PART III

4 Appeals from Orders

SYNOPSIS

1. General	523	7. Res judicata	526
2. Order: Meaning	523	8. Limitation	527
3. Order and decree	523	9. Forum of appeal: Section 106	527
4. Nature and scope	523	10. Procedure at hearing	527
5. Appealable orders: Section 104, Order 43	524	11. Letters patent Appeal	527
6. Other orders: Section 105, Rule 1-A	526	12. Appeal to Supreme Court	528

1. GENERAL

SECTIONS 104 to 108 and Order 43 deal with appeals from orders. They state that certain orders are appealable. No appeal lies against other orders. But those orders can be attacked in an appeal from the final decree. They also provide for the forum of an appeal.

2. ORDER: MEANING

"Order" has been defined as "the formal expression of any decision of a civil court which is not a decree"[1]. Thus, an adjudication of a court which does not fall within "decree", is an "order"[2].

3. ORDER AND DECREE

In spite of some similarities, an order differs from a decree.[3]

4. NATURE AND SCOPE

The Code has made certain orders appealable. Appeals can be filed only against those orders[4] which are made appealable. No appeal lies from other orders.[5]

[1] S. 2(14).

[2] *Ibid*, see also *Vidyacharan Shukla* v. *Khubchand Baghel*, AIR 1964 SC 1099: (1964) 6 SCR 129.

[3] For detailed discussion, *see supra*, Pt. I, Chap. 2.

[4] S. 104(1). See also *Keshardeo* v. *Radha Kissen*, AIR 1953 SC 23 at p. 27: 1953 SCR 136: *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393: AIR 1974 SC 1126; *Shah Babulal* v. *Jayaben D. Kania*, (1981) 4 SCC 8: AIR 1981 SC 1786.

[5] S. 104(2).

5. APPEALABLE ORDERS: SECTION 104, ORDER 43

An appeal shall lie from the following orders:

(*i*) An order awarding compensatory costs in respect of false or vexatious claims or defence. (Section 35-A)[6]
Such appeal, however, is limited to two grounds, namely:
  (*a*) No such order could have been made; or
  (*b*) An order for less amount ought to have been made.[7]

(*ii*) An order refusing leave to institute a suit against public nuisance. (Section 91)[8]

(*iii*) An order refusing leave to institute a suit in case of breach of trust. (Section 92)[9]

(*iv*) An order awarding compensation for obtaining arrest, attachment or injunction on insufficient grounds. (Section 95)[10]

(*v*) An order imposing a fine[11] or directing the arrest or detention in civil prison of any person except where such arrest or detention is in execution of a decree.[12]

(*vi*) An order returning a plaint to be presented to the proper court. (Order 7 Rule 10)[13]

(*vii*) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for default. (Order 9 Rule 9)[14]

(*viii*) An order rejecting an application (in appealable cases) to set aside an ex parte decree. (Order 9 Rule 13)[15]

(*ix*) An order dismissing a suit or striking out defence for non-compliance with an order for discovery. (Order 9 Rule 13)[16]

(*x*) An order objecting to the draft of a document or an endorsement on a negotiable instrument. (Order 21 Rule 34)[17]

(*xi*) An order setting aside or refusing to set aside a sale. (Order 21 Rule 72, 92)[18]

(*xii*) An order rejecting an application to set aside orders passed *ex parte* in execution proceedings. [Order 21 Rule 106(1)][19]

[6] S. 104(1)(*ff*).
[7] Proviso to S. 104(1)(*ff*).
[8] S. 104(1)(*ffa*).
[9] S. 104(1)(*ffa*).
[10] S. 104(1)(*g*).
[11] S. 104(1)(*h*); Or. 16 Rr. 10, 12, 17 & 21; Or. 26 R. 17.
[12] S. 104(1)(*h*); Or. 38 Rr. 1 & 4; Or. 39 R. 2-A.
[13] Or. 43 R. 1(*a*).
[14] R. 1(*c*).
[15] R. 1(*d*).
[16] R. 1(*f*).
[17] R. 1(*i*).
[18] R. 1(*j*).
[19] R. 1(*ja*).

(*xiii*) An order refusing to set aside the abatement or dismissal of a suit. (Order 22 Rule 9)[20]

(*xiv*) An order giving or refusing to give leave to continue a suit by or against an assignee. (Order 22 Rule 10)[21]

(*xv*) An order rejecting an application (in appealable cases) to set aside the dismissal of a suit for not furnishing security for costs within time. (Order 25 Rule 2)[22]

(*xvi*) An order rejecting an application for permission to sue as an indigent person. (Order 33 Rule 5 or 7)[23]

(*xvii*) An order in an interpleader suit for costs of the plaintiff where the defendant in interpleader suit sues the plaintiff in another court (Order 35 Rule 3), or for costs and discharge of the plaintiff in an interpleader suit. (Order 35 Rule 4 or 6)[24]

(*xviii*) An order to deposit money or other property, or to furnish security, or fresh security for appearance of the defendant (Order 38 Rule 2 or Rule 3) or for attachment of property before judgment. (Order 38 Rule 6)[25]

(*xix*) An order granting or refusing to grant interim injunction. (Order 39 Rule 1 or 2)[26]

(*xx*) An order for attachment of property or detention of a person disobeying an order of injunction. (Order 39 Rule 2-A)[27]

(*xxi*) An order discharging, varying or setting aside injunction. (Order 39 Rule 4)[28]

(*xxii*) An order for deposit of money or other thing in court or for its delivery to the person entitled. (Order 39 Rule 10)[29]

(*xxiii*) An order for appointment of receiver. (Order 40 Rule 1)[30]

(*xxiv*) An order for attachment and sale of property of defaulting receiver. (Order 40 Rule 4)[31]

(*xxv*) An order refusing to restore an appeal dismissed for default of appearance by appellant. (Order 41 Rule 19)[32]

[20] R. 1(*k*).
[21] R. 1(*l*).
[22] R. 1(*n*).
[23] R. 1(*na*).
[24] R. 1(*p*).
[25] R. 1(*q*).
[26] R. 1(*r*).
[27] R. 1(*r*).
[28] R. 1(*r*).
[29] R. 1(*r*).
[30] R. 1(*s*).
[31] R. 1(*s*).
[32] R. 1(*t*).

(*xxvi*) An order refusing to rehear an appeal heard *ex parte*. (Order 41 Rule 21)[33]

(*xxvii*) An order of remand (in appealable cases). (Order 41 Rule 23 or 23-A)[34]

(*xxviii*) An order granting an application for review. (Order 47 Rule 1)[35]

6. OTHER ORDERS: SECTION 105, RULE 1-A

Section 105 enacts that every order whether appealable or not, except an order of remand, can be attacked in an appeal from the final decree on the ground (*i*) that there is an error, defect or irregularity in the order; and (*ii*) that such error, defect or irregularity affects the decision of the case.[36] The principle underlying Section 105 is that when an interlocutory order is appealable, the party against whom such order is made is not bound to prefer an appeal against it. There is no such law which compels a party to appeal from every interlocutory order by which he may feel aggrieved. Section 105 makes it clear that an order appealable under Section 104 may be questioned under this section in an appeal from the decree in the suit, even though no appeal has been preferred against the interlocutory order.[37]

Prior to the Amendment Act of 1976, an order under Order 23 Rule 3 recording or refusing to record an agreement, compromise or satisfaction was appealable.[38] By the Amendment Act of 1976, the said provision has been deleted. However Rule 1-A has been added which provides that in an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.[39]

7. RES JUDICATA

The doctrine of res judicata applies to two stages of the same litigation also.[40] Hence, if any interlocutory order has not been challenged,

[33] R. 1(*t*).

[34] R. 1(*u*).

[35] R. 1(*w*).

[36] S. 105 R. 1-A. See also *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941 at p. 946: (1960) 3 SCR 590; *Amar Chand* v. *Union of India*, AIR 1964 SC 1658 at p. 1661; *Lonankutty* v. *Thomman*, (1976) 3 SCC 528 at p. 535: AIR 1976 SC 1645 at p. 1651: 1976 Supp SCR 74; *Jasraj Inder Singh* v. *Hemraj Multanchand*, (1977) 2 SCC 155 at p. 164: AIR 1977 SC 1011 at pp. 1017-18.

[37] *Ibid*, see also *Maharajah Moheshur Sing* v. *Bengal Govt.*, (1859) 7 Moo IA 283 at p. 302 (PC).

[38] Or. 43 R. 1(*m*) (before the amendment).

[39] R. 1-A(2). See also *Anant* v. *Achut*, AIR 1981 Bom 357.

[40] *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946. For detailed discussion, *see supra*,

the same would operate as *res judicata* at all subsequent stages of the suit and no party can be allowed to "set the clock back" during the pendency of the proceedings.[41] It thus gives finality to such orders.[42] Correctness thereof, however, can be challenged by an aggrieved party in a regular appeal from the final decree.[43]

8. LIMITATION

An appeal from an order can be filed in a High Court within ninety days and in another court within thirty days from the date of the order.[44]

9. FORUM OF APPEAL: SECTION 106

Appeals from orders in cases in which they are appealable, shall lie to the court to which an appeal would lie from the decree in the suit in which the order is made.[45] Where such order is made by a court other than a High Court in the exercise of appellate jurisdiction, an appeal shall lie to the High Court.[45] In certain circumstances, even a letters patent appeal is maintainable.[46]

10. PROCEDURE AT HEARING

The provisions relating to first appeals[47] shall apply to appeals from orders also.[48]

11. LETTERS PATENT APPEAL

Sub-section (2) of Section 104 states that no appeal shall lie from any order made in appeal. A question may arise whether a Letters Patent Appeal would lie against an order passed by a Single Judge of the High Court.

There was a conflict of opinions on this point in the past but the controversy has been set at rest by a decision of the Supreme Court in *Shah*

Pt. II, Chap. 2.

[41] *Ibid*, see also *Sankaranarayan* v. *K. Sreedevi*, (1998) 3 SCC 751; *Ishwar Dass* v. *Sohan Lal*, (2000) 1 SCC 434: AIR 2000 SC 426.

[42] *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590; *Arjun Singh* v. *Mohindra Kumar*, AIR 1964 SC 993: (1964) 5 SCR 946. For detailed discussion, *see*, Pt. II, Chap. 2.

[43] S. 105.

[44] Art. 116, Limitation Act, 1963.

[45] S. 106.

[46] *Shah Babulal* v. *Jayaben D. Kania*, (1981) 4 SCC 8 at p. 22: AIR 1981 SC 1786; *Madan Naik* v. *Hansubala Devi*, (1983) 3 SCC 15: AIR 1983 SC 676; *Jugal Kishore* v. *S. Satjit Singh*, (1984) 1 SCC 358; *Umaji Keshao* v. *Radhikabai*, 1986 Supp SCC 401: AIR 1986 SC 1272; *Madhusudan Vegetable Products* v. *Rupa Chemicals*, (1986) 27 (1) Guj LR 101.

[47] Or. 41, *see supra*, Chap. 2.

[48] Or. 43 R. 2.

Babulal v. *Jayaben D. Kania*[49] wherein the Apex Court held that Section 104 applies to appeals to the High Court from subordinate courts. If a Single Judge of the High Court exercises original jurisdiction and makes an order, an appeal is competent under the Letters Patent to a Division Bench. But if such order is passed by a court subordinate to the High Court and an appeal against that order is decided by the Single Judge of the High Court under Section 104, no Letters Patent Appeal is maintainable.[50]

12. APPEAL TO SUPREME COURT

The bar to further appeal under Section 104(2) does not apply to appeals to the Supreme Court.[51]

[49] (1981) 4 SCC 8: AIR 1981 SC 1786.

[50] *Ibid*, see also *Resham Singh* v. *Abdul Sattar*, (1996) 1 SCC 49; *New Kenilworth Hotel (P) Ltd.* v. *Orissa State Finance Corpn.*, (1997) 3 SCC 462: AIR 1997 SC 978.

[51] *Dewaji* v. *Ganpatlal*, AIR 1969 SC 560; *Satyadhyan Ghosal* v. *Deorjin Debi*, AIR 1960 SC 941: (1960) 3 SCR 590.

PART III

5 Appeals by Indigent Persons

SYNOPSIS

1. General	529	5. Payment of court fees: Rule 2	530
2. Who may appeal: Rule 1	529	6. Limitation	531
3. Inquiry: Rule 3	530	7. Letters patent appeal	531
4. Power and duty of court	530		

1. GENERAL

AS DISCUSSED above,[1] Order 33 deals with suits by indigent persons. Order 44 deals with appeals by indigent persons. The provisions of Order 44 are subject in all matters to the provisions of Order 33 insofar as they are applicable.[2]

2. WHO MAY APPEAL: RULE 1

Any person entitled to prefer an appeal, who is unable to pay court fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person.[3]

Before the Amendment Act of 1976, certain restrictions were imposed on the right of an indigent person to prefer an appeal under sub-rule (2) of Rule 1. It provided that the court shall reject the application to appeal *in forma pauperis*, unless it is shown that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust. Those restrictions were considered to be unjust, unfair, discriminatory and without any rational basis.[4] The Law Commission,[5] therefore, recommended that the said provisions be deleted. The said recommendation of the Law Commission

[1] *See supra*, "Suits by indigent persons", Pt. II, Chap. 16.

[2] Or. 44 R. 1. See also *Dipo* v. *Wassan Singh*, (1983) 3 SCC 376: AIR 1983 SC 846.

