

the Court may permit and then, shall deliver the summons to such party for service, and such summons shall be effected by or on behalf of such party by delivering or tendering to the witness personally a copy thereof.

The provisions of Rule 6 shall apply to summons to produce documents while the procedure provided in rule 10 shall be applicable where witness fails to comply With summons and rule 12 where the witness fails to appear.

Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.¹⁹

Witnesses not to be Ordered to attend in Person: As per rule 19 of Order XVI, no one shall be ordered to attend in person to give evidence unless he resides:-

- a. within the local limits of the Court's Ordinary Original Jurisdiction, or
- b. without such limits but at a place less than one hundred or (where there is a railway or steamer communication or other established public conveyance for five-sixths of the distance between' the place where he resides and the place where the Court is situate) less than five hundred kilometers distances from the Court house:

Provided that where transport by air is available between the two places mentioned in this rule and the Witness is paid the fare by air, he may be ordered to attend in person.

APPEARANCE OF PARTIES AND EFFECT OF THEIR NON-APPEARANCE (Order IX)

Introduction: Order IX of the Code provides the law with regard to the appearance of the parties to the suits and the consequences of their non-appearance. Where a party (Plaintiff or Plaintiff and Defendant, both) does not appear when the suit is called on for hearing, the suit may be dismissed and where a party (Defendant) does not appear even when the summons is duly served on him, the Court may Order for the ex-parte hearing of the suit.

Therefore, Order IX can be discussed under the following heads:

- a. Dismissal of Suit: The plaintiff's suit may be dismissed under rules 2, 3, 5(1) and 8 of Order IX of the Code, while the Court may order ex-parte hearing of the suit under rule 6(1) of Order IX.

Rule 2: A suit may be dismissed under rule 2 if the summons has not been served upon the defendant due to the failure of the plaintiff to pay Court-fee or Postal charges, if any chargeable for such service or failure to present copies of the plaint as required by rule 9 of Order VII.

Rule 3: The Court may dismiss the suit under rule 3 where, both the parties are absent when the suit is called on for hearing.

Rule 5(1): The Court shall pass an order for dismissal of the suit under rule 5(1), where a summons has been returned unserved on the defendant(s) and the plaintiff fails to apply for a fresh summons for a period of seven days from the date of the return of summons made to the Court by the serving officer.

But, the Court shall not dismiss the suit under rule 5(1), if the plaintiff satisfies the Court that-

- a. he has failed after using his best endeavors to discover the residence of the defendant who has not been served, or
- b. such defendant is avoiding service of process, or
- c. there is any other sufficient cause of extending the time, and may extend the time for making such application.

Rule 8: The Court shall make an order of dismissal of suit under rule 8, where the plaintiff remains absent and the defendant is present, when the suit is called on for hearing and the defendant does not admit the claim or part thereof.

Remedies against Dismissal: Where the suit has been dismissed under rule 2 or 3, the plaintiff has remedies either to file a fresh suit (subject to the law of limitation) under rule 4 or to make an application under rule 4 for restoration of the suit. When the suit has been dismissed under rule 5(1), the plaintiff may bring a fresh suit (subject to the law of limitation) under rule 5(2).

When a suit is dismissed under rule 8, the plaintiff shall be precluded to bring a fresh suit on the same cause of action but he may apply to set the dismissal aside under rule 9 of Order IX and the Court shall, after issuing a notice²⁰ of application on the opposite party set aside the order of dismissal, on being satisfied that there was sufficient cause for plaintiffs non-appearance when the suit is called on for hearing.

- 2) Ex- Parte Hearing : Where only the plaintiff appears and the defendant does not appear when the suit is called on for hearing, and the Court observed that the summons was duly served on defendant then the Court may pass an order that the suit be heard ex-parte.²¹

Remedies: The defendant in the same manner may be allowed by the Court to be heard, as if he had appeared on the day fixed for his appearance, where the Court has adjourned the ex parte hearing and he (defendant) appears on or before such adjourned date and satisfy the Court with good cause for his previous non-appearance.

Setting aside ex-parte hearing: Where in an ex-parte hearing, a decree is passed ex-parte against a defendant, he has the following options -

- a. To apply under rule 13 to set aside the ex-parte decree and the Court after service of Notice²² of such application on the opposite party and on being satisfied that the summons was not duly served on the defendant or he was prevented by any sufficient cause from appearing when the suit was called on for hearing. But no such decree shall be set-aside on the basis of irregularity in the service of summons,²³

When the Court rejects an application under rule 13, such 3n order is appealable under Order XLI Rule 1(d).

