principle of the doctrine of restitution is that, on the reversal of a decree, the law imposes an obligation on the party to the suit who received an unjust benefit of the erroneous decree to make restitution to the other party for what he has lost. The obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making the restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the court by its erroneous action had displaced them from.<sup>4</sup>

Section 144 does not confer any new substantive right. It merely regulates the power of the court in that behalf.<sup>5</sup> It is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied but for that mistake.<sup>6</sup> Similarly, on the reversal of a judgment the law places an obligation on the party who received the benefit of the erroneous judgment to make restitution to the other party for what he has lost and it is the duty of the court to enforce the obligation; unless it is shown that restitution would be clearly contrary to the real justice of the case.<sup>7</sup>

In Halsbury's Laws of England, it is stated, "Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."<sup>8</sup>

The jurisdiction to make restitution is inherent in every court and can be exercised whenever justice of the case demands.<sup>9</sup>

### Illustrations

(1) A obtains a decree against B for possession of immovable property and in execution of the decree obtains possession thereof. The decree is subsequently reversed in appeal. B is entitled under this section to restitution of the property, even though there is no direction for restitution in the decree of the appellate court.

(2) A obtains a decree against B for Rs 5000, and recovers the amount in execution. The decree is subsequently reversed in appeal. B is entitled under this section

<sup>4</sup> Binayak Swain v. Ramesh Chandra, AIR 1966 SC 948 at p. 950; Lal Bhagwant Singh v. Kishen Das, AIR 1953 SC 136 at p. 139:1953 SCR 559; Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380: AIR 1995 SC 441.

<sup>5</sup> Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584: AIR 1992 SC 248.

<sup>6</sup> Jang Singh v. Brij Lal, AIR 1966 SC 1631 at pp. 1632-33: (1964) 2 SCR 145.

<sup>7</sup> Lal Bhagwant Singh v. Kishen Das, supra, at p. 139 (AIR); Binayak v. Ramesh Chandra, supra; Prithvinath Singh v. Suraj Ahir, (1970) 3 SCC 794 at p. 799.

<sup>8</sup> Halsbury's Laws of England (4th Edn.) at p. 434.

<sup>9</sup> Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380: AIR 1995 SC 441.

to a refund of the amount together with interest up to the date of repayment, though the appellate decree may be silent as to interest.

### 3. OBJECT

The doctrine of restitution is based upon the well-known maxim "actus curiae neminem gravabit", i.e. the act of court shall harm no one.<sup>10</sup> In the words of Lord Cairns<sup>11</sup>, "one of the first and highest duties of all courts is to take care that the act of the court does no injury to the suitors". The law also imposes an obligation on the party who received benefit of an erroneous judgment to make restitution to the other party for what he has lost; and it is the duty of the court to enforce this obligation.<sup>12</sup> In other words, a wrong order should not be perpetuated by keeping it alive and respecting it.<sup>13</sup>

Thus, the doctrine of restitution is based on equitable principles. In proceedings for restitution the court should pass an order consistent with justice to both the parties.<sup>14</sup> The jurisdiction to grant restitution is not confined to the cases covered by Section 144. It extends to all cases which do not come strictly within this section. In other words, the court has inherent power to order restitution whenever justice demands it.<sup>15</sup>

In *Jai Berham v. Kedar Nath*<sup>16</sup>, the Privy Council observed, "It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent under the general jurisdiction of the court to act

<sup>10</sup> *Jang Singh v. Brij Lal*, supra; *Lal Bhagwant Singh v. Kishen Das*, supra; *Jagannath Singh v. Dr. Ram Naresh*, (1970) 1 SCC 573 at p. 575; (1970) 3 SCR 970; *Tulsipur Sugar Co. Ltd. v. State of U.P.*, (1969) 2 SCC 100 at pp. 106-07; AIR 1970 SC 70 at pp. 75-76; *Chinnammal v. P. Arumugham*, (1990) 1 SCC 513; AIR 1990 SC 1828; *Neelathupara Kummi v. Montharapalla Padippua*, 1994 Supp (3) SCC 760; AIR 1994 SC 1591.

<sup>11</sup> *Alexander Rodger v. Comptoir D'Escompte de Paris*, LR (1871) 3 PC 465 at p. 475; 7 Moo PC (NS) 314; *Deshmukh v. Ganesh*, AIR 1975 All 82 at p. 84; *Martand Ramchandra (Dr.) v. Dr. Dattatraya Ramchandra*, AIR 1975 Bom 237 at p. 239.

<sup>12</sup> *Binayak v. Ramesh Chandra*, supra; *Lal Bhagwant Singh v. Kishen Das*, supra.

<sup>13</sup> *Alagiriswami, J. in Raso Moopnar v. T.K. Ramamurthy Iyer*, (1967) 1 MLJ 287; *Subhash Chander v. Bodh Raj*, AIR 1969 J&K 8.

<sup>14</sup> *Pappu Reddiar v. P.S.V.Rm. Ramanatha Iyer*, AIR 1963 Mad 45 (FB); *Lucy Kochuvareed v. P. Marinppa Gounder*, (1979) 3 SCC 150 at p. 164; AIR 1979 SC 1214 at p. 1224.

<sup>15</sup> *S.N. Banerji v. Kuchwar Lime & Stone Co. Ltd.*, AIR 1941 PC 128 at p. 129; *Jai Berham v. Kedar Nath*, AIR 1922 PC 269 at p. 271; (1921-22) 49 IA 351; *L. Guran Ditta v. T.R. Ditta*, AIR 1935 PC 12 at p. 13; *Gangadhar v. Raghubar Dayal*, AIR 1975 All 102 at pp. 108-09 (FB); *Subhash Chander v. Bodh Raj*, supra; *Union Carbide Corpn. v. Union of India*, (1991) 4 SCC 584; AIR 1992 SC 248; *Kavita Trehan v. Balsara Hygiene Products Ltd.*, supra.

<sup>16</sup> AIR 1922 PC 269 at p. 271; (1921-22) 49 IA 351; see also supra, *Kavita Trehan v. Balsara Hygiene Products Ltd.*

rightly and fairly according to the circumstances towards all parties involved."

Illustration

(1) A obtains a decree against B and recovers the amount due under the decree by execution. Subsequently it is found that B was dead at the time of institution of the suit. The decree is a nullity, and the court, having levied execution while there was legally no decree at all, has inherent power to rectify the mistake and order restitution.

4. NATURE AND SCOPE

Section 144 of the Code embodying the doctrine of restitution does not confer any new substantive right to the party not available under the general law. The section merely regulates the power of the court in that behalf. It is the paramount duty of all courts to ensure that they do no injury to any litigant.

The expression "the act of the court" does not mean merely that act of the primary or trial court or intermediate court of appeal but the act of the court as a whole from the lowest court which entertains the matter to the highest court which finally disposes the case.<sup>17</sup>

Moreover, the section is not exhaustive and, therefore, even if the case does not fall within the strict terms of Section 144 of the Code, it is always at the discretion of the court to grant relief of restitution.<sup>18</sup>

Further, since the object of the doctrine is to shorten litigation and to afford speedy relief to the party adversely affected, and merely lays down a procedure, the provision should be construed liberally.<sup>19</sup>

Finally, being equitable in nature, the court may not allow restitution if circumstances do not warrant invocation of such doctrine or the applicant wants to take undue advantage of his own wrong.<sup>20</sup>

5. CONDITIONS

Before restitution can be ordered under this section, the following three conditions must be satisfied:<sup>21</sup>

<sup>17</sup> Alexander Rodger v. Comptoir D'Escoinpte de Paris, LR (1871) 3 PC 465; Prabodh Verma v. State of U.P., (1984) 4 SCC 251: AIR 1985 SC 167.

<sup>18</sup> Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380: AIR 1995 SC 441; Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584: AIR 1992 SC 248; Binayak Swain v. Ramesh Chandra, AIR 1966 SC 948; Maqbool Alam v. Khodaija, AIR 1966 SC 1194: (1966) 3 SCR 479; Jai Berham v. Kedar Nath, AIR 1922 PC 269: (1921-22) 49 IA 351.

<sup>19</sup> Chinnammal v. P. Arumugham, (1990) 1 SCC 513: AIR 1990 SC 1828.

<sup>20</sup> Ibid, see also Supdt. of Taxes v. Onkarmal Nathmal Trust, (1976) 1 SCC 766: AIR 1975 SC 2065 at p. 2071; Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584: AIR 1992 SC 248; Ila Vipin v. Smita Ambalal, (2007) 6 SCC 750: AIR 2007 SC 2404.

<sup>21</sup> Ganesh Parshad v. Adi Hindu Social Service League, AIR 1975 AP 310 at p. 313; Gurunath Khandappagouda v. Venkatesh Lingo, AIR 1937 Bom 101 at p. 103; Puni Devi v. Jagannath, AIR 1994 Ori 240.

- (1) The restitution sought must be in respect of the decree or order which had been reversed or varied;
- (2) The party applying for restitution must be entitled to benefit under the reversing decree or order; and
- (3) The relief claimed must be properly consequential on the reversal or variation of the decree or order.

In other words, (i) there must be an erroneous judgment; (ii) the benefit of that erroneous judgment has been received by one party; and (iii) the erroneous judgment has been reversed, set aside or modified.<sup>22</sup> If these conditions are satisfied, the court must grant restitution. It is not discretionary but obligatory.<sup>23</sup>

#### 6. WHO MAY APPLY?

In order to entitle a person to apply under this section, two conditions must be satisfied:

- (1) He must be a party to the decree or order varied or reversed.

The expression "party" is not confined to mean only a technical party to the suit or appeal but includes any beneficiary under the final judgment;<sup>24</sup> and

- (2) he must have become entitled to any benefit by way of restitution or otherwise under the reversing decree or order.<sup>25</sup> Thus, a trespasser cannot get restitution.<sup>26</sup>

It is, however, not necessary that the decree or order by which the original decree or order is reversed or varied should declare the party's rights to restitution. Where the effect of the decree of the appellate court is to reverse the decree of the lower court, the party against whom the lower court's erroneous decree has been enforced is entitled to apply for restitution under this section.<sup>27</sup>

<sup>22</sup> Banchhanidhi Das v. Bhanu Sahuani, AIR 1974 Ori 148 at p. 149; ILR 1973 Cut 498.

<sup>23</sup> Jang Singh v. Brij Lal, AIR 1966 SC 1631: (1964) 2 SCR 145; Lal Bhagwant Singh v. Kishen Das, AIR 1953 SC 136 at p. 139:1953 SCR 559; Binayak Swain v. Ramesh Chandra, AIR 1966 SC 948; Maqbool Alam v. Khodaija, AIR 1966 SC 1194: (1966) 3 SCR 479.

<sup>24</sup> Ganga Prosad v. Brojo Nath, (1907) 12 CWN 642 at p. 643 (PC); Payre Chand v. Ashrafunnisa Begum, AIR 1975 AP 228 at pp. 229-31; B. Yamuna Bai v. L. Venkoba Rao, AIR 1976 AP 46; Jagdish Lal v. M.E. Piera, AIR 1977 Del 12 at pp. 15-16; Jotindra Nath v. Jugal Chandra, AIR 1966 Cal 637.

<sup>25</sup> Binnyak v. Ramesh Chandra, supra; Lal Bhagwant Singh v. Kishen Das, supra.

<sup>26</sup> S.N. Banerji v. Kuchwar Lime & Stone Co. Ltd., AIR 1941 PC 128; Ramji Seth v. Smt Zohra, 1983 All LJ 322.

<sup>27</sup> Sevatha Goundan v. Pappammal, AIR 1935 Mad 476; Gurunath Khandappagouda v. Venkatesh Lingo, AIR 1937 Bom 101.

## 7.      AGAINST WHOM RESTITUTION MAY BE GRANTED

Restitution can be ordered under this section not only against the party to the litigation, but also against his legal representatives, e.g. transferee pendente lite, attaching decree-holder, etc.<sup>28</sup> Section 144 applies only to the parties or their representatives and does not apply to sureties. Hence, restitution cannot be claimed against a surety.<sup>29</sup> It also cannot be granted against a bona fide auction-purchaser.<sup>30</sup>

## 8.      WHO MAY GRANT RESTITUTION?

An application for restitution lies to the court which has passed the decree or made the order.<sup>31</sup>

The Explanation as inserted by the Amendment Act, 1976 defines the expression "Court which passed the decree or order". It includes

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance; (b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order; and (c) where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.<sup>32</sup>

## 9.      NATURE OF PROCEEDINGS

At one time, there was a conflict of judicial opinion as to whether proceedings under Section 144 of the Code were proceedings in execution. According to one view, they were, but according to other view, they were not.

But after the decision of the Supreme Court in *Mahijibhai Mohanbhai v. Patel Manibhai*,<sup>33</sup> the proceedings for restitution are proceedings in execution.

<sup>28</sup> *Parmeshari Din v. Ram Charan*, AIR 1937 PC 260; *Pyare Chand case*, supra; *Samarjut Singh v. Director of Consolidation*, AIR 1974 All 82 at pp. 84-85; *Manikchand v. Gangadhar*, AIR 1961 Bom 288; *Shanker Lal v. Ram Kishan*, AIR 1976 All 250.

<sup>29</sup> *Raj Raghubar Singh v. Jai Indra Bahadur*, AIR 1919 PC 55; *State Bank of Saurashtra v. Chitranjan Rangnath*, (1980) 4 SCC 516 at p. 525; AIR 1980 SC 1528 at p. 1534.