[3] *Ibid.*

[4] Law Commission's Fifty-fourth Report at p. 313.

[5] Law Commission's Fifty-fourth Report at p. 313; see also *Ram Sarup* v. *Union of India*, (1983) 4 SCC 413: AIR 1983 SC 1196.

was accepted and, accordingly, sub-rule (2) of Rule 1 was deleted. The present position is that an indigent person may also file an appeal on all the grounds available to an ordinary person. An indigent person can also file cross-objections.[6]

3. INQUIRY: RULE 3

Rule 3 provides that where the appellant was allowed to sue as an indigent person in the trial court, no fresh inquiry is necessary if the applicant files an affidavit to the effect that he has not ceased to be an indigent person since the date of the decree appealed from. However, if the government pleader or the respondent disputes the truth of the statement made in such affidavit, an inquiry into the question as to whether or not the applicant is an indigent person shall be held by the appellate court, or under its order by an officer of that court.[7]

Where it is alleged that the applicant became an indigent person after the date of the decree appealed from, the inquiry into the means of the applicant shall be made by the appellate court or under its order by an officer of that court or by the trial court if the appellate court considers it necessary in the circumstances of the case.[8]

4. POWER AND DUTY OF COURT

At the stage of hearing of an application, the question to be considered by the court is whether the applicant is an indigent person. If he is, the application will be allowed and the memorandum of appeal will be registered. If he is not, the application will be rejected.[9]

5. PAYMENT OF COURT FEES: RULE 2

The rejection of an application for leave to appeal as an indigent person does not *ipso facto* result in the rejection of the memorandum of appeal filed along with the application.[10] It only means that the court is not satisfied about the claim of the applicant that he is an indigent person and nothing more.[11] Rule 2 empowers the court to grant time for payment of court fees when the application for leave to appeal as an indigent person is rejected.

[6] Or. 41 R. 22(5). For detailed discussion of "Cross-objections", *see supra*, Chap. 2.

[7] R. 3(1); see also *M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427: AIR 1972 SC 2379.

[8] R. 3(2).

[9] *Ram Sarup* v. *Union of India*, (1983) 4 SCC 413: AIR 1983 SC 1196.

[10] *State of T-C* v. *John Mathew*, AIR 1955 TC 209 (FB); *Shahzadi Begam* v. *Alakh Nath*, AIR 1935 All 620.

[11] *Ram Sarup* v. *Union of India*, (1983) 4 SCC 413: AIR 1983 SC 1196.

6. LIMITATION

The period of limitation for presenting an application for leave to appeal as an indigent person to the High Court is sixty days and to other courts is thirty days. The limitation starts from the date of the decree appealed from.[12]

7. LETTERS PATENT APPEAL

There is difference of opinions as to whether a Letters Patent Appeal lies against an order granting or refusing to grant leave to appeal as an indigent person. The majority opinion, however, is that an appeal is maintainable against such orders. The expression "appeal" as used in Order 44 is very wide and comprehensive and includes a Letters Patent Appeal. The phrase "any person entitled to prefer an appeal" takes within its sweep not only the persons who are entitled to prefer an appeal as of right but also the persons who can file an appeal with the leave of the court.[13]

[12] Art. 130, Limitation Act, 1963.

[13] *K.Y. Sodamma* v. *K. Gunneswarudu*, AIR 1973 AP 295; *Chandel Ranjit Kunwar* v. *Hiralal*, AIR 1972 MP 133.

PART III

6 Appeals to Supreme Court

SYNOPSIS

1. General 532
2. Conditions: Section 109, Order 45 Rule 3 532
   (i) Judgment, decree or final order 533
   (ii) Substantial question of law of general importance 533
   (iii) Need to be decided by Supreme Court 534
3. Procedure at hearing 534
   (a) Application for leave and certificate of fitness 534
   (b) Effect of amendment in Constitution 534
   (c) Security and deposit: Rules 7, 9 & 12 535
   (d) Admission of appeal: Rule 8 535
   (e) Powers of court pending appeal 536
   (f) Execution of orders of Supreme Court: Rules 15 & 16 536
4. Appeals under Constitution 536

1. GENERAL

APPEALS TO the Supreme Court are governed by the provisions of Articles 132, 133 and 134-A of the Constitution of India with regard to civil matters. Subject to the provisions of the Constitution, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies that—

(*a*) The case involves a substantial question of law of general importance; and

(*b*) In the opinion of the High Court the said question needs to be decided by the Supreme Court.[1]

Sections 109 and 112 read with Order 45 deal with appeals to the Supreme Court.

2. CONDITIONS: SECTION 109, ORDER 45 RULE 3

An appeal would lie to the Supreme Court under Section 109 of the Code only if the following conditions are fulfilled:

[1] Ss. 109 & 112.

(*i*) a judgment, decree or final order must have been passed by the High Court;

(*ii*) a substantial question of law of general importance must have been involved in the case; and

(*iii*) in the opinion of the High Court, the said question needs to be decided by the Supreme Court.

(i) Judgment, decree or final order

An appeal lies to the Supreme Court only against a judgment, decree or final order of the High Court. A judgment, decree or final order against which an appeal can be preferred to the Supreme Court must be one which purports to put an end to the litigation between the parties.[2] No certificate can be granted in respect of an interlocutory order.[3] *The test whether the order is final or not will not depend on whether the controversy is finally over, but whether the controversy raised before the High Court is finally over or not.*[4] (emphasis supplied)

(ii) Substantial question of law of general importance

An appeal would lie to the Supreme Court if the High Court certifies that the case involves a substantial question of law of general importance. The expression *substantial question of law of general importance* has not been defined in the Code, but it is clear that the High Court can grant certificate under Section 109 only when it is satisfied that the question of law involved in the case is not only substantial but also of general importance. In other words, the substantial question of law must be such that, apart from the parties to the litigation, the *general public* should be interested in determination of such question by the Supreme Court, e.g., it would affect a large number of persons or a number of proceedings involving the same question.[5] Therefore, if the question is settled by the Supreme Court, the application of the

[2] *Jethanand & Sons* v. *State of U.P.*, AIR 1961 SC 794 at p. 796: (1961) 3 SCR 754; *Ramesh* v. *Gendalal*, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198. For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 485-500.

[3] *Syedna Taher Saifuddin* v. *State of Bombay*, AIR 1958 SC 253 at p. 255: 1958 SCR 1010; *Ramesh* v. *Gendalal Motilal Patni*, *supra*.

[4] *Ramesh* v. *Gendalal Motilal Patni*, AIR 1966 SC 1445 at p. 1449: (1966) 3 SCR 198; *Union of India* v. *Gopal Singh*, (1967) 2 SCWR 639; *Tarapore & Co.* v. *V.O. Tractors Export*, (1969) 1 SCC 233 at p. 238: AIR 1970 SC 1168 at pp. 1169-70; *Prakash Chand* v. *Hindustan Steel Ltd.*, (1970) 2 SCC 806 at p. 808: AIR 1971 SC 2319; *see also*, Or. 45 R 1.

[5] *Chunilal V. Mehta and Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd.*, AIR 1962 SC 1314 at p. 1318: 1962 Supp (3) SCR 549 at pp. 557-58; *Mahindra & Mahindra Ltd.* v. *Union of India*, (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; *SBI* v. *N. Sundara Money*, (1976) 1 SCC 822 at p. 824: AIR 1976 SC 1111 at p. 1112.

principle to the facts of a particular case does not make the question a substantial question of law of general importance.[6]

(iii) Need to be decided by Supreme Court

It is not sufficient that the case involves a substantial question of law of general importance, but, in addition to it, the High Court must be of the opinion that such question needs to be decided by the Supreme Court. The word *needs* suggests that there has to be a necessity for a decision by the Supreme Court on the question, and such a necessity can be said to exist when, for instance, two views are possible regarding the question and the High Court takes one view of the said views. Such a necessity can also be said to exist when a different view has been expressed by another High Court.[7]

3. PROCEDURE AT HEARING

(a) Application for leave and certificate of fitness

Whoever desires to appeal to the Supreme Court shall apply by a petition to the court whose decree is sought to be appealed from.[8] Ordinarily, such a petition should be decided within sixty days from the date of filing of the petition.[9] Every petition should state the grounds of appeal and pray for the issue of a certificate (*i*) that the case involves a substantial question of law of general importance; and (*ii*) that in the opinion of the court the said question needs to be decided by the Supreme Court.[10] After notice to the other side, the court may grant or refuse to grant the certificate.[11]

(b) Effect of amendment in Constitution

These provisions, however, must be read in the light of and subject to Article 134-A of the Constitution. By the Constitution (Forty-fourth Amendment) Act, 1978, Article 134-A has been inserted with effect from 1 August 1979. It states that every High Court, passing or making a judgment, decree, final order or sentence referred to in Article 132(1)

[6] *Chunilal V. Mehta and Sons Ltd.* v. *Century Spg. & Mfg. Co. Ltd., supra; Mahindra & Mahindra Ltd.* v. *Union of India,* (1979) 2 SCC 529 at pp. 550-51: AIR 1979 SC 798 at pp. 811-12; *SBI* v. *N. Sundara Money,* (1976) 1 SCC 822 at p. 824: AIR 1976 SC 1111 at p. 1112; *Pankaj Bhargava* v. *Mohinder Nath,* (1991) 1 SCC 556 at p. 563: AIR 1991 SC 1233; For detailed discussion and case law, *see,* Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 509-14.

[7] *SBI* v. *N. Sundara Money, supra; Union of India* v. *Hafiz Mohd. Said,* AIR 1975 Del 77 at pp. 78-79 (FB). For detailed discussion and case law, *see,* Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 514-15.

[8] Or. 45 R. 2(1).

[9] R. 2(2).

[10] R. 3.

[11] Rr. 3(2), 6, 7.

or 133(1) or 134(1), may, if it deems so to do, either *suo motu* or shall, if an oral application is made, by or on behalf of the party aggrieved, *immediately after the passing or making of such judgment, decree, final order or sentence*, determine whether a certificate may be given or not.[12]

The effect of the amendment is that if an aggrieved party wants to approach the Supreme Court under Article 132, 133 or 134 after getting certificate from the High Court, he will have to make an oral application *immediately* after the pronouncement of the judgment, and if such an application is not made immediately, by taking resort to Article 133(*b*) of the Limitation Act, 1963, he may not be able to approach the Supreme Court. The reason is that the source of power are Articles 132, 133, 134 read with Article 134-A, and if an application is not made as per the provisions of the Constitution, the procedural law [Article 133(*b*), Limitation Act, 1963] cannot override the substantive law (Article 134-A of the Constitution) and such an application even if it is filed within a period of sixty days from the date of judgment, order, etc. as per Article 133(*b*) of the Limitation Act, 1963, it is not maintainable at law. The author is of the opinion that in the light of the Constitution (Forty-fourth Amendment) Act, 1978, Article 133(*b*) of the Limitation Act, 1963 requires to be amended. But even if it is not done, it cannot override the provisions of the Constitution.[13]

(c) Security and deposit: Rules 7, 9 & 12

When the certificate is granted, the applicant should furnish security for the costs of the respondent and also deposit the expenses for translating, printing, indexing, etc. within the stipulated period. The court may revoke acceptance of security. The court has also the power to refund the balance of the deposit after necessary deductions for expenses.[14]

(d) Admission of appeal: Rule 8

Where the directions regarding furnishing of security and making of deposit are carried out, the court shall declare the appeal admitted, give notice thereof to the respondent and transmit the record to the Supreme Court.[15] If the security furnished or the costs deposited appears to be inadequate, the court may order further security to be furnished or costs to be deposited.[16] If the appellant fails to comply with

[12] For Statement of Objects and Reasons, *see*, Gazette of India, Extra., Pt. II, S. 2, dt. 15 May 1978 at p. 616; see also *SBI* v. *Employees' Union*, (1987) 4 SCC 370: AIR 1987 SC 2203.

[13] *Keshava S. Jamkhandi* v. *Ramachandra S. Jamkhandi*, AIR 1981 Kant 97: (1980) 2 Kant LJ 432 (FB); *Dhangir* v. *Jankidas*, AIR 1990 Raj 102.

[14] Rr. 7, 9 & 12.

[15] R. 8.

[16] Rr. 10 & 14; *see also*, R, 9-A.

such order, the proceedings shall be stayed and the appeal shall not proceed without an order of the Supreme Court.[17] The execution of the decree shall not be stayed meanwhile.[18]

(e) Powers of court pending appeal

The pendency of an appeal to the Supreme Court does not affect the right of the decree-holder to execute the decree unless the court otherwise directs.[14] The court may stay execution after taking sufficient security from the appellant or it may allow the decree to be executed after taking sufficient security from the respondent.[19]

(f) Execution of orders of Supreme Court: Rules 15 & 16

The appeal will then be heard by the Supreme Court and an order will be made. Whoever desires to execute a decree or an order of the Supreme Court shall apply by a petition accompanied by a copy of the decree or order sought to be executed to the court from which the appeal was preferred to the Supreme Court. Such court shall transmit the record of the Supreme Court to the trial court or to such court as the Supreme Court may direct, with the necessary directions for execution of the same. The court to which it is transmitted shall execute it in the same manner as it executes its own decrees and orders.[20] The orders relating to such execution shall be appealable in the same manner as the orders relating to the execution of its own decree.[21]

4. APPEALS UNDER CONSTITUTION

Over and above Articles 132, 133 and 134-A, Article 136 of the Constitution confers very wide and plenary powers on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order (final as well as interlocutory) passed by any court or tribunal. Section 112 of the Code saves the powers conferred on the Supreme Court by the Constitution and declares that nothing in the Code of Civil Procedure would affect these powers.[22]

[17] R. 11.