- b. To file appeal against ex-parte decree²⁴

But when an appeal is preferred against ex-parte decree and the same is dismissed on any ground except as being withdrawn by the appellant, no application shall lie under rule 13 for setting aside

that ex-parte decree.²⁵

EXECUTION OF DECREES

S. 36 TO 74 AND O. 21: In a suit, after the pronouncement of judgment and passing of decree in respect of the relief given by the Court, the next step is the execution of decree or order.

Meaning: "Execution is the enforcement of decrees and orders of the Court by the process of the Court." As a matter of fact, execution is the formal procedure prescribed by law whereby the party entitled to the benefit of a judgment may obtain that benefit.

Execution of Decree and Order: Section-36 of the Code lays down that the provision of the Code relating to execution of decrees (including provision relating to the payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

Subject Matter of Execution: The subject matter of execution may be either a decree or an order of a Court of competent jurisdiction. Every decree or order of a Court cannot be the subject matter of an execution, but only those decrees and orders are executable which finally determine and enforce the rights of the parties at the date when the decree or order is made.

Decree which may be executed: Before a decree can be executed, it must be both valid and capable of execution. The decree put into execution must not be barred under any law. It is the decree passed by the Court of first instance which can be executed but when an appeal has been preferred against the original decree, it is the decree of the appellate Court, which alone can be executed. The decrees of the Court of first instance become merged in the appellate Court's decree. The appellate decree whether it confirms, varies or reverses the decree of original Court, it is the only decree which can be executed.

Court by which decrees may be executed: Section 38

According to S. 38, an executing Court may be either the Court which passed the decree, or the Court to which the decree is sent for execution.

The expression "Court which passed a decree" means –

- 1) The Court of first instance -
 - a) in case where the decree is passed by the Court of first instance, and
 - b) in case of appellate decrees,
- 2) The Court at the time of execution would have had jurisdiction to try the suit where the Court of first instance has either ceased to exist or ceased to have jurisdiction to execute the decree.

Explanation to S.37 says that

The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court; but, in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making application for execution of the decree it would have jurisdiction to try the said suit.

Application for Execution: The execution proceedings commence with the filing of an application for execution before the Court, which passed the decree, or before the Court to which the decree has been transferred for execution. Rules 10-25 and 105-106 of Order 21 deal with execution applications.

Who may apply for execution: Rule 10

An execution proceeding may be started on the application of the -

- i) Decree holder- Rule 10 of Order 21
- ii) Where the decree-holder is dead, his legal representative-S 146.
- iii) Any other person claiming under the decree-holder-S. 146.
- iv) Representative of or a person claiming under the decree-holder - S. 146.
- v) Transferee of decree-holder²⁶, subject to the following-
 - a. Where the decree has been transferred by an assignment, in writing or by operation of law;
 - b. The application is to the Court which passed the decree;
 - c. Notice and after providing an opportunity of being heard to the transferor and the judgment debtor.
- vi) One or more of the joint decree holders,²⁷ subject to the fulfillment of the following conditions:
 - a. There is no contrary condition imposed by the decree.
 - b. The execution application is to the execution of the whole decree; and
 - c. The application is made for the benefit of all the joint decree holders; or if anyone of them is dead, for the benefit of the survivors and the legal representatives of the deceased decree holder.

]Against whom an execution proceeding can be started: Execution proceeding may be started against the following persons:-

- a. Judgment debtor, S. 50, 0.21, R.15
- b. When the judgment debtor is dead, against his legal representatives. But the legal representatives shall be liable only to extent of the property of the judgment debtor received by them. -So 50, 52, 53.
- c. Representative of or the person claiming under the judgment debtor.-S.146.
- d. Surety of the judgment debtor. S. 150.

Court to whom an execution application may be made: As per S. 38, an execution application may be filed either in the Court who passed the decree or in the Court to whom the decree has been transferred for execution.

Contents of Application: According to Rule 11 of 0.21, every application for execution, except in a case of a money decree, shall be in writing, signed and verified by the applicant or by some other person acquainted with the fact of the case and shall contain the particulars like the number of the suit, the name of

the parties, the date of the decree, the amount of the decree etc Rules 11-A, 12, 13, 14 and R. 45(1) of O.21 should be read together.

Procedure: Admission (Rule 17) and Hearing (Rules 105-106)

Admission: According to Rule 17 of O.21, on receiving an application for execution of a decree, the Court must admit and register the application, if the Court is satisfied that the execution application complies with the requirements of Rule 11 to 14. Where such application does not comply with the above requirements then the Court shall allow the defect to be remedied then and there or within a time fixed by it, and if the defect is not remedied as specified then, the Court shall reject the application.