<sup>30</sup> *Janak Raj v. Gurdial Singh*, AIR 1967 SC 608; (1967) 2 SCR 77; *Chinnammal v. P. Arumugham*, supra; *Padanathil Ruqmini v. P.K. Abdulla*, (1996) 7 SCC 668; AIR 1996 SC 1204.

<sup>31</sup> Expln. to S. 144(1).

<sup>32</sup> Clauses (a), (b), (c) to Explanation to S. 144.

<sup>33</sup> AIR 1965 SC 1477; (1965) 2 SCR 436; see also *Maqbool Alam v. Khodaija*, AIR 1966 SC 1194; (1966) 3 SCR 479.



10. FORM OF APPLICATION

No specific form has been prescribed by the Code for making an application for restitution.

11. EXTENT OF RESTITUTION

The court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the court by its erroneous action had displaced them.<sup>34</sup> The words "place the parties in the position which they would have occupied but for such a decree" should be construed to mean that the parties should be put in the position which they would have occupied but for a wrong judgment, decree or order.<sup>35</sup>

12. INHERENT POWER TO GRANT RESTITUTION

Section 144 of the Code embodying the doctrine of restitution does not confer any new substantive right to the party not available under the general law. It merely regulates the power of courts. The doctrine is based on equity and against unjust enrichment. Section 144 is not exhaustive. Hence, there is always an inherent jurisdiction to order restitution.<sup>36</sup>

13. RES JUDICATA

The doctrine of res judicata applies to execution proceedings also.<sup>37</sup> An application for restitution dismissed on merits, hence, would operate as res judicata. But if such an application is dismissed on some technical grounds, a fresh application will be maintainable.<sup>38</sup>

14. BAR OF SUIT

Sub-section (2) of Section 144 provides in express terms that where restitution could be claimed by an application under this section, no separate suit shall be brought for such relief.<sup>39</sup>

<sup>34</sup> Lal Bhagwant Singh v. Kishen Das, AIR 1953 SC 136 at p. 139:1953 SCR 559; Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai, supra.

<sup>35</sup> Ibid, see also Binayak v. Rameshchandra, supra; L. Guran Ditta v. T.R. Ditta, AIR 1935 PC 12:153 IC 654 (PC).

<sup>36</sup> Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584: AIR 1992 SC 248; Kavita Trehan v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380: AIR 1995 SC 441.

<sup>37</sup> Expln. VII to S. 11. For detailed discussion, see supra, Pt. II, Chap. 2.

<sup>38</sup> Maqbool Alam v. Khodaija, AIR 1966 SC 1194: (1966) 3 SCR 479; Sheoratan Kurmi v. Kalicharan Ram, AIR 1968 Pat 270; Choudhary Hariram v. Pooransingh, AIR 1962 MP 295.

<sup>39</sup> Kunwar Rohani Ramandhwaj v. Thakur Har Prasad, AIR 1943 PC 189; Ansuya Bai v. Ramaiah Raju, AIR 1961 Mys 238; Math Sauna v. Kedar Nath, AIR 1977 All 115; Mahijibhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477: (1965) 2 SCR 436.

15.      LIMITATION

An application under Section 144 is an application for execution of a decree and is governed by Article 136 of the Limitation Act, 1963.<sup>40</sup> The period of limitation for such an application is twelve years and it will start from the date of the appellate decree or order.<sup>41</sup>

16. APPEAL

The determination of a question under Section 144 has been expressly declared to be a "decree" under Section 2(2) of the Code and is, therefore, appealable.<sup>42</sup> Second appeal also lies on a "substantial question of law"<sup>43</sup>

17.      REVISION

Since an order under Section 144 is a "decree", it is appealable and no revision lies against such order. But where the order does not fall under four corners of the section, a revision is maintainable as it can be said to be a "case decided" under Section 115 of the Code.<sup>44</sup>

18.      ORDER IMPLEMENTED: EFFECT

Even if a decree is executed or order is implemented, restitution proceedings under Section 144 of the Code will not become infructuous. Normally, it is only after the decree is executed or order is implemented and enforced that the question of restitution or restoration of earlier position arises. It is, therefore, not open to a court to dispose of an application for restitution that the order has already been given effect and nothing requires to be made.<sup>45</sup>

<sup>40</sup>      Mahijibhai Mohanbhai v. Patel Manibhai, AIR 1965 SC 1477 at p. 1486: (1965) 2 SCR 436.

<sup>41</sup>      Art. 136, Limitation Act, 1963.

<sup>42</sup>      Rahimbhoy v. C.A. Turner, ILR (1890) 15 Bom 155 (PC); Bhim Rao v. Laxmibai, AIR 1966 Mys 112 at p. 115; Abdul Majid v. Abdul Sattar, AIR 1941 Nag 313; Sarat Chandra v. Subasini Devi, AIR 1930 Cal 89.

<sup>43</sup>      For detailed discussion, see, Pt. III, Chap. 3.

<sup>44</sup>      Maqbool Alam v. Khodaija Begum, AIR 1949 Pat 133 (FB); Kaku Singh v. Gobind Singh, AIR 1959 Punj 468. For detailed discussion of revisional jurisdiction of High Courts, see supra, Pt. III, Chap. 9.

<sup>45</sup>      State of Gujarat v. Dilipbhai, (2006) 8 SCC 72: AIR 2006 SC 3091; Damodar Mishra v. State of Orissa, 1994 Supp (2) SCC 51.

# PART V

## 3

### Caveat

#### SYNOPSIS

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#### 1. MEANING

THE TERM "caveat" has not been defined in the Code. The word (caveat) has been derived from Latin which means "beware". According to the dictionary meaning,<sup>1</sup> "a caveat is an entry made in the books of the offices of a registry or court to prevent a certain step being taken without previous notice to the person entering the caveat".

In other words, a caveat is a caution or warning given by a party to the court not to take any action or grant any relief to the applicant without notice or intimation being given to the party lodging the caveat and interested in appearing and objecting to such relief. It is very common in testamentary proceedings. It is a precautionary measure taken against the grant of probate or letters of administration, as the case may be, by the person lodging the caveat.<sup>2</sup> The person filing or lodging a caveat is called "caveator". Section 148-A of the Code of Civil Procedure provides for lodging of a caveat.

<sup>1</sup> Earl Jowitt, The Dictionary of English Law (1977) Vol. 1 at p. 298; The Concise Oxford English Dictionary (2002) at p. 225.  
<sup>2</sup> S. 284, Indian Succession Act, 1925. See also Nirmal Chandra v. Girindra Narayan, AIR 1978 Cal 492 at p. 494; 82 CWN 1026; C. Seethaiah v. Govt. of A.P., AIR 1983 AP 443; H. G. Shankar Narayan v. State of Rajasthan, AIR 1985 Raj 156:1984 Raj LW 266.

## 2. SECTION 148-A

Section 148-A, as inserted by the Amendment Act, 1976 is a salutary provision. It allows a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him. It reads as under:

(1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a court, any person claiming a right to appear before the court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application has, been, or is expected to be made, under subsection (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the court shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator, at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period.

## 3. OBJECT

The underlying object of a caveat is twofold: firstly, to safeguard the interest of a person against an order that may be passed on an application filed by a party in a suit or proceeding instituted or about to be instituted. Such a person lodging a caveat may not be a necessary party to such an application, but he may be affected by an order that may be passed on such application.

This section affords an opportunity to such party of being heard before an ex parte order is made; and secondly, it seeks to avoid multiplicity of proceedings. In the absence of such a provision, a person who is not a party to such an application and is adversely affected by the order has to take appropriate legal proceedings to get rid of such or

der.3 Such a provision is found in the Supreme Court Rules.4 The Law Commission, therefore, recommended insertion of such a provision in the Code of Civil Procedure also. Accordingly, Section 148-A has been inserted by the Amendment Act of 1976.5

#### 4. NATURE AND SCOPE

Section 148-A enacts that a caveat can be lodged in a suit or proceeding. Construing the connotation in a narrow manner, some High Courts have taken the view that no caveat can be filed in a first or second appeal or in execution proceedings. But, as observed in *Ram Chandra Aggarwal v. State of U.P.*<sup>6</sup>, the expression "Civil Proceedings" in Section 141 of the Code includes all proceedings which are not original proceedings. Thus, the provision relating to caveat would be applicable to suits, appeals as well as other proceedings under the Code or under other enactments.<sup>7</sup>

Again, it is no doubt true that no order should be passed against the caveator unless he is heard, but if the caveator is not present at the time of hearing of the application and the court finds that there is a prima facie case in favour of the applicant, ad interim relief can be granted by the court in his favour. Interim order passed without giving notice to the caveator is not without jurisdiction and is operative till it is set aside in appropriate proceedings.<sup>8</sup>

#### 5. WHO MAY LODGE CAVEAT?

Sub-section (1) of Section 148-A prescribes qualifications for the person who intends to lodge a caveat. He must be a person claiming a right to appear before the court on the hearing of the application, which the applicant might move for the grant of interim relief. The language of sub-section (1) of Section 148-A is wide enough to include not only a necessary party, but even a proper party.<sup>9</sup> Hence, a caveat may be filed by any person who is going to be affected by an interim order likely to be passed on an application which is expected to be made in a suit or proceeding instituted or about to be instituted in a court.<sup>10</sup>

3 Nirmal Chandra v. Girindra Narayan, AIR 1978 Cal 492 at p. 494: 82 CWN 1026.

4 Supreme Court Rules, 1966, Or. 19 R. 2.

5 Law Commission's Fifty-fourth Report at p. 118; see also *Chandrajit v. Ganeshiya*, AIR 1987 All 360.

6 AIR 1966 SC 1888:1966 Supp SCR 393.

7 *Chandrajit v. Ganeshiya*, AIR 1987 All 360.

8 *Employees Assn. v. RBI*, AIR 1981 AP 246: (1981) 1 AP LJ 338; *Babubhai Nagindas Shah v. State*, (1983) 24 (1) Guj LR 784.

9 *Employees Assn. v. RBI*, AIR 1981 AP 246: (1981) 1 AP LJ 338.

10 *Nirmal Chandra v. Girindra Narayan*, AIR 1978 Cal 492 at p. 494: 82 CWN 1026; *G.C. Siddalingappa v. G.C. Veeranna*, AIR 1981 Kant 242 at p. 243.

Thus, a person who is a stranger to the proceeding cannot lodge a caveat.<sup>11</sup> Likewise, a person supporting the application for interim relief made by the applicant also cannot file a caveat.<sup>12</sup>

Generally, a caveat can be filed after the judgment is pronounced. In exceptional cases, however, a caveat may be filed even before the pronouncement of the judgment.<sup>13</sup>

6. WHEN CAVEAT MAY BE LODGED?

Normally, a caveat may be lodged after the judgment is pronounced or order is passed. In exceptional cases, however, a caveat may be filed even before pronouncement of judgment or passing of order.<sup>14</sup>

7. WHEN CAVEAT DOES NOT LIE?

The provisions of Section 148-A of the Code can be attracted only in cases where the caveator is entitled to be heard before any order is made on the application already filed or proposed to be filed. The section cannot be construed to mean and provide that even in cases where the Code does not contemplate notice, it can be claimed by lodging a caveat. Such a construction would be inconsistent with the object underlying Section 148-A.<sup>15</sup>

8. FORM

Unlike the Indian Succession Act<sup>16</sup>, no form of caveat has been prescribed under the Code. A caveat may, therefore, be filed in the form of a petition wherein the caveator has to specify the nature of the application which is expected to be made or has been made and also his right to appear before the court at the hearing of such application.<sup>17</sup> The Stamp Reporter or Registry of the court will keep a register wherein entries will be made of the filing of caveats.<sup>18</sup>

<sup>11</sup> Kattil Vayalil Parkkum v. Mannil Paadikayil, AIR 1991 Ker 411; Nav Digvijay Coop. Housing Society Ltd. v. Sadhana Builders, AIR 1984 Bom 114; Chloride India Ltd. v. Ganesh Das, AIR 1986 Cal 74.

<sup>12</sup> Nirmal Chandra v. Girindra Narayan, AIR 1978 Cal 492 at p. 494: 82 CWN 1026; Mahatma Gandhi Housing Colony Development Society v. Devangapuri Gram Panchayat, 1995 AIHC 3243 (AP).

<sup>13</sup> Pashupati Nath v. Registrar, Coop. Societies, AIR 1983 Raj 191 at p. 192; H.G. Shankar Narayan v. State of Rajasthan, AIR 1985 Raj 156 at p. 160:1984 Raj LW 266

<sup>14</sup> Pashupati Nath v. Registrar, Coop. Societies, AIR 1983 Raj 191: 1982 RLR 694: 1982 RLW 572; H.G. Shankar Narayan v. State of Rajasthan, AIR 1985 Raj 156: 1984 Raj LW 266.

<sup>15</sup> Chloride India Ltd. v. Ganesh Das, AIR 1986 Cal 74; Nav Digvijay Coop. Housing Society Ltd. v. Sadhana Builders, AIR 1984 Bom 114; Kattil Vayalil Parkkum v. Mannil Paadikayil, AIR 1991 Ker 411; Madhukantaben v. Arvindlal Kantilal & Co., 1985 Guj LH 391.

<sup>16</sup> S. 284(4), Sch. V.

<sup>17</sup> Nirmal Chandra v. Girindra Narayan, AIR 1978 Cal 492 at p. 494: 82 CWN 1026.

<sup>18</sup> Chandrajit v. Ganeshiya, AIR 1987 All 360. For Model "Caveat", see, Appendix 'I'.