[18] R. 13(1). See also *Deochand* v. *Shiv Ram*, AIR 1965 SC 615 at p. 617: (1965) 1 SCR 109.

[19] R 13(2). See also *Deochand* v. *Shiv Ram*, *supra*.

[20] R. 15.

[21] R. 16.

[22] For detailed discussion, *see*, Author's, *Lectures on Administrative Law* (2008) at pp. 390-97.

PART III

7 Reference

SYNOPSIS

1. Nature and Scope	537	9. Costs	541
2. Object	537	10. Revision	541
3. Conditions	538	11. Reference and appeal	541
4. Reasonable doubt	539	12. Reference and review	541
5. Who may apply?	539	13. Reference and revision	541
6. Power and duty of Referring Court	539	14. Reference under CPC and CrPC	541
7. Power and duty of High Court	540	15. Reference under CPC and Constitution	542
8. Procedure at hearing	540		

1. NATURE AND SCOPE

SECTION 113 of the Code empowers a subordinate court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the court itself feels some doubt about a question of law. The High Court may make such order thereon as it thinks fit.

Such opinion can be sought by a court when the court trying a suit, appeal or execution proceedings entertains reasonable doubt about a question of law.[1]

2. OBJECT

The underlying object for the provision for reference is to enable subordinate courts to obtain in non-appealable cases the opinion of the High Court in the absence of a question of law and thereby avoid the commission of an error which could not be remedied later on.[2] Such provision also ensures that the validity of a legislative provision (Act, Ordinance or Regulation) should be interpreted and decided by the

[1] S. 113; Or. 46 R. 1.

[2] *Chhotubhai* v. *Bai Kashi*, AIR 1941 Bom 365 at p. 366: ILR 1941 Bom 131: (1941) 43 Bom LR 733; *Birendra Kishor* v. *Secy. of State*, AIR 1921 Cal 262 (FB).

highest court in the State.[3] The reference must, therefore, be made before passing of the judgment in the case.[4]

3. CONDITIONS

The right of reference, however, is subject to the conditions prescribed by Order 46 Rule 1 and, unless they are fulfilled, the High Court cannot entertain a reference from a subordinate court.[5] The rule requires the following conditions to be satisfied to enable a subordinate court to make a reference:

(*i*) There must be a pending suit or appeal in which the decree is not subject to appeal or a pending proceeding in execution of such decree;

(*ii*) A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding; and

(*iii*) The court trying the suit or appeal or executing the decree must entertain a reasonable doubt on such question.

Questions of law on which a subordinate court may entertain a doubt may be divided into two classes:

(*i*) Those which relate to the validity of any Act, Ordinance or Regulation; and

(*ii*) Other questions.

In the latter case, the reference is optional, but in the former case it is obligatory if the following conditions are fulfilled:[6]

(*i*) It is necessary to decide such question in order to dispose of the case;

(*ii*) The subordinate court is of the view that the impugned Act, Ordinance or Regulation is *ultra vires*; and

(*iii*) There is no determination either by the Supreme Court or by the High Court to which such court is subordinate that such Act, Ordinance or Regulation is *ultra vires*.

[3] *Ibid*, see also *Public Prosecutor* v. *Dr. B. Krishnasami*, AIR 1957 AP 567; *M.S. Oberoi* v. *Union of India*, AIR 1970 Punj 407: (1970) 72 Punj LR 830; *Indian Council of Agricultural Research* v. *Veterinary Council of India*, (1996) 63 DLT 786.

[4] *Diwalibai* v. *Sadashivdas*, ILR (1900) 24 Bom 310 at p. 314.

[5] *Garling* v. *Secy. of State for India*, ILR (1903) 30 Cal 458 at p. 462; *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365: ILR 1970 AP 1175; *Ranadeb Choudhuri* v. *Land Acquisition Judge*, AIR 1971 Cal 368 at p. 375: 75 CWN 375; *Geevarghese George* v. *K.P. Abraham*, AIR 1979 Ker 237; *Behramshaw Hormanshah Bharda* v. *Dastoorji*, AIR 1980 Guj 74.

[6] Proviso to S. 113. See also *Ganga Pratap Singh* v. *Allahabad Bank Ltd.*, AIR 1958 SC 293 at p. 295: 1958 SCR 1150; *State Financial Corpn. Ltd.* v. *Satpathy Bros. & Nanda Co. (P) Ltd.*, AIR 1975 Ori 132 at p. 133: ILR 1975 Cut 659 (FB); *H.P. Financial Corpn.* v. *Nahan Electricals*, AIR 1982 HP 49; *Behramshaw Hormanshah* v. *Dastoorji*, AIR 1980 Guj 74 at p. 78: (1980) 21 Guj LR 202; *Municipal Corpn. of City* v. *Shivshanker Gaurishanker*, (1998) 9 SCC 197: AIR 1999 SC 2874.

The object of this provision is to see that the Act of legislature should be interpreted by the Supreme Court in the State.[7]

4. REASONABLE DOUBT

A reference can be made on a question of law only when the judge trying the case entertains a reasonable doubt about it.[8] There can be no reasonable doubt on a question decided by the High Court to which the judge making reference is subordinate.[9] But if such decision is doubted in a later decision by the same court or by a higher court, e.g. Privy Council, Federal Court or Supreme Court, there is a room for reasonable doubt to make reference.[10]

5. WHO MAY APPLY?

Only a court can refer a case either on an application of a party or *suo motu*.[11] "Court" means a Court of Civil Judicature.[12] A tribunal or *persona designata* cannot be said to be a "court" and no reference can be made by them.[13]

6. POWER AND DUTY OF REFERRING COURT

A reference can be made only in a suit, appeal or execution proceeding pending before the court. Such reference can be made when a subordinate court entertains a doubt on a question of law.[14] Further, such question must have actually arisen between the parties litigating and the court must have been called upon to adjudicate the *lis*.[15] No reference, hence, can be made on a hypothetical question or to provide an answer to a point likely to arise in future.[16]

[7] *Public Prosecutor* v. *Dr. B. Krishnasami*, AIR 1957 AP 567.

[8] *Ralia Ram* v. *Sadh Ram*, AIR 1952 Pepsu 1 (FB); *E.E. Dawoodjee & Sons* v. *Municipal Corpn. of Rangoon*, AIR 1923 Rang 193: (1923) 1 Rang 220: 76 IC 519; *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365.

[9] *Ibid*, see also *Bhanaji Raoji Khoji* v. *Joseph De Brito*, (1906) Bom 226; *Hurish Chunder* v. *W.P.O. Brien*, (1870) 14 Suth WR 248.

[10] *Ibid*, see also *Fatima-ul-Hasna* v. *Baldeo Sahai*, AIR 1926 All 204(2) (FB); *Puttu Lal* v. *Parbati Kunwar*, (1914-15) 42 IA 155 (PC); *see also infra*, "Power and duty of referring court".

[11] S. 113; Or. 46 R. 1.

[12] *Phul Kumari* v. *State*, AIR 1957 All 495; *Delhi Financial Corpn.* v. *Ram Parshad*, AIR 1973 Del 28.

[13] *Ramakant Bindal* v. *State of U.P.*, AIR 1973 All 23; *Nanak Chand* v. *Estate Officer*, AIR 1969 P&H 304; *Banarsi Yadav* v. *Krishna Chandra*, AIR 1972 Pat 49 (FB).

[14] *Tika Ram* v. *Maheshwari Din*, AIR 1959 All 659: (1959) 2 All 87: 1959 All LJ 592; *State Financial Corpn. Ltd.* v. *Satpathy Bros. & Nanda Co. (P) Ltd.*, AIR 1975 Ori 132: ILR 1975 Cut 659 (FB); *L.S. Sharlekar* v. *D.L. Agarwal*, AIR 1968 Bom 439: (1968) 70 Bom LR 100.

[15] *Banarsi Yadav* v. *Krishna Chandra Dass*, AIR 1972 Pat 49 (FB); *Distt. Munsif, Chittoor, In re*, AIR 1970 AP 365: ILR 1970 AP 1175.

[16] *Ibid*, see also *Ranganath* v. *Hanumantha*, (1984) 1 Kant LC 243.

But once the question "arises" and the Proviso is attracted and validity of any Act, Ordinance or Regulation is challenged, and the referring court is *prima facie* satisfied that such Act, Ordinance or Regulation is *ultra vires*, the case has to be referred to the High Court.[17]

7. POWER AND DUTY OF HIGH COURT

The jurisdiction of the High Court is consultative.[18] In dealing with and deciding the reference the High Court is not confined to the questions referred by a subordinate court. If a new aspect of law arises, the High Court can consider it.[19] The High Court may answer the question referred to it and send back the case to the referring court for disposal in accordance with law.[20] It may also refuse to answer the reference or even to quash it.[21] The High Court, however, cannot make any order on merits nor can it make suggestions.[22]

8. PROCEDURE AT HEARING

The referring court should draw up a statement of the facts of the case, formulate the question of law on which opinion is sought and give its opinion thereon.[23] The court may either stay the proceedings or pass a decree or order contingent upon the decision of the High Court on the point referred, which cannot be executed until receipt of a copy of the judgment of the High Court on the reference.[24] If the High Court answers the question in favour of the plaintiff, the decree will be confirmed. If it is answered against him, the suit will be dismissed.[25] The High Court after hearing the parties, if they so desire, shall decide the point so referred and transmit a copy of its judgment to the court which shall dispose of the case in accordance with the said decision.[26] Where the referring court has not complied with the conditions laid down for making reference, the High Court has power to return the case for amendment.[27] The High Court can even quash the order of

[17] *Ganga Pratap Singh* v. *Allahabad Bank Ltd.*, AIR 1958 SC 293: 1958 SCR 1150.

[18] *Delhi Financial Corpn.* v. *Ram Parshad*, AIR 1977 Del 80; *Raja Hussain* v. *Gaviappa*, AIR 1984 Kant 108.

[19] *S.K. Roy* v. *Board of Revenue*, AIR 1967 Cal 338; *CIT* v. *Scindia Steam Navigation Co. Ltd.*, AIR 1961 SC 1633.

[20] Or. 46 R. 3; see also *S.K. Roy* v. *Board of Revenue*, *supra*.

[21] Or. 46 R. 5; see also *Krishnarao Bhaskar* v. *Lakshman Ramchandra*, AIR 1929 Bom 30.

[22] *Municipal Corpn. of City* v. *Shivshanker Gaurishanker*, (1998) 9 SCC 197: AIR 1999 SC 2874.

[23] Or. 46 Rr. 1 & 4-A.

[24] R. 2.

[25] *L.S. Sherlekar* v. *D.L. Agarwal*, AIR 1968 Bom 439: (1968) 70 Bom LR 100.

[26] R. 3.

[27] *Garling* v. *Secy. of State for India*, ILR (1903) 30 Cal 458 at p. 462.

reference.[28] The High Court may alter, cancel or set aside any decree or order passed or made by the court making the reference and make such order as it thinks fit.[29]

9. COSTS

As a general rule, the costs of reference shall be the costs in the cause.[30] But if the reference is altogether unwarranted, the High Court may direct the referring judge to personally pay the costs.[31]

10. REVISION

An order refusing to make reference to the High Court is a "case decided" under Section 115 of the Code and is revisable.[32]

11. REFERENCE AND APPEAL[33]

12. REFERENCE AND REVIEW[34]

13. REFERENCE AND REVISION[35]

14. REFERENCE UNDER CPC AND CrPC

Section 395(1) of the Code of Criminal Procedure, 1973 provides that where any Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance or Regulation or provision is invalid or inoperative but has not been declared by the High Court to which that court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reason therefor and refer the same for the decision of the High Court.

Sub-section (2) of Section 395 enables a Court of Session or a Metropolitan Magistrate to make reference for the decision of the High Court any question of law arising in a case pending before the court.[36]

[28] *Krishnarao Bhaskar* v. *Lakshman Ramchandra*, AIR 1929 Bom 30 at p. 31.
[29] R. 5.
[30] R. 4.
[31] *L.S. Sherlekar* v. *D.L. Agarwal*, AIR 1968 Bom 439 at pp. 442-43.
[32] *Cantonment Board* v. *Phulchand*, AIR 1932 Nag 70.
[33] *See infra*, Chap. 9.
[34] *See infra*, Chap. 9.
[35] *See infra*, Chap. 9.
[36] For detailed discussion, *see*, C.K. Thakker, *Criminal Procedure* (2007) at pp. 283-85.

15. REFERENCE UNDER CPC AND CONSTITUTION

Article 228 of the Constitution provides for transfer of certain cases to a High Court.[37] Section 113 of the Code refers to the questions regarding the validity of any *"Act, Ordinance or Regulation or of any provision"*, while Article 228 of the Constitution refers to a substantial question of law as to the *"interpretation of the Constitution"*. An interpretation of an Act or statute does not necessarily involve an interpretation of the Constitution, nor vice versa. But a question as to the validity of an Act or provision may involve the interpretation of the Constitution in one form or the other.[38]

Again, under Section 113 of the Code, the subordinate court trying the case can go into the question of *vires* of any Act, Ordinance or Regulation and can make a reference only when *prima facie* it is of the opinion that such Act, Ordinance or Regulation is invalid or inoperative; under Article 228 of the Constitution, on the other hand, a subordinate court cannot even investigate into such question. It is the duty of a subordinate court to refer the case to the High Court as soon as it discovers that it involves a substantial question of law as to the interpretation of the Constitution. It is also the duty of the High Court to withdraw such a case from a subordinate court.[39]

[37] Art. 228 reads as under:

"*Transfer of certain cases to High Court.*—If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may:

(*a*) either dispose of the case itself; or

(*b*) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of the judgment on such question, and the said courts shall on receipt thereof, proceed to dispose of the case in conformity with such judgment."