Hearing: Rules 105 and 106 deal with the hearing of an execution application and state that when an application is pending then, the Court shall fix a date of hearing and if the applicant is not present at the time of hearing, the Court may dismiss the application and when the applicant is present but the opposite party is not present, the Court may proceed ex-parte hearing and pass an appropriate order.

Under Rule 106, an order of dismissal for default or an ex-parte hearing may be set aside by the court on an application of the aggrieved party where there are sufficient causes shown to do so.

An order rejecting an application u/r 106(1) is appealable.²⁸

Limitation for Execution: Any application for execution of a decree can be filed within 12 years from the date of the decree²⁹ while the period of limitation for the execution of a decree for mandatory injunction is 3 years from the date of the decree³⁰.

Stay of Execution: Rules 26 to 29 of Order XXI deal with the stay of execution. The provisions of Rule 26 are mandatory and imperative while the provisions of Rule 29 are not mandatory but discretionary. But this discretion must be exercised judicially and in the interest of justice.

The execution proceeding may be stayed either by the executing Court i.e. the Court which passed the decree or the Court to which the decree has been transferred for execution or by the Court having appellate jurisdiction in respect of the decree or to which the decree has been transferred for the execution thereof.

The provisions regarding stay of execution of a decree are made in Rule 26, which lays down that the executing Court (the Transferor Court) shall, on sufficient cause being shown by the judgment-debtor, and after furnishing security or fulfilling the conditions, which may be imposed upon him by the Court, stay the execution of a decree for a reasonable time, to enable the judgment debtor to apply to the Court which has passed the decree or to the appellate Court for an Order to stay execution.

The transferor Court can stay the execution absolutely while the power to stay the execution by the Transferor Court is for a reasonable time to enable the judgment debtor to apply to the transferor Court or to the appellate Court to grant stay against the execution.

Stay of Execution Pending suit: Rule 29 of O. XXI deals with the provisions regarding stay of execution pending suit between the decree holder and the judgment debtor. Rule 29 says that "where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as it thinks fit, stay execution of the decree until the pending suit has been decided.

Provided that if the decree is one for payment of money, the Court shall if it grants stay without requiring security, record its reasons for so doing.

Mode of execution: There are various modes of execution of decree provided in the Code. A decree may be enforced, as specified U/s 51 of the Code of Civil Procedure-

- 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 detention³¹ in prison for such period not exceeding the period specified in S. 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.

Choice of mode of execution and simultaneous execution: As a general rule, it is for the decree holder to choose a particular mode of executing his decree and it is permissible too in law to opt for even a simultaneous execution, but the Court may in its discretion refuse execution at the same time against the person and property of the judgment debtor.³²

The Supreme Court in **Shyam Singh v. collector, Distt. Hamirpur 1993 Supp (1) SCC**, observed:

"Section 51 of the Code gives an option to the creditor, of enforcing the decree either against the person or the property of the creditor; 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."

However, the 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 time³³.

Modes of Execution:

1. **By delivery of Property:** Section 51 (a) Rules 31, 35 and 36.
 - a. **Specific moveable property:** The decree for any specific movable properties which do not include money and are in the possession of judgment debtor may be executed:-
 - i) by seizure and delivery of property; or
 - ii) by detention of the judgment debtor; or
 - iii) by attachment and sale of his property; or
 - iv) by attachment and detention both.³⁴

The provisions of Rule 31 of O. 21 are not applicable for the execution of a decree for money or where the property is not in possession of the judgment debtor but is in the possession of a third party.

b. Immovable property: Rules 35 and 36 Of O. XXI provide the mode of executing decrees, for possession of immovable property. Where the decree is for immovable property in the possession of judgment debtor or in the possession of any person bound by the decree³⁵, 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.

2. **Attachments and Sale of Property:** Section 51(b) The Court is empowered to order execution of a decree by attachment and sale or by sale without attachment of any property³⁶ and the sale of property without an attachment is merely an irregularity and such sale is not void or without jurisdiction and does not vitiate the sale.

Sections 60 to 64 and Rules 41 to 57 of Order XXI deal with the subject of attachment of property.