9. NOTICE  
When a caveat is lodged, the court will serve a notice of an application on the caveator. The section obliges the applicant who has been served with a caveat to furnish the caveator, at the caveator's expense, a copy of the application along with copies of papers and documents submitted by him in support of his application.<sup>19</sup>

10. RIGHTS AND DUTIES  
Sub-sections (2), (3) and (4) of Section 148-A prescribe the rights and duties of the caveator who lodges a caveat, of the applicant who intends to obtain an interim order and of the court.

(a) Of caveator  
Under sub-section (2) of Section 148-A, once a party is admitted to the status of a caveator, he is clothed with certain rights and duties. It is his duty to serve a notice of the caveat lodged by him by registered post on the person or persons by whom an application against the caveator for an interim order has been or is expected to be made.<sup>20</sup>

The provision is directory and not mandatory. Where no notice could be served on account of uncertainty of the person likely to institute a suit, appeal or other proceeding, the court may, at its discretion, dispense with the service of notice of a caveat and permit a party to lodge a caveat without naming the party respondent.<sup>21</sup>

(b) Of applicant  
Sub-section (4) of Section 148-A provides that it is the duty of the applicant to furnish to the caveator forthwith at the caveator's expense a copy of the application made by him along with the copies of papers and documents on which he relies. This provision thus makes it obligatory for the applicant to serve his application along with all copies and documents filed or intended to be filed in support of his application.<sup>22</sup>

(c) Of court  
Once a caveat had been lodged, under sub-section (3), it is the duty of the court to issue a notice of that application on the caveator. This duty has been cast on the court obviously for the purpose of enabling

19 Nova Granites (India) Ltd. v. Craft (Banglore) (P) Ltd., (1994) 1 Civ LJ 711 (Kant); Akbar Ali v. Alla Pitchai, 2000 AIHC 115 (Mad).  
20 Nirmal Chandra v. Girindra Narayan, supra; Employees Assn. v. RBI, supra; Pashupati Nath v. Registrar, Coop. Societies, supra; G.C. Siddalingappa v. G.C. Veeranna, supra; C. Seethaiah v. Govt. of A.P., supra.  
21 State of Karnataka v. NIL, (1999) 5 Kant LJ 637.  
22 Employees Assn. v. RBI, supra; G.C. Siddalingappa v. G.C. Veeranna, supra; C. Seethaiah v. Govt. of A.P., supra.

the caveator to appear and oppose the granting of an interim relief in favour of the applicant.<sup>23</sup> Although the expression "notice of application" has not been defined in the Code, it would include the date of hearing.<sup>24</sup> It must, therefore, be taken that it is the duty of the court to give a sufficiently reasonable and definite time to the caveator to appear and to oppose the application filed by the applicant.<sup>25</sup> This duty of the court is in addition to the duty of the applicant under sub-section (4) and non-compliance with it defeats the very object of introducing Section 148-A and the breach thereof vitiates the order. Therefore, merely because the caveator refuses to accept the copy of the application from the applicant, the court is not absolved from serving the notice of the application to the caveator.<sup>26</sup>

#### 11. FAILURE TO HEAR CAVEATOR: EFFECT

The intention of the legislature in enacting the provision of caveat is to enable the caveator to be heard before any orders are passed and no orders are passed by the court *ex parte*.<sup>27</sup> It is, therefore, clear that once a caveat is filed, it is a condition precedent for passing an interim order to serve a notice of the application on the caveator who is going to be affected by the interim order.<sup>28</sup> Unless that condition precedent is satisfied, it is not permissible for the court to pass an interim order affecting the caveator, as otherwise it will defeat the very object of Section 148-A.<sup>29</sup>

(emphasis supplied)

It also cannot be contended that the caveator is required to be heard not at the time of passing an *ex parte* order at the initial stage, but at the time of passing the final order.<sup>30</sup> This reasoning would make the provisions of Section 148-A nugatory and meaningless because, even in the absence of Section 148-A, before passing a final order the other side is always required to be heard. That is the requirement of natural justice.<sup>31</sup> Therefore, once a caveat is filed, it is the duty of the court to

<sup>23</sup> Nirmal Chandra v. Girindra Narayan, *supra*-, Employees Assn. v. RBI, *supra*; G.C. Siddalingappa v. G.C. Veeranna, *supra*; Kandla Port Trust v. Mulraj, (1986) 27 (1) GLR 442 at p. 449.

<sup>24</sup> Employees Assn. v. RBI, AIR 1981 AP 246: (1981) 1 AP LJ 338.

<sup>25</sup> Ibid, see also *supra*, G.C. Siddalingappa v. G.C. Veeranna.

<sup>26</sup> Ibid, see also *supra*, C. Seethaiah v. Govt, of A.P.

<sup>27</sup> Nirmal Chandra v. Girindra Narayan, *supra*; C. Seethaiah v. Govt. of A.P., *supra*; Employees Assn. v. RBI, *supra*.

<sup>28</sup> G.C. Siddalingappa v. G.C. Veeranna, *supra*; C. Seethaiah v. Govt. of A.P., *supra*; Kandla Port Trust v. Mulraj, *supra*.

<sup>29</sup> G.C. Siddalingappa v. G.C. Veeranna, *supra*, at p. 244 (AIR).

<sup>30</sup> Kandla Port Trust v. Mulraj, *supra*.

<sup>31</sup> For detailed discussion about "Natural Justice" see, Author's Lectures on Administrative Law (2008) Lecture VI.



hear the caveator before passing any interim order against him.<sup>32</sup> But an interim order passed without hearing the caveator is not without jurisdiction and operates unless set aside.<sup>33</sup>

12. TIME-LIMIT

A caveat lodged under sub-section (1) will remain in force for ninety days from the date of its filing.<sup>34</sup>

After the prescribed period of ninety days is over, caveat may be renewed.<sup>35</sup>

32 G.C. Siddalingappa v. G.C. Veeranna, *supra*; C. Seethaiah v. Govt. of A.P., *supra*; Kandla Port Trust v. Mulraj, *supra*.

33 Employees Assn. v. RBI, *supra*.

34 Sub-s. (5). See also, Statement of Objects and Reasons; Pashupati Nath v. Registrar, Coop. Societies, AIR 1983 Raj 191 at p. 192; H.G. Shankar Narayan v. State of Rajasthan, AIR 1985 Raj 156 at p. 159; 1984 Raj LW 266; Enamul Horo v. Harbans Kaur, (1995) 2 BLJR 1136.

35 Ibid.

PART V

4 Inherent powers of Courts

SYNOPSIS

1. GENERAL

EVERY COURT is constituted for the purpose of administering justice between the parties and, therefore, must be deemed to possess, as a necessary corollary, all such powers as may be necessary to do the right and to undo the wrong in the course of administration of justice.1 As stated above,2 the Code of Civil Procedure is a procedural or adjective law and the provisions thereof must be liberally construed to advance the cause of justice and further its ends.2

The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and the court is free to exercise them for the ends of justice or to prevent the abuse of the process of the court.3

1 Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 at p. 534:1962 Supp (1) SCR 450; State of Punjab v. Shamlal Murari, (1976) 1 SCC 719: AIR 1976 SC 1117; Raj Narain v. Indira Nehru Gandhi, (1972) 3 SCC 850 at p. 858: AIR 1972 SC 1302 at p. 1307; Jaipur Mineral Development Syndicate v. CIT, (1977) 1 SCC 508 at pp. 510-11: AIR 1977 SC 1348 at p. 1350; Mulraj v. Murti Raghunathji Mahaaraj, AIR 1967 SC 1386 at p. 1390: (1967) 3 SCR 84; State of U.P. v. Roshan Singh, (2008) 2 SCC 488: AT.( 2008 SC 1190. See also supra, Pt. I, Chap.1.

2 See supra, Pt. I, Chap.1

3 S. 151 of the Code reg.

4 Saving of inherent powers of j

be necessary for the ends of j

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3 affect the inherent powers of the court to make such orders as may

The reason is obvious. The provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation.<sup>4</sup> Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised *ex debito justitiae* in absence of express provisions in the Code.<sup>5</sup>

As Justice Raghubar Dayal<sup>6</sup> rightly states, "The inherent power has not been conferred upon the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Thus, this power is necessary in the interests of justice. The inherent power has its roots in necessity and its breadth is coextensive with the necessity.<sup>7</sup> Sections 148 to 153-A of the Code enact the law relating to inherent powers of a court in different circumstances.

## 2. INHERENT POWER: MEANING

According to dictionary meaning, "inherent" means "natural", "existing and inseparable from something", "a permanent attribute or quality", "an essential element, something intrinsic, or essential, vested in or attached to a person or office as a right of privilege."<sup>8</sup>

Inherent powers are thus powers which may be exercised by a court to do full and complete justice between the parties before it.

## 3. INHERENT POWERS: SCHEME

Sections 148 to 153-B of the Code deal with inherent powers of courts. The scheme, however, is not based on intelligible pattern. Sections 148 and 149 provide for grant and enlargement of time while Section 151 preserves inherent powers of courts. Sections 152, 153 and 153-A deal with amendments in judgments, decrees and orders and in other proceedings. Section 153-B declares a place of trial to be an open court. Section 150, however, provides for transfer of business. This section could have been placed along with Sections 22-25 dealing with transfer of cases. Likewise, Section 148-A (lodging of caveat) could have been taken

See also *Padam Sen v. State of U.P.*, AIR 1961 SC 218 at p. 219: (1961) 1 SCR 884 at p. 887; *Manohar Lal v. Seth Hiralal*, supra, at pp. 533, 537 (AIR); *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava*, AIR 1966 SC 1899: (1966) 3 SCR 856; *Midraj v. Murti Raghunathji Mahaaraj*, supra.

<sup>4</sup> *Manohar Lal v. Seth Hiralal*, supra, at pp. 532, 537 (AIR).

<sup>5</sup> *Mahendra Manilal v. Sushila Mahendra*, AIR 1965 SC 364 at p. 399: (1964) 7 SCR 267; *Manohar Lal v. Seth Hiralal* (ibid.) at p. 537 (AIR).

<sup>6</sup> *Manohar Lal v. Seth Hiralal*, supra, at p. 534 (AIR); see also *State of W.B. v. Indira Debi*, (1977) 3 SCC 559.

<sup>7</sup> *Newabganj Sugar Mills v. Union of India*, (1976) 1 SCC 120 at p. 123: AIR 1976 SC 1152 at p. 1155.

<sup>8</sup> *Concise Oxford English Dictionary* (2002); *Chamber's 20th Century Dictionary* (1992) at p. 647; *Webster's Encyclopedic Unabridged Dictionary* (1994) at p. 732.

either with Sections 26-32 dealing with institution of suits or before Section 148 or after Section 153-B.

#### 4. ENLARGEMENT OF TIME: SECTION 148

Section 148 provides that where any period is fixed or granted by the court for the doing of any act, the court has power to enlarge the said period even if the original period fixed has expired.<sup>9</sup>

Where a court in the exercise of its jurisdiction can grant time to do a thing, in the absence of a specific provision to the contrary curtailing, denying or withholding such jurisdiction, the jurisdiction to grant time would include in its ambit the jurisdiction to extend time initially fixed by it.<sup>10</sup>

The use of the word "may" indicates that the power is discretionary, and the court is therefore, entitled to take into account the conduct of the party praying for such extension.<sup>11</sup> The principle of equity is that when some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the court retains to itself the jurisdiction to re-examine the alteration or modification of circumstances which may necessitate extension of time. If the court by its own act denies itself the jurisdiction to do so, it would be denying to itself the jurisdiction which, in the absence of a negative provision, it undoubtedly enjoys.<sup>12</sup> In the words of Hidayatullah, J. (as he then was), "conditional orders are not like the law of the Medes and the Persians."<sup>13</sup> As Justice Desai states, "The danger inherent in passing conditional orders becomes self-evident because that by itself may result in taking away jurisdiction conferred on the court for just decision of the case. The true purport of conditional orders is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such consideration."<sup>14</sup>

<sup>9</sup> Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882 at p. 883: (1961) 3 SCR 763; Ganesh Prasad v. Lakshmi Narayan, (1985) 3 SCC 53 at p. 60: AIR 1985 SC 964 at p. 968; Johri Singh v. Sukh Pal Singh, (1989) 4 SCC 403: AIR 1989 SC 2073.

<sup>10</sup> Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159 at p. 168: AIR 1982 SC 137 at p. 142; Ramesh Bejoy v. Pashupati Rai, (1979) 4 SCC 27 at p. 40: AIR 1979 SC 1769 at p. 1779; Jogdhayan v. Babu Ram, (1983) 1 SCC 26 at p. 29: AIR 1983 SC 57 at p. 59.

<sup>11</sup> Johri Singh v. Sukh Pal Singh, (1989) 4 SCC 403 at p. 415: AIR 1989 SC 2073.

<sup>12</sup> Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159 at p. 168: AIR 1982 SC 137 at p. 142; Periyakkal v. Dakshyani, (1983) 2 SCC 127 at p. 131: AIR 1983 SC 428 at p. 431; Jogdhayan v. Babu Ram, supra.

<sup>13</sup> Mahanth Ram Das v. Ganga Das, supra, at p. 883 (AIR).

<sup>14</sup> Chinnamarkathian v. Ayyavoo, supra, at p. 169 (SCC): at p. 142 (AIR); Jogdhayan v. Babu Ram, supra; Prem Narain v. Vishnu Exchange Charitable Trust, (1984) 4 SCC 375: AIR

Before extension of time is granted by a court, two conditions must be fulfilled:

- (i) A period must have been fixed or granted by the court; and
- (ii) Such period must be for doing an act prescribed or allowed by the Code.

The section has no application when the time has not been fixed or granted by the court or a particular act has not been prescribed or allowed by the Code.