[38] *Ranadeb Choudhuri* v. *Land Acquisition Judge, supra; Ganga Pratap Singh* v. *Allahabad Bank Ltd., supra; Penguine Textiles Ltd.* v. *A.P. State Financial Corpn.*, AIR 1971 AP 339.

[39] *Ibid*, see also *Behramshaw Hormanshah* v. *Dastoorji*, AIR 1980 Guj 74 at p. 78: (1980) 21 Guj LR 202 at p. 208.

PART III

8 Review

SYNOPSIS

1. General	543	(iii) Other sufficient reason	552
2. Review: Meaning	543	11. By whom review may be made	554
3. Nature and scope	544	12. No inherent power of review	555
4. Object	545	13. Form of application	555
5. Review and appeal	546	14. Crucial date	555
6. Review and reference	546	15. Suo motu review	556
7. Review and revision	546	16. Procedure at hearing	556
8. Who may apply?	546	(i) First stage	556
9. When review lies?: Circumstances	547	(ii) Second stage	556
(a) Cases in which no appeal lies	547	(iii) Third stage	557
(b) Cases in which appeal lies but not preferred	547	17. Limitation	557
(c) Decisions on reference from Court of Small Causes	548	18. Appeal	557
10. Grounds	548	19. Letters patent appeal	557
(i) Discovery of new evidence	548	20. Revision	557
(ii) Error apparent on the face of record	551	21. Review in writ petitions	557
		22. Review by Supreme Court	558
		23. Concluding remarks	558

1. GENERAL

SECTION 114 of the Code gives a substantive right of review in certain circumstances and Order 47 provides the procedure therefor. The provision relating to review constitutes an exception to the general rule that once the judgment is signed and pronounced by the court it becomes *functus officio* (ceases to have control over the matter) and has no jurisdiction to alter it.[1]

2. REVIEW: MEANING

Stated simply, review means to reconsider, to look again or to re-examine.[2] In legal parlance, it is a judicial re-examination of the case by the

[1] Or. 20 R. 3.

[2] *Chamber's 21st Century Dictionary* (1997) at p. 1197; *Random House Dictionary* (1970) at p. 1227; *Black's Law Dictionary* (1979) at p. 1186; *Concise Oxford English Dictionary*

same court and by the same judge.[3] In review, a judge, who has disposed of the matter reviews an earlier order passed by him in certain circumstances.[4]

3. NATURE AND SCOPE

The normal principle of law is that once a judgment is pronounced or order is made, the court becomes *functus officio*. Such judgment or order is final and it cannot be altered or changed.[5]

As a general rule, once an order has been passed by a court, a review of such order must be subject to the rules of the game and cannot be lightly entertained.[6] A review of a judgment is a serious step and reluctant resort to it is called for only where a glaring omission, patent mistake or like grave error has crept in earlier by judicial fallibility.[7]

A power of review should not be confused with appellate powers which enable an appellate court to correct all errors committed by the subordinate court.[8] In other words, it is beyond dispute that a review cannot be equated with the original hearing of the case, and finality of the judgment by a competent court cannot be permitted to be reopened or reconsidered, unless the earlier judicial view is manifestly wrong.[9] It is neither fair to the court which decided the matter nor to the huge backlog of dockets waiting in the queue for disposal to file review petitions indiscriminately and fight over again the same battle which has been fought and lost. Public time is wasted in such matters

(2002) at p. 1225.

[3] *Maharajah Moheshur Sing* v. *Bengal Govt.*, (1857-60) 7 Moo IA 283; *State of Orissa* v. *Commr. of Land Records and Settlement*, (1998) 7 SCC 162: AIR 1998 SC 3067; *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433.

[4] For detailed discussion, *see infra*, "When review lies: Circumstances".

[5] Or. 20 R. 3.

[6] *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845 at p. 855: (1965) 1 SCR 933 at p. 948; *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674: AIR 1975 SC 1500; *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167: AIR 1980 SC 674; *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, (1979) 4 SCC 389: AIR 1979 SC 1047; *Meera Bhanja* v. *Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455; *State of Orissa* v. *Commr. of Land Records and Settlement*, (1998) 7 SCC 162: AIR 1998 SC 3067; *Kewal Chand* v. *S.K. Sen*, (2001) 6 SCC 512.

[7] *Ibid*, see also *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, AIR 1954 SC 526 at p. 538: (1955) 1 SCR 520.

[8] *Ibid*, see also *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433; *Delhi Admn.* v. *Gurdip Singh*, (2000) 7 SCC 296; *Susheela Naik* v. *G.K. Naik*, (2000) 9 SCC 366.

[9] *Ibid*, see also *B.H. Prabhakar* v. *Karnataka State Coop. Apex Bank Ltd.*, (2000) 9 SCC 482.

and the practice, therefore, should be deprecated.[10] Greater care, seriousness and restraint is needed in review applications.[11]

If a review application is not maintainable, it cannot be allowed by describing such an application as an application for "clarification" or "modification".[12]

A right of review is both, substantive as well as procedural. As a substantive right, it has to be conferred by law, either expressly or by necessary implication. There can be no inherent right of review. As a procedural provision, every court or tribunal can correct an inadvertent error which has crept in the order either due to procedural defect or mathematical or clerical error or by misrepresentation or fraud of a party to the proceeding, which can be corrected *ex debito justitae* (to prevent the abuse of process of court)[13].

4. OBJECT

The remedy of review, which is a reconsideration of the judgment by the same court and by the same judge, has been borrowed from the courts of equity. The concept was not known to common law. The remedy has a remarkable resemblance to a writ of error.[14] The basic philosophy inherent in the recognition of the doctrine of review is acceptance of human fallibility. If there is an error due to human failing, it cannot be permitted to perpetuate and to defeat justice. Such mistakes or errors must be corrected to prevent miscarriage of justice.[15] Justice is above all. It is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can come in its way. The law has to bend before justice.[16] Rectification of an order stems from the fun-

[10] *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674: AIR 1975 SC 1500; *Delhi Admn.* v. *Gurdip Singh*, (2000) 7 SCC 296.

[11] *Delhi Admn.* v. *Gurdip Singh Uban*, (2000) 7 SCC 296 at p. 309; *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674: AIR 1975 SC 1500.

[12] *Delhi Admn.* v. *Gurdip Singh Uban*, (2000) 7 SCC 296 at p. 309; see also *Sone Lal* v. *State of U.P.*, (1982) 2 SCC 398.

[13] *Delhi Admn.* v. *Gurdip Singh Uban*, (2000) 7 SCC 296: AIR 2000 SC 3737; *Patel Narshi Thakershi* v. *Pradyuman Singhji*, (1971) 3 SCC 844: AIR 1970 SC 1273; *M.C. Mehta* v. *Union of India*, (1999) 2 SCC 91: AIR 1999 SC 582.

[14] *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674: AIR 1975 SC 1500; *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167: AIR 1980 SC 674.

[15] *Ibid*, see also *S. Nagaraj* v. *State of Karnataka*, 1993 Supp (4) SCC 595; *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650; *Cauvery Water Disputes Tribunal, Re*, 1993 Supp (1) SCC 96 (II): AIR 1992 SC 1183; *Susheela Naik* v. *G.K. Naik*, (2000) 9 SCC 366.

[16] *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433; *S. Nagaraj* v. *State of Karnataka*, 1993 Supp (4) SCC 595.

damental principle that justice is above all. It is exercised to remove an error and not to disturb finality.[17]

5. REVIEW AND APPEAL[18]

6. REVIEW AND REFERENCE[19]

7. REVIEW AND REVISION[20]

8. WHO MAY APPLY?

A person aggrieved by a decree or order may apply for review of a judgment.[21] A "person aggrieved" means a person who has suffered a legal grievance or against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.[22] The expression "person aggrieved" denotes an elastic, and to some extent, an illusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition.[23]

Generally speaking, a person aggrieved has been understood to mean one who has a genuine grievance because an order has been made which prejudicially affects his interests.[24] But the concept of "person aggrieved" varies according to the context, purpose and provisions of the statute.[25] However leniently one may construe the expression "party aggrieved", a person not affected directly and immediately cannot be so considered, otherwise an interpretation of service rules and regulations may affect several members and they will also be considered "persons aggrieved".[26]

A person who is neither a party to the proceedings nor a decree or order binds him, cannot apply for review as the decree or order does

[17] *Ibid*, see also *Common Cause, A Registered Society* v. *Union of India*, (1999) 6 SCC 667 at p. 752: AIR 1999 SC 2979.

[18] *See infra*, Chap. 9.

[19] *Ibid*.

[20] *Ibid*.

[21] S. 114; Or. 47 R. 1.

[22] *Sidebotham, Re, Ex p. Sidebotham*, (1880) 14 Ch D 458 at p. 465: (1874-80) All ER Rep 588 (CA); *Kabari (P) Ltd.* v. *Shivnath Shroff*, (1996) 1 SCC 690: AIR 1996 SC 742; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149. For detailed discussion of "person aggrieved", *see*, V.G. Ramachandran, *Law of Writs* (1993) at pp. 22-43.

[23] *Jasbhai Motibhai* v. *Roshan Kumar*, (1976) 1 SCC 671 at p. 677: AIR 1976 SC 578 at p. 581; *Bangalore Medical Trust* v. *B.S. Muddappa*, (1991) 4 SCC 54: AIR 1991 SC 1902.

[24] *Attorney General of the Gambia* v. *N'Jie*, 1961 AC 617 at p. 634: (1961) 2 All ER 504 (PC) (*per* Lord Denning); see also *Official Receiver, Ex p., In re, Reed, Bowen & Co.*, (1887) 19 QB 174; *Adi Pherozshah Gandhi* v. *H.M. Seervai*, (1970) 2 SCC 484: AIR 1971 SC 385.

[25] *Bar Council of Maharashtra* v. *M.V. Dabholkar*, (1975) 2 SCC 702: AIR 1975 SC 2092 at p. 2098.

[26] *Gopabandhu Biswal* v. *Krishna Chandra*, (1998) 4 SCC 447: AIR 1998 SC 1872.

not adversely or prejudically affect him.[27] But if third party is affected or prejudiced by a judgment or order, he can seek review of such order.[28] Again, a person who is a necessary party to the suit and yet not joined and the order passed in such suit affects him, may seek review thereof.[29]

9. WHEN REVIEW LIES?: CIRCUMSTANCES

A review petition is maintainable in the following cases:

(a) Cases in which no appeal lies

A decree or order from which no appeal lies is open to review.[30] Hence, an application for review against a decree passed by a Court of Small Causes is competent.[31] On the same principle, where an appeal is dismissed on the ground that it was incompetent or was time-barred, the provisions of review would get attracted.[32]

(b) Cases in which appeal lies but not preferred

A review petition is also maintainable in cases where appeal is provided but no such appeal is preferred by the aggrieved party.[33] The fact that an order is subject to appeal is no ground to reject an application for review.[34] An application for review can be presented so long as no appeal is preferred against the order.[35]

Where, however, an appeal is already instituted before making an application for review, the court cannot entertain such application.[36] Likewise, where an appeal is preferred and is disposed of, no review would lie against the decision of the lower court.[37] But if an application for review is preferred first and then an appeal is filed, the jurisdic-

[27] *Bharat Singh* v. *Firm Sheo Pershad Giani Ram*, AIR 1978 Del 122; *Gopabandhu Biswal* v. *Krishna Chandra Mohanty, supra*; *Jagdish Ch. Patnaik* v. *State of Orissa*, (1998) 4 SCC 456: AIR 1998 SC 1926; *Satvir Singh* v. *Baldeva*, (1996) 8 SCC 593: AIR 1997 SC 169.

[28] *Shivdeo Singh* v. *State of Punjab*, AIR 1963 SC 1909.

[29] *Savithramma* v. *H. Gurappa Reddy*, AIR 1996 Kant 99 at p. 106: (1996) 1 Civ LJ 557.

[30] S. 114(*a*); Or. 47 R. 1(1)(*b*); see also *Ganeshi Lal* v. *Seth Mool Chand*, AIR 1935 All 435: (1935) 57 All 781: 157 IC 1084.

[31] S. 114(*c*); Or. 47 R. 1; see also *Ganeshi Lal* v. *Seth Mool Chand*, AIR 1935 All 435: (1935) 57 All 781: 157 IC 1084.

[32] *Ram Baksh* v. *Rajeshwari Kunwar*, AIR 1948 All 213; *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174.

[33] R. 1(1)(*a*); see also *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650.

[34] *Mohd. Bakhsh* v. *Pirthi Chand*, AIR 1933 Lah 226: (1933) 14 Lah 55: 143 IC 768.

[35] *Sitaramasastry* v. *Sunderamma*, AIR 1966 AP 173.

[36] *Gopabandhu Biswal* v. *Krishna Chandra*, (1998) 4 SCC 447: AIR 1998 SC 1872.