An executing Court is competent to attach the property if it is situated within the local limits of the jurisdiction of the Court and the place of business of the judgment debtor is not material³⁷. The provisions of the Code, however, do not affect any local or special law.³⁸ The attachment and sale under any other statute can be made and the judgment debtor cannot claim benefit under the Code.³⁹

Modes of Attachment: Section 62 and Rules 43 to 54 of Order XXI lay down the procedure for attachment of different types of moveable and immovable properties. These are the provisions in the Code relating to mode of attachment of movable property,⁴⁰ Negotiable instruments,⁴¹ Debt not secured by a Negotiable instrument,⁴² Share in capital of a corporation,⁴³ Share or interest in movable property,⁴⁴ Salary or allowance of a Public Servant or a Private employee,⁴⁵ Partnership property,⁴⁶ Property in custody of Court or Public Officer,⁴⁷ Decree (i) for Payment of money or sale in enforcement of a mortgage or charge⁴⁸ and (ii) Decree other than that mentioned above,⁴⁹ Agricultural produce,⁵⁰ Immovable property⁵¹ while S. 63 prescribes procedure to be followed in case the property is attached in execution of decrees by several Courts.

Properties, which can and cannot be attached:⁵² Section 60(1) of the Code specifies about the properties which can be attached and sold in execution of a decree while being subject to the provisions of sub-section (2) of section 60, the properties which can be attached and sold in execution of a decree are specified in proviso to s. 60(1) and s. 61 of the Code.

Determination of Attachment:⁵³ Under the following circumstances, an order of attachment under the Code shall be determined -

- i. On the satisfaction of the decree either by the payment of the decretal amount or otherwise;⁵⁴
- ii. On the reversal or setting aside of the decree;⁵⁵
- iii. On an order to release the property;⁵⁶
- iv. Dismissal of execution application after the attachment of property;⁵⁷
- v. On withdrawal of attachment by attaching Creditor;⁵⁸
- vi. On failure by decree-holder to do what he is bound to do under the decree;⁵⁹ and
- vii. Where the attachment order is made before judgment and the defendant furnishes the

necessary security.⁶⁰

- 3. Arrest and Detention:** Section 51 (c) One mode of the execution of a decree is arrest and detention⁶¹ of a judgment debtor in the Civil Prison. The provisions stated in proviso to Section 51 are relevant in this regard and are as under:-

An order of arrest and detention of judgment debtor in civil prison can be passed by the Court while executing the decree for payment of money,⁶² or for specific moveable property,⁶³ or for specific performance of a contract,⁶⁴ or for an injunction,⁶⁵ or where a decree for specific performance of a contract or for an injunction is against a corporation.⁶⁶

But the persons like a woman, judicial officers, the parties and their pleaders, members of Legislative Bodies, a judgment debtor etc., can not be arrested under certain circumstances.⁶⁷

An order of detention of judgment debtor in civil prison shall not be passed, in execution of a decree for the payment of money, where the total amount of such decree does not exceed two thousand rupees.⁶⁸

Period of detention: According to S. 58(1), every person detained in the civil prison in execution of a decree shall be so detained, where the detention is for the payment of a sum of money –

- i) exceeding five thousand rupees- for a period not exceeding 3 months, and
- ii) exceeding two thousand rupees, but not exceeding five thousand rupees - for a period not exceeding six weeks.

Release of person detained: A warrant for the arrest may be cancelled or an arrested judgment debtor may be released by the Court on the ground of his serious willness,⁶⁹ while a judgment debtor, who has been committed to civil prison, may be release of therefrom, either by the State Government, on the ground of the existence of any infectious or contagious disease, or by the committing court or any superior court, on the grounds of his suffering from any serious illness.⁷⁰

A judgment debtor may also be released as specified under proviso to s. 58, Le.

- i. on the, payment of amount mentioned in the warrant, to the officer in charge of the civil prison, or
- ii. on the otherwise satisfaction (by an order of the Court) of the decree, or
- iii. on the request to release of the person on whose application he has been so detained, or
- iv. on the omission to pay subsistence allowance, by the person, on whose application he has been so detained.

But such release as specified in clause (iii) or on such omission shall noF 1 be without an order of the Court.

Re-arrest: A judgment debtor released under section 58 shall not be discharged from his debt but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison and if he has been released under section 59, he may be re-arrested but the detention period in civil prison shall -not exceed the aggregate period specified in S. 58.

4. **By' Appointment of Receiver:** Section 51(d) The provisions relating to the execution by appointment of a Receiver are provided in Order XXI, Rule 11 (2) (J) (iv).

An execution of a decree by appointment of receiver is an equitable remedy which cannot be claimed as a right and is granted by the Court in its discretion, and the same is an exception to the general rule that a decree holder can choose the mode of execution and that the Court has no power to refuse the mode chosen by him. The provisions of section 51 (d) should be read with - the provisions of Order XL, Rule 1.

Questions to be determined by the Executing Court: Section 47 provides the provisions regarding the matters arising subsequent to the passing of a decree, and deals with objections to execution, discharge and satisfaction of a decree.