The power conferred by the Code on the court is discretionary. The court "may" use it for securing the ends of justice. It cannot be claimed by the party as of right.

Before exercising the power, therefore, the court may take into account all the facts and circumstances including the conduct of the applicant.<sup>15</sup>

#### 5. PAYMENT OF COURT FEES: SECTION 149

Section 149 empowers the court to allow a party to make up the deficiency of court fees payable on a plaint, memorandum of appeal, etc. even after the expiry of the period of limitation prescribed for the filing of such suit, appeal, etc. Section 4 of the Court Fees Act, 1870 provides that no document chargeable with court fee under the Act shall be filed or recorded in any court of justice, unless the requisite court fee is paid.

Section 149 of the Code of Civil Procedure is a sort of proviso to that rule by allowing the deficiency to be made good within a period fixed by it. If the proper court fee is not paid at the time of filing of a memorandum of appeal, but the deficit court fee is paid within the time fixed by the court, it cannot be treated as time barred.<sup>16</sup> Thus, the defective document is retrospectively validated for the purposes of limitation as well as court fees.<sup>17</sup> The power, however, is discretionary and should be exercised, judiciously and in the interests of justice.<sup>18</sup>

1984 SC 1896; Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344: AIR 2005 SC 3353.

<sup>15</sup> Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159: AIR 1982 SC 137; Ramesh Bejoy v. Pashupati Rai, (1979) 4 SCC 27: AIR 1979 SC 1769; Jogdhayan v. Babu Ram, (1983) 1 SCC 26: AIR 1983 SC 57; Johri Singh v. Sukh Pal Singh, (1989) 4 SCC 403: AIR 1989 SC 2073.

<sup>16</sup> Mannan Lal v. Chhotaka Bibi, (1970) 1 SCC 769 at pp. 775-77: AIR 1971 SC 1374 at pp. 1378-80; Mahanth Ram Das v. Ganga Das, supra; Mahasay Ganesh Prasad v. Narendra Nath, AIR 1953 SC 431 at pp. 432-33:17 Cut LT 73:1951 KLT (SC) 28; Jugal Kishore v. Dhanno Devi, (1973) 2 SCC 567: AIR 1973 SC 2508; Indian Statistical Institute v. Associated Builders, (1978) 1 SCC 483: AIR 1978 SC 335 at p. 340; Mohd. Mahibulla v. Seth Chaman Lal, (1991) 4 SCC 529: AIR 1993 SC 1241.

<sup>17</sup> Mahasay Ganesh Prasad v. Narendra Nath (ibid.); Mahanth Ram Das v. Ganga Das (ibid.); Jugal Kishore v. Dhanno Devi (ibid.).

<sup>18</sup> Scheduled Caste Coop. Land Owning Society Ltd. v. Union of India, (1991) 1 SCC 174: AIR 1991 SC 730; Indian Statistical Institute v. Associated Builders, supra; Mahasay Ganesh

## 6. TRANSFER OF BUSINESS: SECTION 150

Section 150 of the Code declares that where the business of any court is transferred to any other court, the transferee court will exercise same powers and discharge same duties conferred or imposed by the Code upon the transfer court.

## 7. ENDS OF JUSTICE: SECTION 151

The inherent powers saved by Section 151 can be used to secure the ends of justice.<sup>19</sup> Thus, the court can recall its own orders and correct mistakes;<sup>20</sup> can set aside an ex parte order passed against the party;<sup>21</sup> can issue temporary injunctions in cases not covered by the provisions of Order 39;<sup>22</sup> can add, delete or transpose any party to a suit;<sup>23</sup> can set aside illegal orders or orders passed without jurisdiction;<sup>24</sup> can revive execution applications;<sup>25</sup> can take notice of subsequent events;<sup>26</sup> can hold trial in camera or prohibit excessive publication of its proceedings;<sup>27</sup> can allow amendments of pleadings;<sup>28</sup> can correct errors and mistakes;<sup>29</sup> can expunge remarks made against a judge;<sup>30</sup> can extend time for payment of court fees;<sup>31</sup> can extend time to pay arrears

Prasad v. Narendra Nath (ibid.). K.C. Skaria v. Govt. of State of Kerala, (2006) 2 SCC 285: AIR 2006 SC 811.

<sup>19</sup> Manohar Lal v. Seth Hiralal, AIR 1962 SC 527 at pp. 533, 537: 1962 Supp (1) SCR 450; Raja Soap Factory v. S.P. Shantharaj, AIR 1965 SC 1449: (1965) 2 SCR 800; Naresh Shridhar v. State of Maharashtra, AIR 1967 SC 1 at p. 8: (1966) 3 SCR 744; Jaipur Mineral Development Syndicate v. CIT, (1977) 1 SCC 508 at pp. 510-11: AIR 1977 SC 1348 at p. 1350; Mulraj v. Murti Raghunathji Mahaaraj, AIR 1967 SC 1386 at p. 1390: (1967) 3 SCR 84; Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165 at p. 1178: (1968) 3 SCR 163; All Bengal Excise Licensees' Assn. v. Raghavendra Singh, (2007) 11 SCC 374: AIR 2007 SC 1386.

<sup>20</sup> Keshardeo v. Radha Kissen, AIR 1953 SC 23 at pp. 26-27:1953 SCR 136.

<sup>21</sup> Martin Burn Ltd. v. R.N. Banerjee, AIR 1958 SC 79 at p. 83:1958 SCR 514.

<sup>22</sup> Manohar Lal v. Seth Hiralal, supra.

<sup>23</sup> Saila Bala Dassi v. Nirmala Sundari Dassi, AIR 1958 SC 394 at p. 398: 1958 SCR 1287.

<sup>24</sup> Keshardeo v. Radha Kissen, supra; B.V. Patankar v. C.G. Sastry, AIR 1961 SC 272 at p. 275: (1961) 1 SCR 591; Mulraj v. Murti Raghunathji Mahaaraj, supra.

<sup>25</sup> Kumar Daulat Singh v. Prahlad Rai, (1979) 4 SCC 326: AIR 1979 SC 1818.

<sup>26</sup> Nair Service Society Ltd. v. K.C. Alexander, supra, at pp. 1177-78 (AIR); Shikharchand Jain v. Digamber Jain Praband Karini Sabha, (1974) 1 SCC 675: AIR 1974 SC 1178.

<sup>27</sup> Naresh Shridhar v. State of Maharashtra, supra, at p. 11 (AIR).

<sup>28</sup> For detailed discussion, see supra, Pt. II, Chap. 6.

<sup>29</sup> L. Janakirama Iyer v. P.M. Nilakanta Iyer, AIR 1962 SC 633 at p. 643:1962 Supp (1) SCR 206; Samarendra Nath v. Krishna Kumar, AIR 1967 SC 1440 at p. 1443: (1967) 2 SCR 18.

<sup>30</sup> State of Assam v. Ranga Muhammad, AIR 1967 SC 903 at pp. 907-08: (1967) 1 SCR 454.

<sup>31</sup> Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882: (1961) 3 SCR 763.

rears of rent;<sup>32</sup> can restore the suit and rehear it on merits;<sup>33</sup> can review its orders,<sup>34</sup> etc. What would meet the ends of justice would always depend upon the facts and circumstances of each case and the requirements of justice.<sup>35</sup>

#### 8. ABUSE OF PROCESS OF COURT: SECTION 151

The inherent powers under Section 151 can also be exercised to prevent the abuse of the process of a court.<sup>36</sup> Such abuse may be committed by a court or by a party. Where a court employs a procedure in doing something which it never intended to do and there is miscarriage of justice, there is an abuse of process by the court itself. The injustice so done to the party must be remedied on the basis of the doctrine *actus curiae neminem gravabit* (an act of the court shall prejudice no one).<sup>37</sup> Similarly, a party to a litigation may also be guilty of an abuse of the process of the court, e.g. by obtaining benefits by practising fraud on the court;<sup>38</sup> or upon a party to the proceedings;<sup>39</sup> or by circumventing the statutory provisions;<sup>40</sup> or by resorting to or encouraging multiplicity of proceedings;<sup>41</sup> or by instituting vexatious, obstructive or dilatory tactics;<sup>42</sup> or by introducing scandalous or objectionable matter in

<sup>32</sup> Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159: AIR 1982 SC 137.

<sup>33</sup> Jaipur Mineral Development Syndicate v. CIT, (1977) 1 SCC 508: AIR 1977 SC 1348; Lachi Tewari v. Director of Land Records, 1984 Supp SCC 431: AIR 1984 SC 41.

<sup>34</sup> Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909 at p. 1911. See also, Author's Lectures on Administrative Law (2008) Lecture VII.

<sup>35</sup> Per Gajendragadkar, C.J. in Naresh Shridhar v. State of Maharashtra, AIR 1967 SC 1 at p. 8: (1966) 3 SCR 744.

<sup>36</sup> Manohar Lal case, supra, at p. 537 (AIR); Raja Soap Factory v. S.P. Shantharaj, supra, at p. 1450 (AIR); Rain Chand case, supra, at p. 1902 (AIR); Naresh Shridhar v. State of Maharashtra, supra, at p. 11 (AIR); Jaipur Syndicate case, supra, at p. 1350 (AIR).

<sup>37</sup> Kanai Law Shaw v. Bhathu Shaw, C.A. 151 of 1963, decided on 3-5-1965 (SC) (unrep); Forasol v. ONGC, 1984 Supp SCC 263 at pp. 295-96: AIR 1984 SC 241 at pp. 259-60. For detailed discussion, see supra, "Restitution", Chap. 2.

<sup>38</sup> Dadu Dayal Mahasabha v. Sukhdev Arya, (1990) 1 SCC 189; U.P. Junior Doctors' Action Committee v. Dr. B. Sheetal Nandxvani, (1990) 4 SCC 633: AIR 1991 SC 909; Baidyanath Dubey v. Deonandan Singh, 1968 SCD 275.

<sup>39</sup> Dadu Dayal v. Sukhdev Arya (ibid.); Sadho Saran v. Anant Rai, AIR 1923 Pat 483: ILR (1923) 2 Pat 731.

<sup>40</sup> Manilal Mohanlal v. Sardar Sayed Ahmed, AIR 1954 SC 349: (1955) 1 SCR 108; Jibon Krishna v. New Beerbhum Coal Co. Ltd., AIR 1960 SC 297 at pp. 299-300: (1960) 2 SCR 198; Manohar Lal v. Seth Hiralal, supra. See also supra, Forasol v. ONGC; Cotton Corpn. of India Ltd. v. United Industrial Bank Ltd., (1983) 4 SCC 625: AIR 1983 SC 1272.

<sup>41</sup> Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165 at pp. 1177-78: (1968) 3 SCR 163.

<sup>42</sup> Jethabhai Versy and Co. v. Amarchand Madhavji and Co., AIR 1924 Bom 90; Mula v. Babu Ram, AIR 1960 All 573 at pp. 575-76.

proceedings;<sup>43</sup> or by trying to secure an undue advantage over the opposite party,<sup>44</sup> etc.

#### 9. AMENDMENT OF JUDGMENTS, DECREES, ORDERS AND OTHER RECORDS: SECTIONS 152, 153 AND 153-A

Section 152 enacts that clerical or arithmetical mistakes in judgments, decrees or orders arising from any accidental slip or omission may at any time be corrected by the court either of its own motion (*suo motu*) or on the application of any of the parties.<sup>45</sup> The section is based on two important principles:<sup>46</sup> (i) an act of court should not prejudice any party;<sup>47</sup> and (ii) it is the duty of courts to see that their records are true and they represent the correct state of affairs<sup>48</sup>

In the words of Bowen, L.J., "Every court has inherent power over its own records so long as those records are within its power and that it can set right any mistake in them. An order even when passed and entered may be amended by the court so as to carry out its intention and express the meaning of the court when the order was made."<sup>49</sup> It can be done at any time.<sup>50</sup>

#### Illustrations

(1) A files a suit against B for Rs 10,000 in court X. The court passes a decree for Rs 1000 "as prayed". The decree can be amended under this section.

(2) A files a suit against B for Rs 10,000 and interest in court X. The court passes a decree for Rs 5000 only and nothing more. A applies to amend the decree by adding a prayer for payment of interest. The decree cannot be amended under this section. If aggrieved by the decree, A may file an appeal or application for review.

Section 153-A as inserted by the Amendment Act of 1976 provides that where the appellate court dismisses an appeal summarily under

<sup>43</sup> Shankerlal v. Ramniklal, AIR 1951 Kant 23.

<sup>44</sup> Yasin Ali v. Ali Bahadur, AIR 1924 Oudh 230; Director of Inspection (Intelligence) v. Vinod Kumar, AIR 1987 SC 1260; V. Ramakrishna v. N. Sarojini, AIR 1993 AP 147; Rajappa Hanamantha Ranoji v. Mahadev Channabasappa, (2000) 6 SCC 120; AIR 2000 SC 2108.

<sup>45</sup> Master Construction Co. (P) Ltd. v. State of Orissa, AIR 1966 SC 1047 at p. 1049; (1966) 3 SCR 99; Samarendra Nath v. Krishna Kumar, AIR 1967 SC 1440 at p. 1443; (1967)

<sup>46</sup> 2 SCR 18; Ram Kumar v. Union of India, (1991) 2 SCC 247; Special Land Acquisition Officer v. Dharmaraddi Venkatearaddi, (2005) 13 SCC 262; AIR 2005 SC 4099; Director (L.A.) v. Malla, (2006) 12 SCC 87; AIR 2007 SC 740.