[37] *Mallikarjun Sadashiv* v. *Suratram Shivlal*, AIR 1971 Bom 45; *Ganeshi Lal* v. *Seth Mool Chand*, AIR 1935 All 435: (1935) 57 All 781: 157 IC 1084.

tion of the court to deal with and decide the review petition is not affected.[38]

The words "from which an appeal is allowed" should be construed liberally keeping in mind the underlying object of the provision that before making a review application, no superior court has been moved for getting the selfsame relief, so that for one and the same relief two parallel proceedings before two forums are not taken.[39] If review is granted before disposal of the appeal, the decree or order ceases to exist and the appeal will not remain.[40]

Conversely, if appeal is decided on merits before an application of review is heard, such petition becomes infructuous and is liable to be dismissed.[41] The principle applies to dismissal of Special Leave Petitions by the Supreme Court.[42] But if a Special Leave Petition is merely filed and is not decided, the bar would not apply.[43]

(c) Decisions on reference from Court of Small Causes

The Code of Civil Procedure, 1908 allows a review of a judgment on a reference from a Court of Small Causes.[44]

10. GROUNDS

An application for review of a judgment may be made on any of the following grounds:[45]

(*i*) Discovery of new and important matter or evidence; or
(*ii*) Mistake or error apparent on the face of the record; or
(*iii*) Any other sufficient reason.

Let us consider the above grounds in detail:

(i) Discovery of new evidence

A review is permissible on the ground of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.

[38] *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174.

[39] *Kabari (P) Ltd.* v. *Shivnath Shroff*, (1996) 1 SCC 690 at pp. 703-04: AIR 1996 SC 742.

[40] *Ram Baksh* v. *Rajeshwari Kunwar*, AIR 1948 All 213.

[41] *Gour Krishna Sarkar* v. *Nilmadhab Shah*, AIR 1923 Cal 113: (1922) 36 Cal LJ 484: 73 IC 34; *Khatemannessa Bibi* v. *Upendra Chandra*, AIR 1928 Cal 804.

[42] *Shree Narayana Dharmasanghom Trust* v. *Swami Prakasananda*, (1997) 6 SCC 78; *State of Maharashtra* v. *Prabhakar Bhikaji*, (1996) 3 SCC 463; *Yogendra Narayan* v. *Union of India*, (1996) 7 SCC 1; *Abbai Maligai Partnership Firm* v. *K. Santhakumaran*, (1998) 7 SCC 386: AIR 1998 SC 1486.

[43] *Kapoor Chand* v. *Ganesh Dutt*, 1993 Supp (4) SCC 432: AIR 1993 SC 1145.

[44] R. 1(1)(*c*): see also *Ramchandra* v. *Sitaram Vinayak*, ILR (1886) 10 Bom 68; *Ganeshi Lal* v. *Seth Mool Chand*, AIR 1935 All 435: (1935) 57 All 781: 157 IC 1084.

[45] Or. 47 R. 1.

As a general rule, where a litigant has obtained a judgment in a court of justice, he is by law entitled not to be deprived of the fruits thereof without very strong reasons.[46] Therefore, where a review of a judgment is sought by a party on the ground of discovery of fresh evidence, utmost care ought to be exercised by the court in granting it.[47]

It is very easy for the party who has lost the case to see the weak points in his case and he would be tempted to try to fill in gaps by procuring evidence which will strengthen that weak part of his case and put a different complexion upon that part.[48]

The underlying object of this provision is neither to enable the court to write a second judgment[49] nor to give a second innings to the party who has lost the case because of his negligence or indifference.[50] Therefore, a party seeking review must show that there was no remiss on his part in adducing all possible evidence at the trial.[51]

Again, the new evidence must be such as is presumably to be believed, and if believed to be conclusive.[52] In other words, such evidence must be (1) relevant; and (2) of such a character that if it had been given it might possibly have altered the judgment.[53]

Thus, the discovery of a document containing an admission of liability by the defendant would be a good ground for review.[54] Similarly, where the decree for restitution of conjugal rights was passed and subsequently it was discovered that the parties were cousins and the marriage was, therefore, null and void, the review was granted.[55] Again, where the court issued commission for the examination of a witness in Pakistan and subsequently it was brought to its notice that there was

[46] *Nundo Lal* v. *Punchanon Mukherjee*, AIR 1918 Cal 618 at p. 621; *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845 at p. 855: (1965) 1 SCR 933 at p. 948; *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167 at pp. 171-72: AIR 1980 SC 674 at pp. 677-78.

[47] *Nundo Lal case, supra*; *Hridey Kanta* v. *Jogesh Chandra*, AIR 1959 Cal 150 at p. 152; *State of Gujarat* v. *Dr. B.J. Bhatt*, (1977) 18 Guj LR 173 at p. 175.

[48] *Nundo Lal Mullick* v. *Punchanon Mukherjee, supra.*

[49] *S.O. Krishna Aiyar* v. *S.V. Narayanan*, AIR 1951 Mad 660; *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi, supra*; *Patel Naranbhai* v. *Patel Gopaldas*, AIR 1972 Guj 229.

[50] *Sardar Balbir Singh* v. *Atma Ram*, AIR 1977 All 445 at p. 447; *Sow Chandra Kante* v. *Sk. Habib*, (1975) 1 SCC 674: AIR 1975 SC 1500.

[51] *Kessowji Issur* v. *Great Indian Peninsula Railway Co.*, ILR (1907) 31 Bom 381 (PC); *Patel Naranbhai Jinabhai* v. *Patel Gopaldas Venidas*, AIR 1972 Guj 229; *Sardar Balbir Singh* v. *Atma Ram Srivastava*, AIR 1977 All 445.

[52] *Brown* v. *Dean*, 1910 AC 373 (HL) at p. 374.

[53] *Appa Rao, In re*, (1886) 10 Mad 73 at p. 77 (PC); *Nundo Lal* v. *Punchanon Mukherjee, supra.*

[54] *Faiz Mohhamad* v. *Mohd. Zakariya*, (1911) 11 IC 15 (Lah).

[55] *Mary Josephine* v. *James Sidney*, AIR 1930 Pat 63.

no reciprocal arrangement in this respect between Pakistan and India, the court reviewed its earlier decision.[56]

But where it is doubtful whether the evidence, even if produced, would have had any effect on the judgment, review cannot be granted. Thus, where a suit was dismissed on two grounds; namely (*i*) for want of notice as required by law; and (*ii*) the illegitimacy of the plaintiff; and a review was applied for on the ground of legitimacy of the plaintiff, it was refused on the ground that the suit was, in any case, required to be dismissed on the ground of want of notice.[57] Further, Rule 1 refers to *evidence* or other matter *in the nature of evidence*, and therefore, review cannot be granted on the ground of discovery of new points of law or authorities which show that the decision was not correct.[58] Nor can it be granted on the happening of some subsequent event or change in law.[59]

As observed by Lord Davey,[60] "The section[61] does not authorise the review of a decree which was right when it was made on the ground of happening of some subsequent event."

Before an application of review can be granted, the applicant must establish that even after exercise of due diligence, such evidence was not within his knowledge or could not be produced by him before the court at the time when the decree was passed.[62] There must be sufficient evidence of diligence in getting all the evidence available.[57]

An application for review should be refused when such evidence could have been produced had reasonable care and diligence been exercised.[57] Thus, where the trial lasted for three years, an application for review of the judgment was refused on the ground that no sufficient cause was shown as to why the new evidence was not produced at the relevant time.[63]

[56] *Mohd. Azizul* v. *Mohd. Ibrahim*, AIR 1958 All 19.

[57] *Mahabir Prasad* v. *Collector of Allahabad*, AIR 1914 All 44; *Jina Lima* v. *Lalji Parbat*, AIR 1951 Kutch 59.

[58] *Rajah Kotagiri Venkata Subbamma Rao* v. *Rajah Vellanki Venkatrama Rao, infra*; *Raja Shatrunji* v. *Mohd. Azmat*, (1971) 2 SCC 200 at pp. 203-04: AIR 1971 SC 1474 at pp. 1476-77; *Patel Naranbhai* v. *Patel Gopaldas, supra.*

[59] *A.C. Estates* v. *Serajuddin & Co.*, AIR 1966 SC 935: (1966) 1 SCR 235; *Raja Shatrunji* v. *Mohd. Azmat Azim Khan, supra.*

[60] *Rajah Kotagiri Venkata* v. *Rajah Vellanki Venkatrama*, (1900) 27 IA 197 at p. 205 (PC).

[61] Present Or. 47 R. 1.

[62] *Kessowji Issur* v. *Great Indian Peninsula Railway Co., supra*; *Nundo Lal* v. *Punchanon Mukherjee, supra*; *Administrator General of W.B.* v. *Kumar Purnendu*, AIR 1970 Cal 231 at p. 234.

[63] *Shivalingappa* v. *Revappa*, AIR 1915 PC 78.

(ii) Error apparent on the face of record

Another ground for review is a mistake or an error apparent on the face of the record. What is an error apparent on the face of the record cannot be defined precisely or exhaustively, and it should be determined judicially on the facts of each case.[64] Such error may be one of fact or of law.[65] However, no error can be said to be an error apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it.[66] In other words, an error cannot be said to be apparent on the face of the record where one has to travel beyond the record to see if the judgment is correct or not.[67]

An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.[68]

In *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*[69], the Supreme Court rightly observed:

> "A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that *where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.*"[70] (emphasis supplied)

The following have been held to be errors apparent on the face of the record: pronouncement of judgment without taking into consideration

[64] *Hari Vishnu Kamath* v. *Ahmad Ishaque*, AIR 1955 SC 233 at p. 244: (1955) 1 SCR 1104.

[65] *Karutha Kritya* v. *R. Ramalinga Raju*, AIR 1960 AP 17 at p. 21.

[66] *Thungabhadra Industries, infra; Satyanarayan* v. *Mallikarjun Bhavanappa*, AIR 1960 SC 137 at p. 141-42: (1960) 1 SCR 890; *Beant Singh* v. *Union of India*, (1977) 1 SCC 220 at pp. 221-22: AIR 1977 SC 388 at p. 389. (The expression "record" should be construed liberally and should not be restricted as is done in the writ of *certiorari*; *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, AIR 1954 SC 526 at p. 538: (1955) 1 SCR 520; *P.N. Eswara Iyer* v. *Registrar, Supreme Court of India*, (1980) 4 SCC 680: AIR 1980 SC 808; *Meera Bhanja* v. *Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455; *Parsion Devi* v. *Sumitri Devi*, (1997) 8 SCC 715; *Delhi Admn.* v. *Gurdip Singh*, (2000) 7 SCC 296: AIR 2000 SC 3737.

[67] *Ibid*, see also *Satyanarayan Laxminarayan Hegde* v. *Mallikarjun Bhavanappa Tirumala*, AIR 1960 SC 137: (1960) 1 SCR 890.

[68] *Satyanarayan Laxminarayan Hegde* v. *Mallikarjun Bhavanappa Tirumala*, AIR 1960 SC 137: (1960) 1 SCR 890; *Meera Bhanja* v. *Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455.

[69] AIR 1964 SC 1372: (1964) 5 SCR 174.

[70] *Ibid*, at p. 1377 (AIR); *see also*, Author's, *Lectures on Administrative Law* (2008) Lecture VII.

the fact that the law was amended retrospectively;[71] or without considering the statutory provisions;[72] or on the ground of omission to try a material issue in the case;[73] or on the ground that the court decides against a party on matters not in issue;[74] or where the judgment is pronounced without notice to the parties;[75] or where the want of jurisdiction is apparent on the face of the record;[76] or taking a view contrary to the law laid down by the Supreme Court.[77]

The following have been held not to be errors apparent on the face of the record: an erroneous decision on merits;[78] or an erroneous view of law;[79] or the fact that the other High Court has taken a different view on the question;[80] or that a different conclusion would have been arrived at;[81] or where the judgment is based on two or more grounds, each of which is sufficient to sustain it and one of them is erroneous.[82]

The Explanation to Rule 1 has been inserted by the Amendment Act of 1976. It clarifies the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for review of such judgment.

(iii) Other sufficient reason

The last ground for review is "any other sufficient reason". The expression *"any other sufficient reason"* has not been defined in the Code. However, relying on the judgment of the Privy Council[83] and the

[71] *Raja Shatrunji* v. *Mohd. Azmat, supra.*

[72] *Gulam Abbas* v. *Mulla Abdul Kadar,* (1970) 3 SCC 643.

[73] *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius,* AIR 1954 SC 526 at p. 540: (1955) 1 SCR 520.

[74] *Ibid,* at p. 545 (AIR).

[75] *Bankey Bihari* v. *Abdul Rehman,* AIR 1932 Oudh 63.

[76] *Lahiri* v. *Makhan Lal Basak,* AIR 1935 Cal 153 (1); *Ram Prosad* v. *Sricharan Mandal,* AIR 1918 Cal 946; *Bommadevara Venkatarayulu* v. *Lanka Venkata Rattamma,* AIR 1939 Mad 293.

[77] *CST* v. *Pine Chemicals,* (1995) 1 SCC 58; *Medical & Dental College* v. *M.P. Nagaraj,* AIR 1972 Mys 44.

[78] *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma,* (1979) 4 SCC 389: AIR 1979 SC 1047; *Patel Naranbhai* v. *Patel Gopaldas,* AIR 1972 Guj 229.

[79] *Thungabhadra Industries Ltd.* v. *Govt. of A.P., supra; Ujjam Bai* v. *State of U.P.,* AIR 1962 SC 1621: (1963) 1 SCR 778.