- i. 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.
- ii. Omitted
- iii. 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.

In **Jugal Kishore V. Raw Cotton Com. Ltd, AIR 1955, SC**, the Court has decided that once the suit is decreed, S. 47 requires that the executing Court alone should determine all questions in execution proceedings and filing of separate suit is barred. It does not matter whether such questions arise before or after the decree has been executed. For the said purpose, the Court can treat a suit as an execution application or an application as a suit in the interest of justice.

But after the Amendment Act of 1976, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/S 47 as a suit, or a suit as an application, now the Court cannot treat an application U/S 47 as a suit, or a suit as an application.

An Executing Court Can not go behind the Decree: The duty of an executing Court is to execute the decree as it is. An executing Court cannot⁷² go behind the decree. An executing Court has 'to take the decree as it stands and execute it according to its terms. The Court has no power to question the correctness of the decree.

Vague and Ambiguous Decree: But whenever a decree is found to be vague or ambiguous, it is within the power and duty of the executing Court to interpret the decree with the intent to find out the meaning of those

terms.⁷³

Decree passed in Inherent lack of Jurisdiction: When the executing Court finds that there was an inherent lack of jurisdiction, the decree passed by a Court is a nullity and when such a plea is put forward by an aggrieved party, it is obligatory on the part of the executing Court to consider such an objection,⁷⁴ and such a decree cannot be executed, because there cannot be said to be a decree in such a case.

No Appeal against any determination U/s 47, but Revision Lies: Before the Amendment Act of 1976, the determination of any question U/s 47 was deemed to be a decree U/s 2(2) of the Code, but after the amendment, which deleted sub-section (2) of section 47, by which the Court was empowered to treat an application U/s 47 as a suit, or a suit as an application, and hence, now any determination U/ s 47 is not appealable U/s 96 or 100, but a revision lies, subject to the fulfillment of the conditions mentioned in s. 115 of the Code. –

IMPORTANT QUESTIONS

- Q.1. What is the effect of Non-appearance of Parties?
- Q.2. Can sale of immovable property in the execution of a decree be set aside? If so, at whose instance?
- Q.3. What do you understand by execution? Who can apply for execution and against whom an execution can be made?
- Q.4. What are the various modes of execution of decree. or order? Discuss.
- Q.5. An executing court can not go behind decree. Is there any exception to the rule. If any provide?
- Q.6. Explain the following :
 - a. Summons and Discovery of Parties
 - b. Notice
 - c. Provisions relating to attendance of witnesses
 - d. Executing Court
 - e. Properties which cannot be attached
 - f. Dismissal of Suit in default
 - g. Setting aside ex-parte decree

References;

1. Earl Jowit: The Dictionary of English Law
2. Order V, Rule 10
3. Order V, Rule 10
4. Order V, Rule 16
5. Order V, Rule 18
6. Order V, Rule 20
7. Order V, Rule 9(5)
8. Proviso to Order V, Rule 9 (5)
9. Order V, Rule 9-A

10. Order V, Rule 21
11. Order V, Rule 21
12. Order V, Rule 9(4)
13. Order XI, Rule 20
14. Order XVI, Rule 1(1)
15. Order XVI, Rules 1 (2) and 1 (4)
16. Order XVI, Rules 1(3) and i-A
17. Order XVI, Rule 2
18. Order XVI, Rule 2(1)
19. Order XVI, Rule 21
20. Order IX, Rule 9(2)
21. Order IX, Rule 6(1)(a)
22. Order IX Rule 14
23. IInd Proviso to Rule 13 of Order IX
24. Section 96(2)
25. Expl. to Rule 13
26. Section 49, Order XXI, Rule 16
27. Order XXI, Rule 15
28. Order XLIII, Rule 1 Ua)
29. Article 136, Limitation Act, 1963
30. Article 133, Limitation Act, 1963
31. Section 55 to 59
32. Order XXI, Rule 21
33. Order XXI, Rule 21
34. Order XXI, Rule 31
35. The expression "any person bound by the decree" includes the judgment debtor as well as any person bound by such decree. (In Sheikh Yusuf V. Jyotish Chandra, AIR 1932 Calcutta).
36. Section 51(b)
37. Raof V. Lakshmi pathi, AIR 1969 Mad
38. Section 4
39. State of Punjab V. Dinanath AIR 1984 S.C.
40. Order XXI, Rules 42, 43, 43-A and 46 (1) (c)
41. Order XXI, Rule 51
42. Order XXI, Rule 46(1) (a)
43. Order XXI, Rule 46(1) (b)
44. Order XXI, Rule 47
45. Order XXI, Rule 48 and 48-A
46. Order XXI, Rule 49
47. Order XXI, Rule 52
48. Order XXI, Rule 53 (1) (a) and Rule 53 (1) (b)
49. Order XXI, Rule 54(4)
50. Order XXI, Rule 44
51. Order XXI, Rule 45 .
52. Sections 60 and 61
53. Rules 55 to 56
54. Rule 55
55. Rule 55
56. Rule 58(3)
57. Rule 57
58. Bahri Lal V Saral Kumar-AIR 1965
59. Baba V Kiran AIR 1938 Bombay
60. Order 38 Rule 9
61. Sections 51 (c) 52 to 59 and Rules 30 to 41
62. Rule 30