<sup>47</sup> Bishnu Charan Das v. Dhani Biswal, AIR 1977 Ori 68 at p. 69.

<sup>48</sup> Tulsipur Sugar Co. Ltd. v. State of U.P., (1969) 2 SCC 100 at p. 106-07; AIR 1970 SC 70 at pp. 75-76. See also *supra*, Chap. 2.

<sup>49</sup> Samarendra Nath v. Krishna Kumar, AIR 1967 SC 1440 at p. 1443; (1967) 2 SCR 18.

<sup>50</sup> Mellor v. Swire, (1885) 30 Ch D 239 (CA); Samarendra Nath v. Krishna Kumar (*ibid.*); L. Janakirama Iyer v. P.M. Nilakanta Iyer, AIR 1962 SC 633; 1962 Supp (1) SCR 206.

Ss. 152, 153.



Order 41 Rule 11, the power of amendment under Section 152 can be exercised by the court of first instance.<sup>51</sup>

Section 152 is confined to amendments of judgments, orders or decrees. Order 6 Rule 17 deals with amendments of pleadings.<sup>52</sup> Section 153, however, confers a general power on the court to amend defects or errors in "any proceeding in a suit" and to make all necessary amendments for the purpose of determining the real question at issue between the parties to the suit or other proceeding.<sup>53</sup>

#### 10. LIMITATIONS

It is true that the inherent powers of the court are very wide and residuary in nature and they are in addition to the powers specifically conferred on the court by the Code. It is, however, equally true that these inherent powers can be exercised *ex debito justitiae* only in the absence of express provisions in the Code.<sup>54</sup> They cannot be exercised in conflict with what had been expressly provided in the Code or against the intentions of the legislature.<sup>55</sup> If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions.<sup>56</sup> Again, the inherent powers are to be exercised by the court in very exceptional circumstances.<sup>57</sup> The restrictions on the inherent powers are not because they are controlled by the provisions of the Code, but because it should be presumed that the procedure provided by the legislature is dictated by the interests of justice.<sup>58</sup>

Thus, in the exercise of inherent powers a court cannot invest itself with jurisdiction not vested in it by law;<sup>59</sup> or grant an order of stay circumventing

<sup>51</sup> See also *supra*, L. Janakirama Iyer v. P.M. Nilakanta Iyer.

<sup>52</sup> For detailed discussion, see *supra*, Pt. II, Chap. 6.

<sup>53</sup> *Jai Jai Ram Manohar v. National Building Material Supply*, (1969) 1 SCC 869: AIR 1969 SC 1267; *Purushottam Umedbhai & Co. v. Manilal & Sons*, AIR 1961 SC 325 at pp. 329-30: (1961) 1 SCR 982; *Ramkarandas v. Bhagwandas*, AIR 1965 SC 1144: (1965) 2 SCR 186.

<sup>54</sup> *Mahendra Manilal v. Sushila Mahendra*, AIR 1965 SC 364 at p. 399: (1964) 7 SCR 267; *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527 at p. 537:1962 Supp (1) SCR 450; *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998; *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 at p. 1003: (1964) 5 SCR 946.

<sup>55</sup> *Arjun Singh v. Mohindra Kumar* (*ibid*) at p. 1003 (AIR); *Manohar Lal v. Seth Hiralal* (*ibid*) at p. 537 (AIR); *Durgesh Sharma v. Jayshree*, (2008) 9 SCC 648.

<sup>56</sup> *Ram Chand & Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava*, AIR 1966 SC 1899: (1966) 3 SCR 856.

<sup>57</sup> *Manohar Lal v. Seth Hiralal*, *supra*, at p. 534 (AIR); *Ramkarandas v. Bhagwandas*, AIR 1965 SC 1144 at p. 1145: (1965) 2 SCR 186.

<sup>58</sup> *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527 at p. 533:1962 Supp (1) SCR 450.

<sup>59</sup> *Raja Soap Factory v. S. P. Shantharaj*, AIR 1965 SC 1449: (1965) 2 SCR 800; *State of W.B. v. Indira Debi*, (1977) 3 SCC 559.

the provisions of Section 10 of the Code;<sup>60</sup> or allow set-off in execution proceedings at the instance of an auction-purchaser, ignoring the provisions of Order 21 Rule 84;<sup>61</sup> or remand a case, ignoring the provisions of Order 41 Rules 23 and 25;<sup>62</sup> or reopen the questions which had already been heard and finally decided by it and which are consequently barred by the general principles of *res judicata*;<sup>63</sup> or appoint a Commissioner keeping aside the provisions of Section 75;<sup>64</sup> or review its orders or judgments in the absence of statutory provisions;<sup>65</sup> or direct an arbitrator to make a fresh award;<sup>66</sup> or set aside an *ex parte* decree, ignoring the provisions of Order 9 Rule 9 or 13;<sup>67</sup> or override substantive rights of any party;<sup>68</sup> or restrain any party from taking proceeding in a court of law;<sup>69</sup> or implead legal representatives on record after the suit is abated;<sup>70</sup> or make an order restraining execution of the decree against the surety;<sup>71</sup> or set aside an order which was right when it was made,<sup>72</sup> etc.

#### 11. CONCLUDING REMARKS

Sections 148 to 153-B of the Code invest courts with very wide and extensive powers to minimize litigation, avoid multiplicity of proceedings and to render full and complete justice between the parties before them. Section 151 of the Code is a salutary provision and saves inherent powers of a court, which are to be exercised *ex debito justitiae* (in the interest of justice). They have not been conferred upon the court. They are inherent in every court by virtue of its duty to do justice to the cause.

It is submitted that the following observations of Subba Rao, J. (as he then was) in the case of *Ram Chand & Sons Sugar Mills (P) Ltd. v.*

- <sup>60</sup>     *Manohar Lal v. Seth Hiralal*, supra, at p. 536 (AIR).
- <sup>61</sup>     *Manilal Mohanlal v. Sardar Sayed Ahmed*, AIR 1954 SC 349: (1955) 1 SCR 108.
- <sup>62</sup>     *Mahendra Manilal v. Sushila Mahendra*, supra, at p. 399 (AIR); *Nain Singh v. Koonwarjee*, (1970) 1 SCC 732 at pp. 734-35: AIR 1970 SC 997 at p. 998; see also supra, Pt. III,      Chap. 2.
- <sup>63</sup>     *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 at p. 554:1962 Supp (1) SCR 475; *Union of India v. Ram Charan*, AIR 1964 SC 215 at p. 218: (1964) 3 SCR 467.
- <sup>64</sup>     *Padam Sen v. State of U.P.*, AIR 1961 SC 218 at p. 220: (1961) 1 SCR 884.
- <sup>65</sup>     For detailed discussion, see supra, Pt. III, Chap. 8.
- <sup>66</sup>     *Rikhabdass v. Ballabhdas*, AIR 1962 SC 551 at p. 554:1962 Supp (1) SCR 475.
- <sup>67</sup>     *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 at pp. 1003-05: (1964) 5 SCR 946.
- <sup>68</sup>     *Padam Sen v. State of U.P.*, AIR 1961 SC 218: (1961) 1 SCR 884; *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527:1962 Supp (1) SCR 450.
- <sup>69</sup>     *Manohar Lal v. Seth Hiralal* (ibid.) at p. 536 (AIR).
- <sup>70</sup>     *Union of India v. Ram Charan*, AIR 1964 SC 215: (1964) 3 SCR 467.
- <sup>71</sup>     *Bank of Bihar Ltd. v. Dr. Damodar Prasad*, AIR 1969 SC 297 at p. 299: (1969) 1 SCR 620.
- <sup>72</sup>     *A.C. Estates v. Serajuddin & Co.*, AIR 1966 SC 935 at p. 939: (1966) 1 SCR 235.

Kanhayalal Bhargava<sup>73</sup> lay down the correct principle regarding the ambit and scope of the inherent powers of a court under Section 151 of the Code; wherein His Lordship after considering all the leading cases on the subject pronounced:

"The inherent power of a court is in addition to and complimentary to the powers expressly conferred under the Code. But that power will not be exercised if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed by the said provisions. Whatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the undoubted power of the court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court."<sup>74</sup> (emphasis supplied)

<sup>73</sup> AIR 1966 SC 1899: (1966) 3 SCR 856.

<sup>74</sup> Supra, n. 72 at p. 1902 (AIR).

# PART V

## 5 Delay in Civil Litigation

"JARNDYCE and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why.... Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out...but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless."

-Charles Dickens (BLEAK HOUSE)

### SYNOPSIS

4. Position prior to Amendment Acts 745

#### 1. GENERAL

One of the most vexed and worrying problems in the administration of civil justice is of delay. Jonathan Swift in his famous work Gulliver's Travels sarcastically describes the delay in courts in the following words:

"In pleading, they (lawyers) studiously avoid entering into the merits of the cause; but are loud, violent and tedious in dwelling upon all circumstances which are not to the purpose...they never desire to know what claim or title my adversary hath to my cow, but whether the said cow were red or black; her horns long or short; whether the field I graze her in be round or square;

1. General

739

5. Amendments of 1976

746

2. Dangers of delay

740

6. Amendments of 1999 and 2002

747

3. Causes of delay

746

7. Suggestions

747

whether she were milked at home or abroad; what diseases she is subject to; and the like; after which they consult the precedents, adjourn the cause from time to time, and in ten, twenty or thirty years come to an issue.

It is likewise to be observed that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written; which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood; of right and wrong; so that it will take thirty years to decide whether the field, left by my ancestors for six generations, belong to me or to a stranger three hundred miles off."

## 2. DANGERS OF DELAY

Delay in disposal of case threatens justice. The lapse of time blurs truth, weakens memory of witnesses and makes presentation of evidence difficult. This leads to loss of public confidence in the judicial process which in itself is a threat to Rule of Law and consequently to the Democracy. The rising costs of litigation can also be said to be attributable to delay which in turn causes the litigants to either abandon meritorious claims or compromise for a lesser or unjust settlement out of court. Besides, expression of society's moral outrage is essential in an ordered society that asks its members to rely on legal process rather than self-help to vindicate wrongs. To avoid anarchy, fairness has to be actually felt by the aggrieved persons and it is the court which provides the systematic outlet. Obedience to law has been described as the strongest of all the forces making for a nation's peaceful existence and progress.<sup>1</sup>

3. CAUSES OF DELAY As remarked earlier, procedure is the handmaid of justice. It is to be used so as to advance the cause of justice and not to thwart it. An essential requirement of justice is that it should be dispensed as quickly as possible. It is a well-known adage that "justice delayed is justice denied". However, delay in litigation is equally proverbial and, though it may sound paradoxical, the fact remains that the very provisions of the Code which are designed to facilitate smooth and speedy trial of cases are misused and abused in order to delay cases indefinitely and ultimate success in the cause often proves illusory. The result is that cases pile up and a huge backlog accumulates in all courts. The problem of backlog and delay in litigation has been engaging the attention of the Law Commission for a long time and as a result of its

<sup>1</sup> Law Commission's 127th Report at para 2.15.

recommendations, made from time to time, fairly extensive changes have been made in the provisions of the Code in 1976 with a view to removing the causes of delay. However, those changes seemed to have had little impact, more changes, therefore, made by the Amendment Acts of 1999 and 2002.

A number of causes seem to be responsible for this sorry state of affairs. An attempt has been made here to identify some of the causes and suggest measures to remove them. It appears that the main causes of delay are as follows:

(1)      Increase in litigation.—A glance through the figures of cases filed in courts over a number of years would clearly show that litigation has been increasing phenomenally in the country. Whatever may be the causes of this increase, and it would be beyond the scope of this book to go into them, the fact remains that courts are over flooded with cases and though more and more courts are being set up, the increase in their number is not sufficient to keep pace with the increased number of cases.

(2)      There is a general feeling that the Government is not appointing a sufficient number of judges to deal with the increasing work. It is a common experience that even existing vacancies in various High Courts remain unfilled for an unduly long time. Prompt appointment of judges to fill the existing vacancies and creation of additional posts in sufficient number would go a long way to solve the problem of delay and arrears.

(3)      Much of the delay occurs because the provisions of the Code are not properly observed and followed. After filing a plaint, the process fee is not paid for a long time so that summons to the defendant is not served in time. After a defendant makes his appearance, his advocate often seeks long adjournments to file the written statement. After the pleadings are closed, there comes the stage of producing documentary evidence before issues are settled but nobody bothers to produce documentary evidence at this stage. Little use is made of the provisions for discovery and inspection of documents and for serving interrogatories. If these provisions are properly used, the controversy between the parties can often be narrowed before the parties go to trial. However, what usually happens is that when the suit comes for trial, the advocates sit down in the court, open their briefs, probably for the first time, and begin laboriously to prepare lists of documents, etc. All the while the poor judge sits idly on the Bench, helplessly looking on. Countless hours are wasted in this way.