[80] *Iftikhar Ahmad* v. *Bharat Kumar,* AIR 1957 Raj 165.

[81] *Girdharlal* v. *Kapadvanj Municipality,* AIR 1930 Bom 317; *Patel Naranbhai Jinabhai* v. *Patel Gopaldas Venidas, supra.*

[82] *Devji* v. *Dhanji,* AIR 1952 Kutch 45; *Mahabir Prasad* v. *Collector of Allahabad, supra.*

[83] *Chhajju Ram* v. *Neki,* AIR 1922 PC 112: (1921-22) 49 IA 144; *Bisheshwar Pratap* v. *Parath Nath,* (1933-34) 61 IA 378: AIR 1934 PC 213: 31 CWN 89 (PC).

Federal Court[84], the Supreme Court[85] has held that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".

The following have been held to be sufficient reasons for granting review: where the statement in the judgment is not correct;[86] or where the decree or order has been passed under a misapprehension of the true state of circumstances;[87] or where a party had no notice or fair opportunity to produce his evidence;[88] or where the court had failed to consider a material issue, fact or evidence;[89] or where the court has omitted to notice or consider material statutory provisions;[90] or a ground which goes to the root of the matter and affects inherent jurisdiction of the court;[91] or misconception by the court of a concession made by the advocate;[92] or where a party's evidence has been closed owing to a misconception on the part of his pleader;[93] or a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.[94]

The following, on the other hand, have been held not sufficient reasons for granting review: omission to frame an issue regarding the valuation of the suit;[95] or negligence or inadvertence on the part of the party or his pleader;[96] or absence of the party on the date of the

[84] *Hari Shankar* v. *Anath Nath*, AIR 1949 FC 106 at pp. 110-11.

[85] *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, *supra*, at p. 538 (AIR). See also *Raja Shatrunji* v. *Mohd. Azmat*, *supra*, at pp. 203-04 (SCC): at pp. 1475-76 (AIR); *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, *supra*, at p. 390 (SCC): at p. 1048 (AIR).

[86] *Bank of Bihar* v. *Mahabir Lal*, AIR 1964 SC 377 at p. 880: (1964) 1 SCR 842.

[87] *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, *supra*.

[88] *Rajkishore Das* v. *Nilamani Das*, AIR 1968 Ori 140; *Kunjan* v. *Chandra Has*, AIR 1925 Oudh 266.

[89] *Burma Shell Oil Storage Distributing Co. of India Ltd.* v. *Labour Appellate Tribunal*, AIR 1955 Cal 92; *C.C. Naidu* v. *Seva Transports Ltd.*, AIR 1953 Mad 39; *Rukhmabai* v. *Ganpatrao*, AIR 1932 Nag 177.

[90] *Girdhari Lal* v. *D.H. Mehta*, (1971) 3 SCC 189: (1971) 3 SCR 748; *Hari Shankar* v. *Anath Nath*, *supra*.

[91] *Ayesha Bai* v. *Duleep Singh*, AIR 1961 Raj 186; *Harjit Singh* v. *Hardev Singh*, 1972 Cur LJ 158.

[92] *Moran Mar Basselios Catholicos* v. *Mar Poulose Athanasius*, *supra*.

[93] *Pridhanmal* v. *Laloo*, AIR 1931 Sind 3 (4).

[94] *O.N. Mohindroo* v. *District Judge*, (1971) 3 SCC 5: (1971) 2 SCR 11 at p. 27; *Hari Shankar* v. *Anath Nath*, *supra*.

[95] *Pareswar Khuntia* v. *Amareswar Khuntia*, (1973) 39 Cut LT 24.

[96] *Corpn. of Madras* v. *P.G. Arunachalam*, AIR 1974 Mad 288; *S. Anthony D'Costa* v. *Francis R. Anthony*, AIR 1962 Mad 304; *Manorath* v. *Atma Ram*, AIR 1934 Nag 187.

hearing;[97] or subsequent events;[98] or failure of a party or his pleader to raise a plea;[99] or that the case should have been argued differently;[100] or to enable the applicant to raise points which he could and ought to have raised at the former hearing;[101] or where the review is sought on the ground that if another opportunity were given to the applicant to establish his case, he could prove that the judgment of the court is wrong;[102] or that the case has been mismanaged by his counsel;[103] or that the court took a different view in a subsequent case.[104]

11. BY WHOM REVIEW MAY BE MADE

Review is reconsideration of the same subject-matter by the same court and by the same judge. If the judge who has decided the matter is available he alone has jurisdiction to consider the case, and review the earlier order passed by him. He is best suited to remove any mistake or error apparent on the face of his own order. Moreover, he alone will be able to remember what was earlier argued before him and what was not urged. The law, therefore, insists that if he is available, he alone should hear the review petition.[105]

There may, however, be situations wherein this course is not possible. The same "judicial officer" may not be available. Death or such other unexpected or unavoidable causes might prevent the judge who passed the order from reviewing it. Such exceptional cases are allowable only *ex necessitate* and in those cases his successor or any other judge or court of concurrent jurisdiction may hear the review petitions and decide the same.[106]

[97] *Siva Subramania Chettiar* v. *Adaikkalam Chettiar*, AIR 1944 Mad 293; *Chatar Das* v. *Keshavdas*, AIR 1954 MB 3.

[98] *Rajah Kotagiri Venkata Subbamma Rao* v. *Rajah Vellanki Venkatrama Rao*, (1900) 27 IA 197 (PC).

[99] *Ayesha Bai* v. *Duleep Singh, supra; Union of India* v. *Sudhir Kumar*, AIR 1975 Ori 64.

[100] *Bhagwati* v. *Director of Consolidation*, AIR 1977 All 163; *Chhajju Ram* v. *Neki*, AIR 1922 PC 112.

[101] *J.N. Surty* v. *T.S. Chettyar*, AIR 1928 PC 103: (1927-28) 55 IA 161; *Pitambar Mallik* v. *Ramchandra Prasad*, AIR 1968 Pat 320; *Ayesha Bai* v. *Duleep Singh, supra; S. Anthony D'Costa* v. *Francis R. Anthony*, AIR 1962 Mad 304.

[102] *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi, infra; Bhagwati* v. *Director of Consolidation, supra.*

[103] *Pitambar Mallik* v. *Ramchandra Prasad, supra; S. Anthony D'Costa* v. *Francis R. Anthony, supra.*

[104] Expln. to Rule 1 as *added* by the Amendment Act of 1976. See also *Patel Naranbhai* v. *Patel Gopaldas*, AIR 1972 Guj 229.

[105] S. 114; Or. 47 R. 1; see also *Maharaja Moheshur Sing* v. *Bengal Govt.*, (1857-60) 7 Moo IA 283; *Devaraju Pillai* v. *Sellayya Pillai*, (1987) 1 SCC 61: AIR 1987 SC 1160; *State of Orissa* v. *Commr. of Land Records and Settlement*, (1998) 7 SCC 162: AIR 1999 SC 3067.

[106] *Ibid*, see also *Reliance Industries Ltd.* v. *Pravinbhai*, (1997) 7 SCC 300: AIR 1997 SC 3892.

12. NO INHERENT POWER OF REVIEW

It is well-settled that the power of review is not an inherent power. It must be conferred by law either expressly or by necessary implication. If there is no power of review, the order cannot be reviewed. In such cases, the question whether the order is correct or valid in law does not arise for consideration.[107] It is, however, the duty of the court to correct grave and palpable errors committed by it.[108]

This principle applies to courts, tribunals, quasi-judicial authorities or administrative authorities exercising quasi-judicial powers. The principle has no application to decisions purely of an administrative nature. To extend the principle to pure administrative decisions would lead to untoward and startling results. The Government is free to alter its policy or its decisions in administrative matters. The administration cannot be hidebound by rules and restrictions of judicial procedure though of course they are bound to obey statutory provisions and also observe the principles of natural justice where rights of parties are affected. Finally, decisions of the Government are subject to judicial review and questioned in a competent court on all available grounds.[109]

13. FORM OF APPLICATION

An application for review should be in the form of a memorandum of appeal.[110] The form of an application, however, is immaterial. The substance and not the form of an application is decisive.[111]

14. CRUCIAL DATE

The crucial date for determining whether or not the terms of the Code are satisfied is the date when the application for review is filled.[112]

[107] *Patel Narshi Thakershi* v. *Pradyuman Singhji*, (1971) 3 SCC 844: AIR 1970 SC 1273; *State of Assam* v. *J.N. Roy*, (1976) 1 SCC 234: AIR 1975 SC 2277; *Gram Panchayat, Kanonda* v. *Director, Consolidation of Holdings*, 1989 Supp (2) SCC 465: AIR 1990 SC 763; *Lily Thomas* v. *Union of India*, (2000) 6 SCC 224: AIR 2000 SC 1650: 2000 Cri LJ 2433.

[108] *Shivdeo Singh* v. *State of Punjab*, AIR 1963 SC 1909; *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, (1979) 4 SCC 389: AIR 1979 SC 1047; *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602: AIR 1988 SC 1531; *Meera Bhanja* v. *Nirmala Kumari*, (1995) 1 SCC 170: AIR 1995 SC 455; *Surjit Singh* v. *Union of India*, (1997) 10 SCC 592; *United India Insurance Co. Ltd.* v. *Rajendra Singh*, (2000) 3 SCC 581: AIR 2000 SC 1165.

[109] *R.R. Verma* v. *Union of India*, (1980) 3 SCC 402: AIR 1980 SC 1461.

[110] R. 3.

[111] *Raja Shatrunji* v. *Mohd. Azmat*, (1971) 2 SCC 200: AIR 1971 SC 1474.

[112] *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*, AIR 1964 SC 1372: (1964) 5 SCR 174; *Kannegolla Naghabhushanam* v. *Land Acquisition Officer*, AIR 1993 AP 209.

15. SUO MOTU REVIEW

The power of review can be exercised by a court on an application by a "person aggrieved". The Code does not empower the court to exercise power of review *suo motu*.

It is settled principle of law that when a statute requires a particular thing to be done in a particular manner, it has to be done only in that manner and in no any other manner. "There is no provision either in Section 114 or in Order 47 of the Code providing for any *suo motu* review."[113]

In *A.R. Antulay* v. *R.S. Nayak*,[114] however, Mukharji, J. (as he then was) observed that the Supreme Court may exercise power of review *suo motu* in an appropriate case.

16. PROCEDURE AT HEARING

An application for review may be divided into the following three stages:[115]

(i) First stage

An application for review commences ordinarily with an *ex parte* application by the aggrieved party. The court may reject it at once if there is no sufficient ground or may issue rule calling upon the opposite party to show cause why review should not be granted.[116]

(ii) Second stage

The application for review shall then be heard by the same court and by the same judge who passed the decree or made the order, unless he is no longer attached to the court, or is precluded from hearing it by absence or other cause for a period of six months after the application.[117] If the rule is discharged, the case ends and the application will be rejected. If, on the other hand, the rule is made absolute, the application will be granted for rehearing of the matter.[118]

[113] *Danomal* v. *Union of India*, AIR 1967 Bom 355; *Jaya Devi* v. *State of Bihar*, (1996) 7 SCC 757: AIR 1996 SC 1174; *Viswanathan* v. *Muthuswamy Gounder*, AIR 1978 Mad 221; *Calcutta Properties Ltd.* v. *S.N. Chakrabortty*, AIR 1988 Cal 131: (1987) 1 Cri LJ 535; *Vinod Chandra* v. *Manilal*, (1994) 1 Guj LR 291: (1993) 2 Guj LH 1045.

[114] (1988) 2 SCC 602 at p. 654: AIR 1988 SC 1531: 1988 Cri LJ 1661.

[115] *Sha Vadilal* v. *Sha Fulchand*, (1906) ILR 30 Bom 56: 7 Bom LR 664; *Maji Mohan* v. *State of Rajasthan*, AIR 1967 Raj 264.

[116] R. 4(1).

[117] R. 5.

[118] R. 4(2).

(iii) Third stage

In the third stage, the matter will be reheard on merits by the court either at once or at any time fixed by it. After rehearing the case, the court may either confirm the original decree or vary it.[119]

The effect of allowing an application for review is to recall the decree already passed. Any order made subsequently whether reversing, confirming or modifying the decree originally passed will be a new decree superseding the original one.[120]

17. LIMITATION

The period of limitation for an application for review of a judgment by a court other than the Supreme Court is thirty days from the date of the decree or order.[121]

18. APPEAL

An order granting an application for review is appealable, but an order rejecting an application is not appealable.[122] No second appeal lies from an order made in appeal from an order granting review.[123]

19. LETTERS PATENT APPEAL

An order refusing an application for review cannot be said to be a "judgment" and hence, no Letters Patent Appeal lies. But an order granting review may amount to judgment and a Letters Patent Appeal is competent.[124]

20. REVISION

An application for review can be said to be a "proceeding" and a decision thereon amounts to a "case decided" under the Code and such decision is revisable.[125]

21. REVIEW IN WRIT PETITIONS

After the amendment in Section 141 of the Code and insertion of Explanation to that section it is clear that the provisions of Order 47 of the Code do not apply to writ petitions filed in a High Court under Article 226 of the Constitution.[126]

[119] R. 8.

[120] *Sushil Kumar* v. *State of Bihar*, (1975) 1 SCC 774: AIR 1975 SC 1185.

[121] Art. 124, Limitation Act, 1963.