63. Rule 31 (1)
64. Rule 32(1)
65. Rule 32(1)
66. Rule 32(2)
67. Sections 52(2), 56, 58, 135 and 135-A
68. Section 58(1-A)
69. Section 59(1) and (2)
70. Section 59(3) (a) and (b)
71. Proviso to Section 58
72. Ramaswami v Kailasa AIR 1951 SC
73. Bhavan Vaja v. Hanuja Khodaji
74. Kiran Singh v Cham Paswan AIR 1954 SC

KAMKUS

UNIT - IV

INCIDENTAL PROCEEDINGS

Commission (Sections - 75 to 78 and Order 26)

Meaning: 'Commission' is a process through which the witnesses, who are sick or infirm and are unable to attend the Court, are examined by issuing a commission by the Court. Sections 75 to 78 and Order XXVI of the Code deal with the various provisions relating to the issue of Commission to examine witnesses who are unable to attend the Court for one or the other reasons.

Power of Court to issue Commissions: As a general rule, the evidence of a witness in an action, whether he is a party to the suit or not, should be taken in open' Court and tested by cross-examination. The court has a discretion to relax the rule of attendance in Court, under some circumstances and may justify issue of a commission. Section 75 of the Code -specifies the powers of a Court to issue Commission.

Section 75: Subject to the conditions and limitations as may be prescribed, the Court may issue a commission:-

- a. to examine any person; order XXVI, Rule 1 to 8
- b. to make a local investigation; order XXVI, Rule 9 to 10
- c. to examine or adjust accounts; order XXVI, Rule 11 to 12
- d. to make a partition ; order XXVI, Rule 13 to 14
- e. to hold a scientific, technical or expert investigation; order XXVI, Rule 10-A
- f. to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; order XXVI, Rule 10-C
- g. to perform any ministerial act; Rules 15 to 18- B deal with general provisions. order XXVI, Rule 10-B

Cases in which Court may issue Commission to examine a person (Witness): A commission may be issued in the following cases:

- a. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person, if the person to be examined as a witness resides within the local limits of jurisdiction, and
 - i. Is exempted under the Code from attending the Court, or
 - ii. in the interest of justice, or for expeditious disposal of a case, or for any other reason his

examination on commission will be proper;¹ or

- b. if he resides beyond the local limits of jurisdiction of the Court,² or
- c. he is about to leave the jurisdiction of the Court,³ or
- d. If he is a Government servant and cannot in the opinion of the Court, attend without detriment to the public service,⁴ or
- e. he is residing out of India and the Court is satisfied that his evidence is necessary.⁵

Persons for whose examinations commission may be issued: Rule 4(1):

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person,

- a. If he resides beyond the local limits of the jurisdiction of the court or [(Order XXVI, Rule4(1)(a)]
- b. if he is about to leave the jurisdiction of the Court, or [(Order XXVI, Rule4(1)(b)]
- c. if he is a Govt. servant and cannot, in the opinion of the court, attend without detriment to the public service, or [(Order XXVI, Rule4(1)(c)]
- d. if he is residing out of India and the Court is satisfied that his evidence is necessary. Rule 5

To whom Commission may be issued: [Rule 4 (2) and (3)]

Rule 4(2): Such commission may be issued to any Court, not being a high Court, within the local limits of whose jurisdiction such person resides; or to any pleaded or other person whom the Court issuing the commission may appoint.

Rule 4(3): The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

Order for Issue of Commission: (Rule-2)

The Court may issue such a commission –

- a. either sue motu (of its own motion) or
- b. on the application of any party to the suit, or
- c. "ii) of the witness to be examined.

Evidence to be a part of Record: (Rule-7): The evidence taken on commission shall, subject to the provisions of rule 8, form part of the record.

When deposition may be read in evidence: (Rule-S) : Evidence taken under a commission shall not read as evidence in the suit without the consent of the party against whom the same is offered, unless.