(4)      It is a matter of common knowledge that in a large number of cases coming before the High Courts and the Supreme Court, the dispute is about the interpretation of the legislative enactment in question. The

increase in the number of such cases is due to several reasons. There has been a vast expansion of the functions and activities of the State in all spheres with a corresponding increase in the number of laws enacted every year. But there is no reason why mere increase in the number of laws should by itself give rise to increase in litigation. Unfortunately, however, the laws are often hastily drafted with the result that the drafting is often loose and leaves great scope for lawyers to raise arguments about their interpretation. The difficulty of interpreting laws is often compounded by frequent and thoughtless amendments which, though intended to clarify the intention of the legislature, often fails to achieve the designed object and on the contrary results in greater confusion. The words of a statute are not inaugural words but words of valediction. "The problem has been tackled, long live the problem" is the message of most progressive legislations in India.<sup>2</sup>

In the case of *Zinabhai v. State of Gujarat*<sup>3</sup> considering the provisions of the Gujarat Panchayats Act, 1961, the High Court of Gujarat observed as under:

"It is an extraordinary and unique piece of legislation framed without much scientific accuracy of language and many of its provisions are so unhappily worded that it is difficult to penetrate their confusion and obscurity. This is not the first time that we are called upon to face the complexities of this legislation and, with our growing acquaintance with its provisions, we must confess to a feeling of reluctant respect which one feels for an old tough sparring partner whom one has never been able to knock out."<sup>4</sup>

(emphasis supplied)

(5) After the High Courts are empowered under Article 226 of the Constitution of India to issue prerogative writs and after the definition of "State" being liberally interpreted by the Supreme Court<sup>5</sup> so as to include the Union Government, State Governments, statutory corporations, nationalised banks, universities and any authority which is an instrumentality or agency of the Government, there is a soaring rise in litigation against the Government, with the result that today the Government is probably the biggest litigant in the country. The inefficiency of the Governmental machinery has naturally been responsible

<sup>2</sup> Prof. Upendra Baxi, "Judicial Discourse: Dialectics of the face and the mask" 1993 JILI 1 at p. 3.

<sup>3</sup> (1972) 13 Guj LR 1.

<sup>4</sup> Ibid, at p. 2 (per Bhagwati, C.J.).

<sup>5</sup> *Rajasthan SEB v. Mohan Lal*, AIR 1967 SC 1857; (1967) 3 SCR 377; *Sukhdev Singh v. Bhagatram Sardar Singh*, (1975) 1 SCC 421; AIR 1975 SC 1331; *Sow Prakash Rekhi v. Union of India*, (1981) 1 SCC 449; AIR 1981 SC 212; *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722; AIR 1981 SC 487; *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156; AIR 1986 SC 1571.

for considerable delay in disposal of cases where the Government is a party.

The judiciary is often criticised, in and out of Parliament, for mounting arrears of cases. What is forgotten, however, is the fact that the Government itself is responsible for the major portion of delay. The judiciary is not in a position to give a public reply to the criticism levelled against it. However, in the case of *State of Maharashtra v. G.A. Pitre*<sup>6</sup>, Chief Justice Chandrachud, while dealing with a case involving gross delay on the part of the Government, took occasion to draw public attention to this aspect of the problem in the following words:

"We consider this as a deplorable state of affairs. It is a matter of deep concern and regret that despite specific directions given by this court from time to time and despite numerous adjournments granted at the instance of the Government of Maharashtra over a period of 21 months, the Government has not bothered to give any attention to this matter whatsoever. We do not know whether the parties have been heard by the State Government as directed by us and, if so, why the decision is not being divulged. We are unable to understand that the State Government is unable to take any decision in the matter 'in view of the Assembly Session'. The fact that the Legislative Assembly is in session is no reason or justification for the Executive to neglect to discharge its imperative functions. We do not believe that the entire administration of the State of Maharashtra has come to a grinding halt on account of the fact that the Legislative Assembly is in session. And we do not believe, and would like to take this opportunity to give clear and strong expression to our view, that the State Government has hit upon a totally untenable excuse in order to explain away its indefensible indifference to a matter which has been hanging fire for 21 months. This court received inquiries from time to time from the Secretariat of Parliament in connection with questions put by members of Parliament regarding pendency of arrears in various courts and the reasons for delay caused in disposing of court cases. The Special Leave Petition before us is a speaking example of how delays occur in administering justice. We hope that, if and when any Hon'ble Member of the State Legislature puts a question as to law's delays, the State Government, in fairness to this court, will cite the career of this unfortunate Special Leave Petition as a telling example."<sup>7</sup>

(emphasis supplied)

The learned Chief Justice, however, did not choose to follow the easy path of dismissing the case (Special Leave Petition) of the Government

<sup>6</sup> (1982) 2 SCC 447: AIR 1982 SC 1196.

<sup>7</sup> Ibid, at pp. 448-49 (SCC): at p. 1197 (AIR).



and thereby reduce the arrears, but in a gesture of magnanimity went on to observe:

"We should have dismissed the Special Leave Petition filed by the State of Maharashtra for reasons stemming from its total unconcern with a matter which it has itself brought to this court. But, temper has no place in the scheme of justice and we cannot refuse to do justice to the parties by applying mechanically the frustrating adage that 'justice delayed is justice denied'. Experience has it that it is at least marginally more satisfactory to do justice even after a prolonged delay than to perpetrate injustice in quest of speed."<sup>9</sup>

(emphasis supplied)

(6) The attitude of some lawyers is also to some extent responsible for delay. In many cases, where the plaintiff has obtained interim or ad interim relief, he is naturally interested in delaying the proceedings so that stay or injunction is continued as far as possible. Similarly, where the defendant has no defence, he is naturally interested in prolonging the trial with a view to put off the evil day as long as possible. It is the ingenuity of advocates in taking advantage of technicalities which helps defendants in such cases. Lawyers are also known to apply for frequent adjournments on flimsy grounds. When a particular ground, such as his sickness or personal problem, is advanced by the advocate, it is usually not possible for a judge to examine whether the ground is genuine or not and it is in the fitness of things that he should normally accept as true what an advocate says. However, when this is the position, it is equally the duty of lawyers not to seek adjournments on flimsy or non-existent grounds. It is not suggested that such practices are widespread and that a majority of lawyers indulge in such tactics. But it cannot be denied that, as in every profession, there are unscrupulous elements in the legal profession too and that they are responsible for much of the delay in litigation.

(7) If lawyers are able to prolong litigation by resorting to one ruse or another, the question naturally arises, why do judges allow lawyers to take advantage of procedural technicalities and prolong litigation? The answer is that judges often show themselves unable to exercise sufficient control over proceedings being conducted before them. The judges in our country have a reputation for honesty and integrity. But that is not enough. It is an unfortunate fact that, owing to a variety of circumstances, this is not the place to go into them: judges are not drawn from the most talented members of the Bar. The result is that those who are much junior in practice find themselves appointed as judges and quite often they are not able to control senior members of

<sup>8</sup> Ibid, at pp. 448-49 (SCC): at p. 1197 (AIR). See also, M.C. Chagla, *Roses in December* (1973) at pp. 70-71, 126-27.

the Bar. They lack the experience and maturity required of a judge. Their grasp of law and fact leaves much to be desired. They are unable to impress senior members of the Bar who often possess much stronger personalities than the judges. They tend to avoid "heavy matters". Senior advocates know very well that when they apply for adjournment in a "heavy matter", the judge is sure to grant it, though after making a great show of being inconvenienced and lecturing the advocate about the matter being old. Often the judge has not read the papers at home and when an advocate cites ruling after ruling, the judge gets lost and the hearing becomes very lengthy. If the judge is well-versed in law and is quick to grasp facts, he can immediately pull up the advocate and cut short irrelevant arguments. Mere increase in the number of judges will not solve the problem. What is necessary is that experienced lawyers with a strong personality and character should be induced to accept appointment as judges so that the Bar looks up to the Bench and not down upon it.

#### 4. POSITION PRIOR TO AMENDMENT ACTS

As stated above,<sup>9</sup> before 1859 there was no uniform Code of Civil Procedure in India. After 1859, uniform Codes of Civil Procedure were enacted but they were also defective and unsatisfactory. Therefore, in the year 1908, the present Code was enacted. Though it had worked satisfactorily, all the problems were not solved. The Law Commission in its Report<sup>10</sup> observed:

"Although the provisions of the Code of Civil Procedure, 1908 are basically sound, it cannot be gainsaid that in view of the appalling backlog of cases which has unfortunately become a normal feature of nearly all the courts of the country, the problem of delay in law courts has assumed great importance."

There used to be delay at all the three important stages: delay up to passing of the decree, e.g. delay in the matter of issuing summons to the parties and witnesses; filing of written statements; framing of issues and even in pronouncement of judgment. Similarly, there was delay in First Appeals, Second Appeals, Revisions, etc. because of the language employed in the relevant provisions of the Code. With regard to execution proceedings, as early as the year 1872, the Privy Council<sup>11</sup> had to observe thus, "The difficulties of a litigant in India begin when he has obtained a decree." Later, in the case of Babu Lal v. Hazari Lal<sup>12</sup>,

<sup>9</sup> See supra, Pt. I, Chap. 1.

<sup>10</sup> Law Commission's Fourteenth Report, Vol. I at p. 263.

<sup>11</sup> Court of Wards v. Coomar Ramaput, (1872) 14 MIA 605 at p. 612:17 WR 195 (PC).

<sup>12</sup> (1982) 1 SCC 525: AIR 1982SC 818; see also Shyam Singh v. Collector, Distt. Hamirpur, 1993 Supp (1) SCC 693 at p. 700.

the Supreme Court has also observed, "The difficulty of the decree- holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections."<sup>13</sup> In the case of *Kuer Jang Bahadur v. Bank of Upper India Ltd.*<sup>14</sup>, the High Court of Oudh had to utter a word of caution, "Courts in India have to be careful to see that process of the court and law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights." In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.*<sup>15</sup>, the Supreme Court commented, "Because of the delay unscrupulous parties to the proceedings take undue advantage and the person who is in wrongful possession draws delight in delay in disposal of the case by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time." Again, in *N.S.S. Narayana Sarma v. Goldstone Exports (P) Ltd.*,<sup>16</sup> the Supreme Court highlighted the plight of decree-holder thus: "It is a general impression prevailing amongst the litigant public that the difficulties of a litigant are by no means over on his getting a decree for immovable property in his favour. Indeed, his difficulties in real and practical sense, arise after getting the decree." (emphasis supplied)

##### 5. AMENDMENTS OF 1976

It must be conceded that by the Amendment Act of 1976, extensive changes were made in the Code of Civil Procedure, 1908, all designed to avoid delay at every level. The necessary amendments were made in the provisions relating to appearance of parties, filing of written statements, production of documents, issue of summons, framing of issues, examination of parties, summoning and enforcing attendance of witnesses, adjournments and pronouncement of judgment. The right of appeal and revision has been considerably curtailed. Execution proceedings have also been made more effective. Over and above these changes, certain important changes have also been effected, e.g. widening of the doctrine of *res judicata*, summary procedure, specific provisions relating to set-off and counterclaim, garnishee order, appeal by indigent persons, costs for vexatious litigation, exemption from attachment of certain properties, legal aid to indigent suitors, etc.

<sup>13</sup> Ibid, at p. 539 (SCC): at p. 826 (AIR).

<sup>14</sup> AIR 1925 Oudh 448 at p. 449.

<sup>15</sup> (1999) 2 SCC 325 at p. 326: AIR 1999 SC 882 at p. 883.

<sup>16</sup> (2002) 1 SCC 662 at p. 668: AIR 2002 SC 251 at p. 254 (per Mohapatra, J.).

6.      AMENDMENTS OF 1999 AND 2002 The amendments made in 1976 were not found sufficient. In pursuance of the recommendations made by Justice Malimath Committee, extensive changes have been made in 1999 and 2002 in the provisions relating to issuance of summons, filing of written statement, amendment of pleadings, production of documents, examination of witnesses and recording of evidence, grant of adjournments, fixing time for oral arguments, pronouncement of judgment, preparation of decree, etc. A new provision for settlement of disputes outside the court has been introduced.

7.      SUGGESTIONS

It is clear, from what has been stated above, that the present Code of Civil Procedure after the Amendments of 1976, 1999 and 2002 is an attempt to provide justice keeping in view, inter alia, the basic consideration that justice should not be delayed. The changes made by the Amendment Acts are, however, not sufficient.

The following suggestions are made with a view to reducing delay in civil litigation:

(1)      There is one provision, which, if used effectively by courts, can help to cut short the litigation. Order 10 Rule 2 provides that at the first hearing of the suit, the court (a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in court, as it deems fit; and

(b)      may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in court or his pleader is accompanied. Thus, this provision casts a duty on the court to examine the parties orally before settling the issues. In practice, however, this provision is simply ignored and issues are invariably raised from the pleadings of the parties. If the judge examines the parties orally, it is quite likely that many a time the truth will come out immediately in spite of what is stated in the pleadings. This will obviate the need for examining numerous witnesses on either side on a point of disputed fact. In the humble opinion of the author, the use of this provision alone, more than anything else, can cut short litigation substantially.

(2)      Even though the Law Commission<sup>17</sup> recommended deletion of a statutory notice under Section 80, it has been retained. It is submitted that because of two reasons such notice is not necessary: firstly, the State or Public Officer should not have a privilege in the matter of litigation as against a citizen and should not have a higher status than an ordinary litigant in this aspect. As a matter of fact, such notice

<sup>17</sup> Law Commission's Fifty-fourth Report at pp. 10-14.

is not necessary for taking proceedings under Articles 32 and 226 of the Constitution of India; and secondly, as observed by Justice Krishna Iyer<sup>18</sup>, it is intended to alert the Government to negotiate a just settlement or at least have the courtesy to tell the aggrieved person why the claim is being resisted. But it has become an empty formality because the administration is always unresponsive.<sup>19</sup> The provision relating to notice is, therefore, required to be deleted.