[122] Or. 43 R. 1(*w*); *see also*, Or. 47 R. 7.

[123] S. 104(2).

[124] *Sattemma* v. *Vishnu Murthy*, AIR 1964 AP 162; *Jwala Prasad* v. *Jwala Bank Ltd.*, AIR 1961 All 381 (FB); *Devaraju Pillai* v. *Sellayya Pillai*, (1987) 1 SCC 61: AIR 1987 SC 1160.

[125] *Vidya Vati* v. *Devi Das*, (1977) 1 SCC 293 at pp. 296-97: AIR 1977 SC 397 at p. 400; *see also infra*, "Revision", Chap. 9.

[126] Expln. to S. 141.

There is nothing in Article 226 to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.[127]

At the same time, however, there are definitive limits to the exercise of the power of review. It cannot be forgotten that a review is not an appeal in disguise whereby an erroneous decision is reheard and corrected. This general rule applicable to civil proceedings would apply to proceedings under Article 226 of the Constitution as well.[128]

While exercising the power of review, a High Court may bear in mind the following principles:[129]

(*i*) The provisions of the Civil Procedure Code in Order 47 are not applicable to the High Court's power of review in proceedings under Article 226 of the Constitution.

(*ii*) The said powers are to be exercised by the High Court only to prevent miscarriage of justice or to correct grave and palpable errors. (The epithet "palpable" means that which can be felt by a simple touch of the order and not which could be dug out after a long drawn out process of argumentation and ratiocination.)

(*iii*) The inherent powers, though *ex facie* plenary, are not to be treated as unlimited or unabridged but they are to be invoked on the grounds analogous to the grounds mentioned in Order 47 Rule 1.[130]

22. REVIEW BY SUPREME COURT

The provisions of Order 47 apply to orders passed under the Code of Civil Procedure. Article 137 of the Constitution confers power on the Supreme Court to review its judgments subject to the provisions of any law made by Parliament or the Rules made under Article 145. The power of the Supreme Court, therefore, cannot be curtailed by the Code of Civil Procedure.[131]

23. CONCLUDING REMARKS

It is submitted that the following observations of Pathak, J. (as he then was) in the leading case of *Northern India Caterers (India) Ltd.* v. *Lt.*

[127] *Shevdeo Singh* v. *State of Punjab*, AIR 1963 SC 1909; *Aribam Tuleshwar Sharma* v. *Aribam Pishak Sharma*, (1979) 4 SCC 389: AIR 1979 SC 1047; *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi*, (1980) 2 SCC 167: AIR 1980 SC 674.

[128] *Ibid*, see also *A.R. Antulay* v. *R.S. Nayak*, (1988) 2 SCC 602: AIR 1988 SC 1531.

[129] *Gujarat University* v. *Sonal P. Shah*, AIR 1982 Guj 58: (1982) 23 (1) Guj LR 171 (FB).

[130] *Ibid*, at p. 62 (AIR).

[131] Art. 137, Constitution of India, Or. 40, Supreme Court Rules, 1966. For detailed discussion, see, V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. V, Chap. 2.

Governor of Delhi[132] lay down the correct principle of law on the power of review and, therefore, are worth quoting:

> "The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so... . [W]hatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered *except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.*"[133] (emphasis supplied)

[132] (1980) 2 SCC 167: AIR 1980 SC 674.

[133] *Ibid*, at p. 172 (SCC): at p. 678 (AIR). *See also*, Author's, *Lectures on Administrative Law* (2008) Lecture VII.

PART III

9 Revision

SYNOPSIS

1. General 560
2. Revision: Meaning 561
3. Section 115 561
4. Nature and scope 561
5. Object 563
6. Revision and appeal 564
7. Revision and second appeal 564
8. Revision and reference 564
9. Revision and review 564
10. Revision and writ 564
11. Revision and power of superintendence 565
12. Conversion of revision into appeal 566
13. Appeal, reference, review and revision: Distinction 566
    (1) Appeal and revision 566
    (2) First appeal and second appeal 566
    (3) Second appeal and revision 567
    (4) Appeal and reference 567
    (5) Appeal and review 568
    (6) Reference and review 568
    (7) Reference and revision 568
    (8) Review and revision 568
14. Law Commission's view 569
15. Who may file? 569
16. Conditions 569
    (i) Case decided 570
    (ii) Subordinate court 571
    (iii) No appeal lies 571
    (iv) Jurisdictional error 572
        (a) Nature and scope 572
        (b) Error of fact and error of law 572
        (c) Error of law and error of jurisdiction 572
        (d) Exercise of jurisdiction not vested by law: Clause (a) 574
        (e) Failure to exercise jurisdiction: Clause (b) 575
        (f) Exercise of jurisdiction illegally or with material irregularity: Clause (c) 575
17. Alternative remedy 578
18. Other limitations of revisional jurisdiction 578
19. Form of revision 580
20. Limitation 580
21. Suo motu exercise of power 580
22. Revision under other laws 581
23. Interlocutory orders 581
24. Death of applicant 582
25. Doctrine of merger 582
26. Procedure 582
27. Dismissal in limine 583
28. Recording of reasons 583
29. Letters patent appeal 583
30. Revision 584

1. GENERAL

Section 115 of the Code of Civil Procedure empowers a High Court to entertain a revision in any case decided by any subordinate court in certain circumstances. This jurisdiction is known as revisional jurisdiction of the High Court.

2. REVISION: MEANING

According to the dictionary meaning, "to revise" means "to look again or repeatedly at"; "to go through carefully and correct where necessary", "to look over with a view to improving or correcting". "Revision" means "the action of revising, especially critical or careful examination or perusal with a view to correcting or improving".[1]

3. SECTION 115

Section 115 invests all High Courts with revisional jurisdiction. It reads as under:

"(1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears:

(*a*) to have exercised a jurisdiction not vested in it by law, or
(*b*) to have failed to exercise a jurisdiction so vested, or
(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.—In this section, the expression, 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or order proceeding."

4. NATURE AND SCOPE

Section 115 authorises the High Court to satisfy itself on three matters: (*a*) that the order of the subordinate court is within jurisdiction;

[1] *Shorter Oxford English Dictionary* (1990) Vol. II at p. 1821; *Concise Oxford English Dictionary* (2002) at p. 1226; *Chamber's 21st Century Dictionary* (1997) at p. 1197; *Random House Dictionary* (1970) at p. 1227; *Ram Sarup* v. *Shikhar Chand*, AIR 1961 All 221 at p. 227: 1960 All LJ 810: 1961 All WR 32 (FB); *Shankar Ramchandra* v. *Krishnaji Dattatreya*, (1969) 2 SCC 74: AIR 1970 SC 1.

(*b*) that the case is one in which the court ought to exercise its jurisdiction; and (*c*) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.[2]

If the High Court is satisfied with these three matters, it has no power to interfere because it differs, however profoundly, from the conclusion of the subordinate court on questions of fact or of law.[3] It is well-established that where there is no question of jurisdiction the decision cannot be corrected for a court has jurisdiction to decide wrongly as well as rightly.[4]

In *Major S.S. Khanna* v. *Brig. F.J. Dillon*[5], Shah, J. (as he then was) stated, "The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e. there is a case decided by a subordinate court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction may be exercised."

Hidayatullah, J. (as he then was) also observed that "the section is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists or an assumption of jurisdiction where none exists and lastly acting with illegality or material irregularity".[6]

In *Pandurang Ramchandra Mandlik* v. *Maruti Ramchandra Ghatge*[7], Gajendragadkar, J. (as he then was) rightly propounded:

> "The provisions of S. 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under S. 115, it is not competent to the High Court to

[2] *Keshardeo* v. *Radha Kissen*, AIR 1953 SC 23 at pp. 27-28: 1953 SCR 136; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409; *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446; *Pandurang Dhondi v. Maruti Hari*, AIR 1966 SC 153 at p. 155: (1966) 1 SCR 102; *D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh*, (1969) 3 SCC 807: AIR 1971 SC 2324; *M.L. Sethi* v. *R.P. Kapur*, (1972) 2 SCC 427: AIR 1972 SC 2379; *Sk. Jaffar* v. *Mohd. Pasha*, (1975) 1 SCC 25 at pp. 27-28: AIR 1975 SC 794 at pp. 796; *Johri Singh* v. *Sukh Pal Singh*, (1989) 4 SCC 403 at pp. 416-17: AIR 1989 SC 2073.

[3] *N.S. Venkatagiri* v. *Hindu Religious Endowments Board*, AIR 1949 PC 156:(1948-49) 76 IA 67; *Keshardeo Chamria* v. *Radha Kissen Chamria, supra*; *M.L. Sethi* v. *R.P. Kapoor, supra*.

[4] *Major S.S. Khanna* v. *Brig. F.J. Dillon, supra*, at p. 505 (AIR). *See also*, observations of Lord Hobhouse in *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa*, (1899-1900) 27 IA 216 at p. 225: ILR (1901) 25 Bom 337 (PC).

[5] AIR 1964 SC 497 at pp. 499-500: (1964) 4 SCR 409.

[6] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409.

[7] AIR 1966 SC 153: (1966) 1 SCR 102.

correct errors of fact, however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As cls. (*a*), (*b*) and (*c*) of S. 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the Court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of S. 115 of the Code. But *an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that Court, cannot be corrected by the High Court under S. 115.*"[8] (emphasis supplied)

5. OBJECT

The underlying object of Section 115 is to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It clothes the High Court with the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice.[9] It enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of a non-appealable order. In other words, for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court.[10]

At the same time, however, the judges of the lower courts have perfect jurisdiction to decide a case, and even if they decide wrongly, they do not commit "jurisdictional error". Revisional jurisdiction is not in-

[8] *Ibid*, at p. 155 (AIR).

[9] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 505: (1964) 4 SCR 409; *Baldevdas* v. *Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201: AIR 1970 SC 406.

[10] *Ibid*, see also *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

tended to allow the High Court to interfere and correct errors of fact or of law.[11]

6. REVISION AND APPEAL[12]

7. REVISION AND SECOND APPEAL[13]

8. REVISION AND REFERENCE[14]

9. REVISION AND REVIEW[15]

10. REVISION AND WRIT

The revisional power under Section 115 of the Code is clearly in the nature of a power to issue a writ of *certiorari*.[16] It is, however, not as wide as *certiorari* since it can be exercised only in the case of a jurisdictional error and not in the case of any other error. Power of the High Court in revision is not in any manner wider than the power under Article 226 of the Constitution.

Again, if the petitioner has already filed a revision in the High Court under Section 115 and has obtained an order, he cannot thereafter invoke the jurisdiction of the High Court under Article 226. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court.[17]

In *Major S.S. Khanna* v. *Brig. F.J. Dillon*[18] Hidayatullah, J. (as he then was) stated, "The power given by S. 115 of the Code is clearly limited to the keeping of the subordinate courts within the bounds of their jurisdiction. It does not comprehend the power exercisable under the writ of prohibition or *mandamus*. It is also not a full power of *certiorari* inasmuch as it arises only in a case of jurisdiction and not in a case of error... . Where there is no question of jurisdiction, the decision cannot be corrected for it has been ruled that a court has jurisdiction to decide

[11] *Rajah Amir Hassan* v. *Sheo Baksh Singh*, (1883-1884) 11 IA 237: ILR (1885) 11 Cal 6 (PC); *N.S. Venkatagiri* v. *Hindu Religious Endowments Board*, AIR 1949 PC 156: (1948-49) 76 IA 67; *Keshardeo Chamria* v. *Radha Kissen Chamria*, *supra*; *see also supra*, "Nature and scope".

[12] *See supra*, "Appeal and Revision", Chap. 2 . *See also infra*, under that head.

[13] *See infra*, "Second Appeal and Revision".

[14] *See infra*, "Reference and Revision".

[15] *See infra*, "Review and Revision".

[16] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497 at pp. 504-05: (1964) 4 SCR 409.

[17] *Shankar Ramchandra* v. *Krishnaji Dattatreya*, (1969) 2 SCC 74: AIR 1970 SC 1.

[18] AIR 1964 SC 497: (1964) 4 SCR 409.

wrongly as well as rightly. But once a flaw of jurisdiction is found the High Court need not quash and remit as is the practice in English Law under the writ of *certiorari* but pass such order as it thinks fit."[19]

11. REVISION AND POWER OF SUPERINTENDENCE

A revision under Section 115 of the Code and a petition under Article 227 of the Constitution are two separate and distinct proceedings. One cannot be identified with the other.[20]

Firstly, while the revisional power is only judicial, the power of superintendence is both judicial as well as administrative. *Secondly,* the revisional power is statutory and it can be taken away by a legislation. But the power of superintendence is constitutional and cannot be taken away or curtailed by a statute. *Finally,* the revisional powers of the High Court are restricted and can be exercised on all the conditions laid down in Section 115 of the Code being fulfilled, none of those restrictions apply to exercise of supervisory powers of the High Court under Article 227 of the Constitution.[21]

But once a party chooses to invoke revisional jurisdictional of the High Court and exhausts that remedy, he cannot be allowed to press in aid supervisory jurisdiction thereafter. Where there are two modes of invoking the jurisdiction of a court, tribunal or authority and an aggrieved party chooses and exhausts one of the remedies, it would not be proper and sound exercise of discretion to grant relief in the other set of proceedings. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the court to prevent abuse of the process of law as also to respect and accord finality to its own decisions.[22]

[19] *Ibid,* at p. 505 (AIR). For detailed discussion of writs, *see,* V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chaps. 1-5; *see also* Author's *Lectures on Administrative Law* (2008) Lecture IX.