- a. The person, who gave the evidence, is beyond the jurisdiction of the Court or dead or unable for sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the Service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service; or

- b. The Court in his discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in' the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Letters Of Request: (Section 77): In lieu of issuing a commission the Court may issue a Letter of Request to examine a witness residing at any place not within India.

SUPPLEMENTAL PROCEEDINGS

Arrest Before Judgment (Order 38, Rule 1 to 4)

Introduction: The general rule is that a creditor having a claim against the debtor has first to obtain a decree against him and then execute the said decree according to the provisions of Order XXI and may adopt the mode of his arrest or attachment of his property in such execution, but under special circumstances, the creditor, however can move for the arrest of the debtor or for the attachment of his property even before the judgment in order to prevent any attempt on the part of the defendant to defeat the execution of decree that may be passed against him.

Principle:

When can such order be passed: An application for arrest may be made by the plaintiff at any time after the plaint is presented, even before the service of summons is effected-on the defendant and the Court may pass the order of-arrest upon the satisfaction of the following two conditions:

- a. The Plaintiffs suit must be bona fide and his cause of action must action be prima facie unimpeachable subject to his proving the allegations in the plaint, and
- b. The Court must have reason to-believe on adequate materials that unless this extraordinary power is exercised there is a real danger that the defendant will remove himself or his property from the ambit of the powers to the Court.

Grounds of arrest before judgment: (Order 38, Rule 1) Where al any stage of the suit, other than a suit of the nature referred to in Section 16, clauses(a) to (d), the Court is satisfied, either by affidavit or otherwise –

- a. that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him :
 - a. has absconded or left the local limits of the jurisdiction of the Court, or
 - b. is about to abscond or leave the local limits of the jurisdiction of the Court, or
 - c. has disposed of or removed, from the local limits of the jurisdiction of the Court his property or any part thereof, or
- b. that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

The Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiffs claims; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

Security : (Rule 2)

- i. Where the defendant fails to show such cause the Court shall order him either to deposit in the Court money -or other property sufficient to answer the claims against him to furnish security for his appearance at the time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.
- ii. Every surety for the appearance of a defendant shall bind himself in default of such appearance, to pay any sum of money, which the defendant may be ordered to pay in the suit.

Procedure on application by surety to be discharged (Discharge of Security) : (Rule 3)

- I. A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.
- ii. On such application being made, that Court shall summon the defenciant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.
- iii. On the appearance of the defendant in pursuance of the sunimons of warrant or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation and shall call upon the defendant to find fresh security. –

Procedure where defendant fails to furnish security or find fresh security: (Rule 3): Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or where a decree is passed against the defendant until the decree has been satisfied:

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of suit does not exceed fifty rupees:

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Arrest on Insufficient Grounds:6 According to section 95, where, in any suit in which an arrest or attachment has been effected and-

- a. it appears ,to the Court that such arrest or attachment was applied for on insufficient ground, or
- b. the suit of the plaintiff fails and it appears to- the Court that there was no reasonable or probable

ground for instituting the same,

on the application of the defendant the Court may, award against the plaintiff by its order such amount, not exceeding fifty thousand rupees, as it deems reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to him.

Provided that a Court shall not award under this section, an amount exceeding the limits of its pecuniary jurisdiction.

Attachment Before Judgment (Order 38 Rules 5 - 12)

Object: In *Sardar Govind Rao Vs Devi Sahai AIR 1982 S.C. 989*, the Court held that "the sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of guarantee against decree becoming in fructuous for want of property available from which the plaintiff can satisfy the decree."

Grounds: Rule 5(1): Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him -

- a. is about to dispose of the whole or any part of his property, or
- b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court;

the Court may direct the defendant, within a time to be fixed by it, either to furnish security in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

Rule 5(2): The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and estimated value thereof.

Rule 5(3): The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Rule 5(4): If an order of attachment is made without complying with the provisions of Sub-rule 1 of Rule 5, such attachment shall be void.

Principles : The remedy of an attachment before judgment is an extraordinary remedy and must be exercised sparingly and strictly in accordance with the law and with the utmost care and caution," and the Court must be satisfied about the following two conditions before making such order of attachment-

- a. that the defendant is about to dispose of the whole or any part of his property; and
- b. that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.

Chandrika Prasad Vs Hiralal, AIR 1924, Pat H C, Dawson Millar C.J.,- stated that" such a power is only given when the Court is satisfied not only that the defendant is about to dispose of his properties or to

remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, if successful, of the fruits of the victory."

As per Rule 12, the plaintiff cannot apply and the Court cannot order the attachment or production of any agricultural produce in possession of an agriculturist.