(3) Certain provisions, on the other hand, are not properly applied, e.g. Sections 99 and 99-A (no decree or order under Section 47 to be reversed or modified for error or irregularity not affecting the merits of the case, etc.) have not been usually pressed into service by courts or even by parties. Similarly, Sections 35-A and 35-B (compensatory costs in respect of false or vexatious claims or defences and for causing delay) are rarely used by courts or even by litigants. Again, though Order 41 Rule 11 expressly authorises an appellate court to dismiss First Appeals summarily by recording reasons, this provision is not known to be used by appellate courts other than High Courts, and all First Appeals are admitted by appellate courts as a matter of course. Further, though Order 41 Rule 3-A prohibits an appellate court to grant stay when the appeal is time-barred, in many cases, appellate courts grant stay/injunction subject to the limitation being condoned. This is clearly contrary to the legislative intent reflected in Rule 3-A. Similarly, in spite of the specific provision in Order 41 Rule 23-A for ordering remand when the case does not fall within the sweep of Rule 23 or Rule 25, generally, it is not resorted to by appellate courts.

(4) Sometimes, the government files an appeal even though there is no substance in it or the point is covered by the judgment of the Supreme Court. Courts are, in these circumstances, constrained to observe against a litigious approach adopted by the Government.

In *State of Maharashtra v. Vinayak Deshpande*<sup>20</sup>, the Supreme Court had to observe:

"It is indeed difficult to understand as to why the State of Maharashtra should have preferred the present appeal at all... . We do not think it is right that the State Government should lightly prefer an appeal in this court against the decision given by the High Court unless they are satisfied, on careful consideration and proper scrutiny, that the decision is erroneous and public interest requires that it should be brought before a superior court for being corrected. The State Governments should not adopt a litigious approach

<sup>18</sup> *State of Punjab v. Geeta Iron & Brass Works Ltd.*, (1978) 1 SCC 68: AIR 1978 SC 1608.

<sup>19</sup> *Ibid*, at p. 69 (SCC): at p. 1609 (AIR); see also *supra*, Pt. II, Chap. 16.

<sup>20</sup> (1976) 3 SCC 405: AIR 1976 SC 1204.

and waste public revenues on fruitless and futile litigation where there are no chances of success."21 (emphasis supplied)

It is undoubtedly true that if the Government were more careful in deciding whether to carry the matter in appeal or not, a number of appeals filed by the Government may substantially diminish.

(5) In many cases the court issues a notice to the Government or public bodies at the admission stage so as to settle the case immediately where the point at issue is such that regular hearing is hardly necessary and the matter could be decided promptly. Unfortunately, however, the Government machinery is very slow to act and, more often than not, there is no response to the notice and the court is constrained to admit the matter which remains pending for a number of years when it could have been disposed of at the initial stage.

(6) It is possible to reduce the burden of cases on regular courts by exploring the possibilities of setting up other forums where the disputes between the parties can be settled more informally and speedily, though under some kind of judicial supervision, e.g. separate Family Courts have been set up to deal with matrimonial cases and other disputes relating to family affairs. Members of such courts may be appointed from amongst serving or retired judges. Similarly, if more tribunals are created to deal with disputes arising under various laws, the burden on regular courts will be reduced to that extent. Since these Family Courts and tribunals will be subject to the supervisory jurisdiction of the High Court under Article 227 of the Constitution, it will ensure that they decide the cases coming before them judiciously and in accordance with law and not arbitrarily or capriciously. In this connection, it will be appropriate to mention of the experiment of holding Conciliation Courts and Lok Adalats which is being carried on in many States. Such Adalats are held at various places from time to time and apart from judges and lawyers, social workers are also invited to attend the proceedings and help the parties in settling their disputes informally. This experiment, it is submitted, is worth making in all States.

It may be stated at this stage by the Code of Civil Procedure (Amendment) Act, 1999, which has come into force from 1 July 2002, a provision has been made (Section 89) for settlement of disputes outside the court through arbitration, conciliation, mediation and Lok Adalats.

(7) Last but not the least, all agree that justice must be cheap and expeditious. However, in order to provide cheap and expeditious justice, it is necessary to appoint competent judges. But the present emoluments of judges are so meagre that they do not attract competent people to the Bench. If society wants cheap and expeditious justice,

21 Ibid., at p.407 (SCC): at p 1206 (AIR)

it must also bear the expense of competent judges. The principle that "justice must be cheap but judges expensive" is, though universally recognised, never acted upon.

Before we conclude the discussion, it is worthwhile to quote the following observations of an eminent jurist<sup>22</sup>:

"To my mind, the solution is very simple. See that the men you appoint are the proper ones. Find judges with an alert and active mind. What is more important, pay the judges better, give them a better pension, and enforce better conditions of service. The usual solution put forward is to increase the number of judges. But if the men selected are not really competent, Parkinson's Law will come into play. The more the judges, the greater will be the load of work."<sup>23</sup> (emphasis supplied)

<sup>22</sup> Justice M.C. Chagla.

<sup>23</sup> M.C. Chagla, *Roses* in December (1973) at p. 127; see also *Kumar Padma Prasad v. Union of India*, (1992) 2 SCC 428: (1992) 20 ATC 217 (2)(a): AIR 1992 SC 1213.

## Appendices





# APPENDIX

## A

### Plaint

In the City Civil Court, at Ahmedabad Civil Suit No. 100 of 2002

Rajnikant Ramprasad Pandya, Hindu, Adult (.... Plaintiff;) aged about 50 years, residing at 15, Paradise Park, Usmanpura, Ahmedabad

Versus

Ramanbhai Mohanbhai Patel, Hindu, Adult, aged (.. Defendant)  
about 55 years, residing at 35, Patidar Society, Paldi, Ahmedabad

The plaintiff above named humbly states as under:

1. That by an agreement in writing, dated 1 January 2001, signed by the defendant, the defendant contracted to sell to the plaintiff his bungalow referred to in the said agreement (hereinafter referred to as "the suit property") for Rs 10,00,000. An amount of Rs 1,00,000 was paid by the plaintiff to the defendant as earnest money at the time of agreement.
2. The plaintiff was ready and willing to perform his part of the contract and on 1 June 2001, he tendered Rs 9,00,000 the balance of consideration to the defendant and called upon him to execute a sale deed, but the defendant refused to do so.
3. The plaintiff has always been and is still ready and willing to perform his part of the contract by paying the balance of purchase price to the defendant.
4. The cause of action for the suit arose on 1 January 2001 when the defendant executed the agreement to sell the suit property to the plaintiff; and on 1 June 2001, when the plaintiff tendered the balance amount to the defendant and showed his readiness and willingness to perform his part of the contract but the defendant refused to execute the sale deed and thereby failed to perform his part of the contract.

1 Strictly speaking, this prayer is not necessary (see *supra*, Pt. II, Chap. 7).

APPENDIX  
B  
Written Statement

In the City Civil Court, at Ahmedabad Civil Suit No. 100 of 2002

Rajnikant Ramprasad Pandya, Hindu, Adult aged about 50 years, residing at 15, Paradise Park, Usmanpura, Ahmedabad .. Plaintiff;  
Versus  
Ramanbhai Mohanbhai Patel, Hindu, Adult, aged, about 55 years, residing at 35, Patidar Society, Paldi, Ahmedabad .. Defendant

The written statement on behalf of the defendant abovenamed:

1. The defendant denies that he entered into an agreement to sell the suit property to the plaintiff on 1 January 2001 or on any other date and that the plaintiff paid Rs 1,00,000 or any other amount to him as earnest money as alleged in para 1 of the plaint.
2. The defendant denies that on 1 June 2001 or on any other date, the plaintiff tendered Rs 9,00,000 or any other amount to him and called upon him to execute the sale deed as alleged in para 2 of the plaint. The defendant says that since it is not true that he executed any agreement to sell the suit property to the plaintiff, the question of the plaintiff tendering the balance of consideration and the plaintiff being ready and willing to perform his part of the alleged contract did not arise at all and the whole story is got up and false.
3. The defendant says that in view of what is stated above, the plaintiff has no cause of action to file the suit against him.
4. The defendant, therefore, submits that the plaintiff is not entitled to any of the reliefs claimed by him in the plaint and the suit filed by him be dismissed with costs.

DEF  
Defendant's Advocate

.....

Defendant

APPENDICES

Verification

I, Ramanbhai Mohanbhai Patel, the defendant abovenamed do solemnly declare that what is stated in paras 1 and 2 is true to my knowledge and that what is stated in the remaining paras is stated on information received by me and I believe it to be true.

.....  
Defendant

## APPENDIX

### C Issues

In the City Civil Court, at Ahmedabad Civil Suit No. 100 of 2002

Rajnikant Ramprasad Pandya, 15, Paradise Park, Usmanpura, Ahmedabad .. Plaintiff;  
Versus  
Ramanbhai Mohanbhai Patel, 35, Patidar Society, Paldi, Ahmedabad .. Defendant.

#### ISSUES

The following issues were framed at Ex. 15:

1. Whether the plaintiff proves that the defendant entered into an agreement to sell suit property to him for Rs 10,00,000?
2. Whether the plaintiff proves that he paid a sum of Rs 1,00,000 as earnest money to the defendant?
3. Whether the plaintiff proves that he was and is ready and willing to perform his part of the contract?
4. Whether the defendant proves that the case of the plaintiff is totally false and got up?
5. To what relief, if any, the plaintiff is entitled to?
6. What order and decree?

My findings are as under:

1. In the affirmative.
2. In the affirmative.
3. In the affirmative.
4. In the negative.
5. As per final order.
6. As per final order.

# APPENDIX D First Appeal

In the City Civil Court, at Ahmedabad Civil Suit No. 57 of 2003

Ramanbhai Mohanbhai Patel, 35, Patidar  
Society, Paldi, Ahmedabad .. Appellant (Ori. Defendant);  
Versus  
Rajnikant Ramprasad Pandya, 15, Paradise Park, Usmanpura, Ahmedabad  
... Respondent (Ori. Plaintiff).

Appeal under Section 96 of the Code of Civil Procedure, 1908

Claim: Rs 10,00,000 The appellant abovenamed most respectfully states as under:

1. That the plaintiff-respondent filed a suit in the City Civil Court at Ahmedabad being Civil Suit No. 100 of 1992 against the defendant- appellant for specific performance of the contract alleged to have entered into by him with the defendant. In the alternative, the plaintiff prayed for damages of Rs 10,00,000 from the defendant alleging that the defendant had committed breach of contract.
2. That the learned Judge, by his judgment dated 13 January 2003, decreed the suit filed by the plaintiff for specific performance of the contract and ordered the defendant to execute a sale deed in favour of the plaintiff.
3. That being aggrieved by the decree passed by the learned Judge, the appellant herein begs to prefer this appeal on the following among other grounds:  
Grounds  
(1) That the learned Judge has erred in decreeing the suit for specific performance filed by the plaintiff.  
(2) That the learned Judge ought to have dismissed the suit for specific performance filed by the plaintiff.

- (3) That the learned Judge has erred in holding that the defendant had entered into an agreement to sell his bungalow to the plaintiff.
- (4) That the learned Judge ought to have held that it was not proved by the plaintiff that the defendant had entered into an agreement of sale with him.
- (5) That the learned Judge ought to have held that since no agreement was entered into between the parties, there was no question of showing readiness or willingness to perform the alleged contract at all.
- (6) That the learned Judge has erred in holding that the plaintiff had paid Rs 1,00,000 to the defendant on 1 January 2001 as alleged by him.
- (7) That the learned Judge ought to have held that the plaintiff did not pay Rs 1,00,000 or any part thereof to the defendant on 1 January 2001 or on any day.
- (8) That the learned Judge has erred in holding that the plaintiff tendered Rs 9,00,000 to the defendant on 1 June 2001 as alleged by him.
- (9) That the learned Judge ought to have held that the plaintiff did not tender Rs 9,00,000 or any part thereof on 1 June 2001 or on any day to the defendant as alleged.
- (10) That the learned Judge has erred in holding that the defendant had committed breach of contract as alleged by the plaintiff.
- (11) That the learned Judge ought to have held that when the plaintiff did not enter into an agreement with the defendant, there was no question of breach of contract by him.
- (12) That the learned Judge has erred in ordering the defendant to execute a sale deed in favour of the plaintiff.
- (13) That the learned Judge ought not to have granted specific performance of the contract by ordering the defendant to execute a sale deed in favour of the plaintiff.
- (14) That the judgment and decree passed by the learned Judge is otherwise also contrary to law, against the weight of evidence and against the principles of justice, equity and good conscience.
4. The appellant, therefore, prays that the decree passed by the learned Judge in Civil Suit No. 100 of 2002 may kindly be set aside and the suit filed by the plaintiff may be dismissed with costs.

AND FOR THIS ACT OF KINDNESS, THE APPELLANT SHALL AS IN DUTY- BOUND FOREVER PRAY.

Ahmedabad,  
7 February 2003.

ABC  
Advocate for the Appellant



# APPENDIX

## F

### Second Appeal

In the High Court of Gujarat, at Ahmedabad, District Jamnagar Second Appeal No. 34 of 2003

Kantilal Chandulal Thaker, 17, Panchsheel Society, Bedibunder Road, Jamnagar .. Appellant (Ori. Defendant);

Versus  
A.P. Sinha and/or his successor in office, Collector, Jamnagar, District, Jamnagar  
... Respondent (Ori. Plaintiff).  
Appeal under Section 100 of the Code of Civil Procedure, 1908  
Claim: Rs 300

The appellant abovenamed most respectfully states as under:

1. That the plaintiff-appellant filed a suit in the Court of the Civil Judge (S.D.), Jamnagar, being Regular Civil Suit No. 165 of 2000 against the defendant-respondent for a declaration that the order terminating the services of the plaintiff passed by the defendant on 25 June 2000 was illegal, ultra vires, discriminatory, contrary to law, penal in nature and therefore inoperative and for permanent injunction restraining the defendant and/or his servants, agents or nominees from implementing or executing the said order and also for an order directing the defendant to reinstate the plaintiff in service with full back wages and other consequential benefits.
2. That the learned Judge, by his judgment and decree, dated 15 July 2001 dismissed the said suit filed by the plaintiff holding that since the plaintiff was a temporary servant, he had no right to hold the post, and the defendant had power to terminate his services, and the order was, therefore, legal and valid.
3. That being aggrieved by the decree passed by the trial court, the appellant-plaintiff preferred an appeal in the Court of the District Judge, Jamnagar, being Civil Regular Appeal No. 198 of 2001.

4. That the learned District Judge, by his judgment and decree, dated 27 December 2002 dismissed the said appeal filed by the appellant and confirmed the decree of the trial court.

5. That being aggrieved by the decree passed by the trial court and confirmed by the lower appellate court, the appellant abovenamed begs to prefer this appeal to this Hon'ble Court. In this second appeal, among others, the following substantial questions of law arise for the determination of this Hon'ble Court:1

(i) Whether in the facts and circumstances of the case, the courts below have committed an error of law in dismissing the suit filed by the plaintiff?2

(ii) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the order terminating the services of the plaintiff was legal and valid?

(iii) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the plaintiff was merely a temporary employee and had no right to hold the post?

(iv) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the order terminating the services of the plaintiff was not punitive in nature?

(v) Whether in the facts and circumstances of the case, the courts below have committed an error of law in holding that the plaintiff was not entitled to invoke protection of Article 311(2) of the Constitution of India?

6. On the grounds stated above, and on the grounds which may be urged at the time of hearing, it is prayed that this appeal may be allowed, the decree passed by the Civil Judge, (S.D.), Jamnagar in Regular Civil Suit No. 165 of 2000 and confirmed by the District Judge, Jamnagar in Civil Regular Appeal No. 198 of 2001 may be set aside and the suit of the plaintiff be decreed with costs all throughout.

AND FOR THIS ACT OF KINDNESS, THE APPELLANT SHALL AS IN DUTY- BOUND FOREVER PRAY.

Ahmedabad,

31 February 2003.

ABC

Advocate for the Appellant

1 After the Amendment Act of 1976 in the Code of Civil Procedure, now second appeal can be filed only on the ground of "substantial question of law". (See supra, Pt. III, Chap. 3).

2 Strictly speaking, this cannot be said to be a "substantial question of law", but normally, in the Memorandum of Second Appeal, such question is raised by Advocates, (see supra, Pt. III, Chap. 3).

## APPENDIX F Revision

In the High Court of Gujarat, at Ahmedabad,  
District Junagadh Civil Revision Application No. 76 of 2003

Ratilal Mohanlal Thakker, Near Plaza  
Talkies, Mahatma Gandhi Road, Porbandar .. Petitioner (Ori. Defendant);  
Versus  
Ramaben Ramshanker Dave, Mahendra Mansion Near Kamla Nehru Park,  
Porbandar .. Opponent (Ori. Defendant).

Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908 Claim: Rs 360

The petitioner abovenamed most respectfully submits as under:

1. That the petitioner-plaintiff filed a suit in the Court of the Civil Judge, (J.D.), Porbandar, being Regular Civil Suit No. 34 of 2001 against the opponent-defendant for possession of the suit-premises on the grounds of non-payment of rent and reasonable and bona fide requirement of the landlord.
2. That during the pendency of the said suit, the plaintiff made an application, Ext. 67, under the provisions of Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"), on 5 November 2002 praying therein for the amendment of the plaint and claimed relief of possession of the suit premises on two additional grounds; viz. (i) the defendant had made permanent structure on the suit premises without the prior permission of the landlord; and (ii) the defendant was causing nuisance and annoyance to the landlord and to other tenants and neighbours.
3. That the learned Judge, after hearing both the parties rejected the said application by an order, below Ext. 67, on 27 January 2003, holding that the amendment sought was not necessary for the purpose of determining the real question in controversy between the parties; that

there was delay in making the application; that the proposed amendment would change the nature of the suit; and that if such amendment were granted, it would cause great prejudice to the other side.

4. That being aggrieved by the said order, below Ext. 67, the petitioner herein approaches this Hon'ble Court by filing the present revision application on the following, among other grounds:

Grounds

- (1) That the learned Judge has erred in rejecting the application, Ext. 67, filed by the plaintiff.
- (2) That the learned Judge ought to have granted the application, Ext. 67, filed by the plaintiff.
- (3) That the learned Judge has erred in holding that the proposed amendment was not necessary for the purpose of determining the real question in controversy between the parties.
- (4) That the learned Judge ought to have held that the proposed amendment was necessary for the purpose of determining the real question in controversy between the parties.
- (5) That the learned Judge has erred in holding that there was delay on the part of the plaintiff in making the application, Ext. 67.
- (6) That the learned Judge ought to have held that there was no delay on the part of the plaintiff in making the application for amendment.
- (7) That the learned Judge ought to have appreciated the fact that both the grounds mentioned in the application for amendment, Ext. 67, had arisen after the filing of the suit and, therefore, they could not have been included in the plaint.
- (8) That the learned Judge has erred in holding that the proposed amendment would change the nature of the suit.
- (9) That the learned Judge ought to have held that the proposed amendment would not change the nature of the suit inasmuch as the suit was for possession of the suit premises and even after the proposed amendment the nature of the suit and the relief claimed would remain the same.
- (10) That the learned Judge ought to have appreciated the material fact that by addition of some grounds for possession of the suit premises, the nature of the suit can never be changed.
- (11) That the learned Judge has erred in not considering the fact that the proposed amendment was necessary to avoid multiplicity of suits.
- (12) That the learned Judge ought to have appreciated the fact that the proposed amendment would not cause injustice to the defendant and, therefore, ought to have exercised the discretion by granting it.

- (13) That the learned Judge ought to have construed the provisions relating to amendment of pleading liberally and ought to have granted the application for amendment.
- (14) That the learned Judge in rejecting the application for amendment has acted in breach of the provisions embodied in Order 6 Rule 17 of the Code and thereby acted illegally and with material irregularity.<sup>1</sup>
- (15) That had the order been made in favour of the petitioner, it would have finally disposed of the suit (or other proceedings).<sup>2</sup>
- (16) That even otherwise also, the order, passed by the learned Judge, is illegal, erroneous, against the principles of justice, equity and good conscience and at the same requires to be quashed and set aside.
5. On the grounds stated above, and on the grounds which may be urged at the time of hearing, it is prayed—
- (a) that this revision application may kindly be allowed and the order, below Ext. 67, dated 27 January 2003 passed by the Civil Judge (J.D.), Porbandar in Regular Civil Suit No. 34 of 2001 may be set aside and the application for amendment may be allowed;
- (b) that pending hearing and final disposal of this revision application, further proceedings in Regular Civil Suit No. 34 of 2001 pending in the court of the Civil Judge (J.D.), Porbandar may kindly be stayed;
- (c) that any other relief which this Hon'ble Court thinks fit, may also be granted.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL AS IN DUTY- BOUND FOREVER PRAY.  
Ahmedabad.

7 February 2003. Advocate for the Petitioner

Affidavit  
I, Ratilal Mohanlal Thakker, petitioner herein, do state on solemn affirmation that what is stated above is true to my information and belief and I believe the same to be true.

.....  
(Deponent)

- 1 To invoke jurisdiction of a High Court, the case must fall in any of the cls. (a), (b) or (c) of S. 115 of the Code. (See supra, Pt. III, Chap. 9)
- 2 After the Amendment Act of 1999 in the Code of Civil Procedure, revision is maintainable only if the condition laid down in the proviso is satisfied. (See supra, Pt. III, Chap. 9)

## APPENDIX

## G

### Injunction Application

In the City Civil Court at Ahmedabad Civil Suit No. 100 of 2002

Rajnikant Ramprasad Pandya, Hindu, Adult, aged about 50 years, residing at 15, Paradise Park, Usmanpura, Ahmedabad ... Plaintiff;

Versus

Ramanbhai Mohanbhai Patel, Hindu Adult, aged, about 55 years, residing at 35, Patidar Society, Paldi, Ahmedabad ... Defendant

The Plaintiff abovenamed humbly states as under:

1. That by an agreement in writing, dated 1 January 2001, signed by the defendant, the defendant contracted to sell to the plaintiff his bungalow referred to in the said agreement (hereinafter referred to as "the suit property") for Rs 10,00,000. An amount of Rs 1,00,000 was paid by the plaintiff to the defendant as earnest money at the time of agreement.

2. The plaintiff was and is ready and willing to perform his part of the contract but the defendant has refused to execute a sale deed and thus has failed to perform his part of the contract.

3. The plaintiff has filed the above suit against the defendant for specific performance of the contract, which is pending in this Hon'ble Court. The plaintiff has a prima facie case and balance of convenience is also in his favour.

4. The plaintiff has come to know that the defendant is trying to dispose of the suit property and has contacted some parties for the said purpose. The plaintiff submits that if the defendant is not restrained from disposing of and/or in any manner transferring the suit property during the pendency of the suit, irreparable injury and loss would be caused to the plaintiff, which would not be compensated in

terms of money and the suit filed by him would become infructuous. It would also lead to multiplicity of proceedings.

5. The plaintiff, therefore, prays:

(a) that during the pendency of and till the final disposal of Civil Suit No. 100 of 2002, the defendant and/or his servants, agents or nominees be restrained from selling, disposing of, assigning or in any way transferring the suit property to any person;

(b) that any other relief which the Hon'ble Court deems fit in the facts and circumstances of the case may also be granted.

AND FOR THIS ACT OF KINDNESS, THE PLAINTIFF SHALL AS IN DUTY- BOUND FOREVER PRAY.

ABC

.....

Plaintiff's Advocate

Plaintiff

Affidavit

I, Rajnikant Ramprasad Pandya, the plaintiff abovenamed do solemnly declare that what is stated in paras 1 to 3 is true to my knowledge and that what is stated in para 4 is stated on the information received by me and I believe it to be true.

.....  
Plaintiff

# APPENDIX

## H Affidavit

In the City Civil Court at Ahmedabad Civil Suit No. 100 of 2002

Rajnikant Ramprasad Pandya, Hindu, Adult, aged about 50 years, residing at 15, Paradise Park, Usmanpura, Ahmedabad ... Plaintiff;  
Versus  
Ramanbhai Mohanbhai Patel, Hindu, Adult, aged, about 55 years, residing at 35, Patidar Society, Paldi, Ahmedabad .... Defendant.

Application for adjournment

I, Rajnikant Ramprasad Pandya, the deponent herein, do solemnly affirm and state on oath as under

1. That I am the plaintiff in the above suit. I am fully aware of and acquainted with the facts stated hereinbelow.
2. That the above suit is filed for hearing today. However, my advocate has suddenly taken ill. He is confined to bed and is unable to attend the Court.
3. That I came to know about the illness of my advocate when today in the morning I went to his Office in connection with the hearing of the suit.
4. That due to sudden illness and paucity of time it is not possible for me to engage another advocate and to apprise him with all the facts and circumstances of the case. He may not be able to do justice to my case.
5. That I was and am ready and willing to go on with the matter, but because of sudden illness of my advocate, I am unable to proceed with the case.
6. That in the facts and circumstances, it is in the interest of justice that the hearing may be adjourned to any other date.



I,       Rajnikant Ramprasad Pandya, plaintiff herein, do state on oath the solemn affirmation that the facts stated in paras 1 to 6 are true to my personal knowledge.  
I have concealed nothing and no part of it is false. So I pray to Almighty God to help me.

.....  
Deponent

# APPENDIX

## I Caveat

In the High Court of Gujarat, at Ahmedabad

Caveat

in

C.A. No. . . . . of 2003

in

F.A. No. .... of 2003

Rajnikant Ramprasad Pandya, . . . Caveator

15, Paradise Park, ((Ori. Plaintiff);

Usmanpura,

Ahmedabad

Versus

Ramanbhai Mohanbhai Patel,

35, Patidar Society,

Paldi, Ahmedabad

Opponent. (Ori. Plaintiff);

Caveat under Section 148-A of the Code of Civil Procedure, 1908

The Caveator abovenamed most respectfully states as under: —

1. That the Caveator-original plaintiff filed a suit in the City Civil Court at Ahmedabad being Civil Suit No. 100 of 2002 against the opponent-original defendant for specific performance of the contract entered into by him with the opponent. In the alternative, the caveator prayed for damages of Rs 10,00,000 from the opponent alleging that the opponent had committed breach of contract.

2. That the learned Judge, by his judgment dated 13 January 2003, decreed the suit filed by the caveator-original plaintiff for specific performance of the contract and ordered the opponent to execute a sale deed in favour of the caveator.

3. That being aggrieved by the decree passed by the trial court, the opponent-defendant is likely to institute first appeal in this Hon'ble Court and also expected to apply for stay of decree passed against him.

4. That as the Caveator has obtained a decree in his favour, he has a right to appear before this Hon'ble Court and to oppose stay of decree passed by the trial court.

5. The Caveator, therefore, prays that let nothing be done in the matter and no stay and/or interim relief be granted in favour of the opponent by this Hon'ble Court without serving a notice of such appeal/application for stay upon the caveator and without hearing him.

The caveator has sent a notice of this caveat by registered post, acknowledgement due to the opponent. A copy of postal slip is annexed to this caveat.

AND FOR THIS ACT OF KINDNESS, THE CAVEATOR SHALL AS IN DUTY- BOUND FOREVER PRAY.

Ahmedabad,

ABC

15 January 2003.

Advocate for the Caveator

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