Right of Third Party

Rule 10: Attachment before judgment not to affect rights of strangers, nor bar decree holder from applying for sale:

Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Re-attachment In Execution: (Rule 11 and 11-A)

Rule 11: Property attached before judgment not to be re-attached in execution of decree:

Where property is under attachment by virtue of the provisions of the Order 38, and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Rule 11-A: Provisions applicable to attachment:

- a. The provision of this Code (Order 21) applicable to an attachment made in execution of a decree so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.
- b. An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the order for the dismissal of the suit for default has been set aside and the suit has been restored.

Withdrawal of Attachment:

Rule 9: Removal of attachment when security furnished or suit dismissed:

Where an order is made for attachment before judgment; the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for costs of the attachment or when the suit is dismissed.

EMPORARY INJUNCTION (ORDER XXXIX RULES 1 TO 5)

Meaning of Injunction: An injunction is an order by the Court to a party to the effect that he shall do or refrain from doing a particular act.

"A judicial process, by which one, who has invaded or is threatening to invade the rights (legal or suitable) of

another, is restrained from continuing or commencing such wrongful act."

According to Lord Halsbury: "An injunction is a judicial process whereby a party is ordered to refrain . am doing or to do a particular act or thing." In the former case it is called a Restrictive Injunction and the later case a Mandatory Injunction.

Characteristic of Injunction:

An injunction has three characteristics -

1. It is a judicial process,
2. The object thereby is restraint or prevention, and
3. The thing restrained or prevented is a wrongful act.

Classification of Injunction: The law relating to injunction is laid down in the Specific Relief Act, 1963 (Section 36 to 42)

An injunction may be classified according to the relief granted or according to its nature or according to the operation of Time

As regards the "time" of their operation the injunction may be divided into two categories-

- i) Perpetual or (Permanent), and
- ii) Interlocutory Or (Temporary)

i. **Perpetual or (Permanent):** A perpetual injunction restrains a party for ever from doing the specific act and can be granted only on merits at the conclusion of the trial after hearing both the parties to the suits. Section 37(2) of the Specific-Relief Act, 1963

ii. Interlocutory or (Temporary) :

Definition: A temporary injunction or interim injunction, restrains a party temporarily from doing the specified act and can be granted only until the disposal of the suit or until the _ further orders of the Courts. It is regulated by Order 39 rule 1 to 5 of the C.P.C. and may be granted at any stage of the suit.

Section 37(1) of the Specific Relief Act, 1963

Object: The primary object of granting temporary injunction is to maintain and preserve status quo at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit.

Grounds: [Order 39 Rule 1, 2 and also Sec. 94 (c)] A temporary injunction may be granted by the Court under the following cases:

1. Where in any suit it is proved by affidavit or otherwise:
 - a. that any property in dispute in a suit ,is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or Rule 1 (a)

- b. the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, or Rule 1 (b)
- c. the defendant threatens to disposes the plaintiff in relation to any property in dispute in the suit, or Rule 1 (c)

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

- 2. Where the defendant is about to commit a breach of contract, or other injury of any kind, or Rule 2(1)
- 3. Where the Court is of the opinion that the interest of justice so requires: Section 94(c)

Principles: The power to grant a temporary injunction is in the discretion of the Court, but this discretion, should be exercised reasonably, judiciously and on sound legal principles. Generally, before granting the injunction, the Court must be satisfied about the following conditions:

- i) Prima facie case;
- ii) Irreparable Injury; and
- iii) Balance of convenience

- i) **Prima facie case:** The applicant must make out a prima facie case in support of the right claimed by him. The Court must be satisfied that there is a bona fide dispute raised by the applicant and on the facts before the Court there is a probability of the applicant being entitled to the relief claimed by him.

In deciding prima facie case; the Court is to be guided by the Plaintiffs case as revealed in the plaint, affidavits or other materials produced by him... and "while determining whether a prima facie case had been made out, the relevant consideration is, whether' on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at that evidence."?

- ii) **Irreparable Injury:** The applicant must further satisfy the Court that he will suffer irreparable injury if the injunction as prayed is not granted, and there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.
The expression "irreparable injury" means that the injury must be material one, Le. which cannot be adequately compensated by damages.
- iii) **Balance of Convenience:** The balance of convenience must be in favour of the applicant. In other words the Court must be satisfied that the compensation, mischief or inconvenience which is likely to be caused to the applicant by withholding the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

Discretionary Remedy: Since grant of injunction is discretionary and an equitable relief, even if all the conditions are satisfied, the Court may refuse to grant it for some other reasons e.g., on the ground of delay, laches or acquiescence or where the applicant has not come with clean hands or has suppressed material