[20] *Ibid,* see also *Vishesh Kumar* v. *Shanti Prasad,* (1980) 2 SCC 378 at p. 387: AIR 1980 SC 892 at p. 897; *Satyanarayan* v. *Mallikarjun Bhavanappa,* AIR 1960 SC 137: (1960) 1 SCR 890; *Major S.S. Khanna* v. *Brig. F.J. Dillon, supra; Shankar Ramchandra Abhyankar* v. *Krishnaji Dattatreya Bapat, supra.*

[21] *Jetha Bai & Sons* v. *Sunderdas,* (1988) 1 SCC 722: AIR 1988 SC 812. For detailed discussion of supervisory jurisdiction of High Courts, *see,* Author's, *Lectures on Administrative Law* (2008) Lecture IX; *see also,* V.G. Ramachandran, *Law of Writs* (2006) Vol. II, Pt. IV, Chap. 1.

[22] *Shankar Ramchandra* v. *Krishnaji Dattatreya,* (1969) 2 SCC 74: AIR 1970 SC 1.

12. CONVERSION OF REVISION INTO APPEAL[23]

13. APPEAL, REFERENCE, REVIEW AND REVISION: DISTINCTION

(1) Appeal and revision

(*a*) An appeal lies to a superior court, which may not necessarily be a High Court, while a revision application under the Code lies only to the High Court.

(*b*) An appeal lies only from the decrees and appealable orders, but a revision application lies from any decision of a court subordinate to the High Court from which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court.

(*c*) A right of appeal is a substantive right conferred by the statute, while the revisional power of the High Court is purely discretionary.

(*d*) An appeal abates if the legal representatives of a deceased party are not brought on record within the prescribed period. A revision application, however, does not abate in such cases. The High Court may at any time bring the proper parties on the record of the case.

(*e*) The grounds for an appeal and a revision application are also different. A revision application lies only on the ground of jurisdictional error. An appeal lies on a question of fact or of law or of fact and law.

(*f*) Filing of an application is not necessary in case of revision. An aggrieved party may invoke the jurisdiction of the High Court by filing an application or the High Court may exercise the revisional jurisdiction even *suo motu* (of its own motion). In case of appeal, on the other hand, a memorandum of appeal must be filed before the appellate court by the aggrieved party.

(2) First appeal and second appeal

(*a*) Whereas a first appeal lies from a decree passed by a court exercising original jurisdiction, a second appeal lies from a decree passed by a court exercising appellate jurisdiction.

(*b*) A first appeal lies to a superior court, which may or may not be a High Court, whereas a second appeal lies only in the High Court.

(*c*) The grounds of first appeal and second appeal are different. Whereas a first appeal can be filed on a question of fact, or

[23] *See supra*, "Conversion of Appeal into Revision", Chap. 2.

of law, or of fact and law, a second appeal can lie only on a substantial question of law.

(*d*) Where the amount of a decree does not exceed three thousand rupees, a first appeal is maintainable on a question of law, but a second appeal does not lie in such cases.

(*e*) In a first appeal an appellate court has power to decide issues of fact, but in a second appeal a High Court can decide issues of fact only in certain cases. (Section 103)

(*f*) The period of limitation for filing a first appeal is ninety days in case such an appeal lies to a High Court and thirty days if it lies in any other court. A second appeal, however, can be filed only in a High Court within ninety days.

(*g*) A letters patent appeal is maintainable against a "judgment" of a Single judge of a High Court to a Division Bench of the same Court, but no such appeal is maintainable against a decision of a Single Judge in a second appeal. (Section 100-A)

(3) Second appeal and revision

(*a*) A second appeal lies to the High Court on the ground of a substantial question of law, while a revision application lies on the ground of jurisdictional error.

(*b*) The revisional powers of the High Court can be invoked only in those cases in which no appeal (either first appeal or second appeal or appeal from an order) lies to the High Court or to any subordinate court. The second appeal lies only in the High Court under Section 100 of the Code.

(*c*) While exercising revisional jurisdiction the High Court cannot interfere with an order passed by the subordinate court, if it is within its jurisdiction even if it is legally wrong. The High Court, on the other hand, can interfere with a decree passed by the lower appellate court if it is contrary to law.

(*d*) The High Court cannot decide a question of fact in the exercise of its revisional jurisdiction, while it can decide a question of fact in the second appeal in certain circumstances.

(*e*) The High Court may decline to interfere in revision if it is satisfied that substantial justice has been done. In the second appeal, however, the High Court has no discretionary power and it cannot refuse to grant relief *merely* on equitable grounds.

(4) Appeal and reference

(*a*) A right of appeal is a right conferred on the suitor, while the power of reference is vested in the court.

(*b*) Reference is always made to the High Court. An appeal can be filed to a superior court which need not necessarily be a High Court.

(*c*) The grounds of appeal are wider than the grounds of reference.

(*d*) Reference is always made pending a suit, appeal or execution proceedings, while an appeal can only be filed after the decree is passed or an appealable order is made.

(5) Appeal and review

(*a*) An appeal lies to the superior court, while a review lies to the same court.

(*b*) Review of a judgment involves reconsideration of the same subject-matter by the same judge, while an appeal is heard by a different judge.

(*c*) The grounds of appeal are wider than the grounds of review.

(*d*) A second appeal lies on a substantial question of law. A second review application, however, does not lie.

(6) Reference and review

(*a*) In reference, it is the subordinate court and not the party which refers the case to the High Court. In case of review, the application is made by the aggrieved party.

(*b*) The High Court alone can decide matters on reference. Review, on the other hand, is by the court which passed the decree or made the order.

(*c*) Reference is made pending a suit, appeal or execution proceedings, while an application for review can be made only after the decree is passed or order is made.

(*d*) The grounds for reference and review are different.

(7) Reference and revision

(*a*) In reference, the case is referred to the High Court by a court subordinate to it. In case of revision, the jurisdiction of the High Court is invoked either by the aggrieved party or by the High Court *suo motu*.

(*b*) The grounds of reference relate to reasonable doubt on a question of law, while the grounds for revision relate to jurisdictional errors of the subordinate court.

(8) Review and revision

(*a*) Revisional jurisdiction can only be exercised by the High Court, while the power of review can be exercised by the very court which passed the decree or made the order.

(*b*) Revisional power can be exercised by the High Court only in a case where no appeal lies to the High Court, but review can be made even when an appeal lies to the High Court.

(*c*) Revisional powers can be exercised by the High Court even *suo motu* (of its own motion), but for review an application has to be made by an aggrieved party.

(*d*) The powers of revision and review can be exercised on different grounds.

(*e*) The order granting review is appealable, but an order passed in the exercise of revisional jurisdiction is not appealable.

14. LAW COMMISSION'S VIEW

According to Law Commission, while dealing with revisional jurisdiction, a High Court should bear in mind the following rules:[24]

(1) *Rule nisi* should not be issued except upon a very careful and strict scrutiny;

(2) Where no stay is granted, record of subordinate court should not be called for; and even where record is necessary, only copies of thereof should be required to be produced; and

(3) Whenever stay is granted, every effort should be made to dispose of revision within two to three months.

15. WHO MAY FILE?

A person aggrieved by an order passed by a court subordinate to the High Court may file a revision against such order.[25] But the High Court may even *suo motu* exercise revisional jurisdiction under Section 115 of the Code.[26]

16. CONDITIONS

The following conditions must be satisfied before revisional jurisdiction can be exercised by the High Court:

(*i*) a case must have been decided;

(*ii*) the court which has decided the case must be a court subordinate to the High Court;

(*iii*) the order should not be an appealable one; and

(*iv*) the subordinate court must have (*a*) exercised jurisdiction not vested in it by law; or (*b*) failed to exercise jurisdiction vested

[24] Report of Civil Justice Committee at p. 281, para 4.

[25] *Madanlal Tiwari* v. *Bengal Nagpur Cotton Mills Ltd.*, AIR 1964 MP 297; *Rajinder Singh* v. *Karnal Central Coop. Bank Ltd.*, AIR 1965 Punj 331.

[26] For detailed discussion, *see infra*, "Suo motu exercise of power".

in it; or (*c*) acted in the exercise of its jurisdiction illegally or with material irregularity.[27]

(i) Case decided

The expression *"case decided"* was not defined in the Code of 1908. It gave rise to a number of conflicting decisions on the question whether the said expression included an interlocutory order also. But the conflict was ultimately resolved by the Supreme Court in the case of *Major S.S. Khanna* v. *Brig. F.J. Dillon*[28], holding that Section 115 applies even to interlocutory orders. In that case, Shah, J. (as he then was) observed:

> "The expression 'case' is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject to, and *may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.*"[29] (emphasis supplied)

Explaining the ratio laid down in *Major Khanna*[30], the Supreme Court in *Baldevdas Shivlal* v. *Filmistan Distributors (India) (P) Ltd.*,[31] held that a case may be said to have been decided if the court adjudicates for the purpose of the suit some right or obligation of the parties in controversy. Every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code.

On the recommendation of the Joint Committee of Parliament, an Explanation has been added to Section 115 by the Amendment Act of 1976 which makes it clear that the expression "case decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding".[32] Thus, the expression "any case which has been decided" after the Amendment Act of 1976 means "each decision which terminates a part of the controversy involving the question of jurisdiction".[33]

[27] *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409; *Pandurang Dhondi v. Maruti Hari, supra*; see also *Baldevdas* v. *Filmistan Distributors (India) (P) Ltd.*, (1969) 2 SCC 201: AIR 1970 SC 406.

[28] AIR 1964 SC 497: (1964) 4 SCR 409.

[29] *Ibid*, at p. 501 (AIR) (*per* Shah, J.).

[30] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409.

[31] (1969) 2 SCC 201 at p. 206: AIR 1970 SC 406 at p. 407.

[32] *Tata Iron & Steel Co.* v. *Rajarishi Exports (P) Ltd.*, AIR 1978 Ori 179 at p. 180.

[33] *Gulam Rasool* v. *Mariyam*, AIR 1980 Raj 197 at p. 199.

(ii) Subordinate court

The High Court cannot exercise revisional jurisdiction unless the case is decided by a court and such court is subordinate to the High Court. A court means a court of civil judicature. It does not include any person acting in an administrative capacity.

As a general rule, where it is provided that a matter should be decided by a particular *court*, the presiding officer of such court will act as a *court*. But where it is provided that a particular *judge* should decide a matter, the provisions of the statute will have to be considered for the purpose of determining whether the judicial officer acts as a court or as a *persona designata*.[34]

It is the intention that determines the question. If the intention is that the prescribed officers should enforce the rights and liabilities created by the statute in the exercise of the existing jurisdiction of courts, they act as courts. If, on the other hand, the intention is to create new courts, they act as *persona designata*.[35]

Again, while judicial functions are essential for a court,[36] the mere fact that a person exercises judicial functions is not sufficient to constitute him a court.[37] Further, a court will be said to be subordinate to the High Court, when it is subject to its appellate jurisdiction.[38] However, the mere fact that a statute provides an appeal to a court from a particular body does not necessarily constitute that body as a court.[39]

(iii) No appeal lies

The revisional jurisdiction of the High Court can be invoked in respect of any case in which no appeal lies to the High Court.[40] The word "appeal" includes first appeal as well as second appeal. Therefore, where an appeal lies to the High Court either directly or indirectly, revision under Section 115 does not lie. On the other hand, where no first or second appeal lies to the High Court, the revision is competent.

[34] *Central Talkies Ltd.* v. *Dwarka Prasad*, AIR 1961 SC 606 at p. 609: (1961) 3 SCR 495; *Ram Chandra* v. *State of U.P.*, AIR 1966 SC 1888 at pp. 1889-90: 1966 Supp SCR 393; *Surindra Mohan* v. *Dharam Chand Abrol*, AIR 1971 J&K 76 at pp. 78, 80 (FB); *Chatur Mohan* v. *Ram Behari*, AIR 1964 All 562 at p. 566.

[35] *National Telephone Co. Ltd.* v. *HM Postmaster-General*, 1913 AC 546 (HL); *Surindra Mohan* v. *Dharam Chand Abrol, supra.*

[36] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, AIR 1949 PC 129 (133).

[37] *National Federation of Railway* v. *E.I. Railway Admn.*, AIR 1950 All 80 at p. 81.

[38] *Spring Mills Ltd.* v. *G.D. Ambekar*, AIR 1949 Bom 188.

[39] *C. Abboy Reddiar* v. *Collector of Chingleput*, AIR 1952 Mad 45 at p. 46.

[40] *Vidya Vati* v. *Devi Das*, (1977) 1 SCC 293 at pp. 296-97: AIR 1977 SC 397 at p. 400; *Sunderlal* v. *Paramsukhdas*, AIR 1968 SC 366 at p. 371: (1968) 1 SCR 362; *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512: AIR 1986 SC 446.

As has been rightly observed by the Supreme Court in the case of *Major S.S. Khanna* v. *Brig. F.J. Dillon*[41], "If an appeal lies against the adjudication directly to the High Court, or to another court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded."[42]

(iv) Jurisdictional error

(*a*) *Nature and scope*

The power conferred by Section 115 of the Code is clearly limited to the keeping of subordinate courts within the bounds of their jurisdiction. Section 115 is concerned with jurisdiction and jurisdiction alone involving a refusal to exercise jurisdiction where one exists, an assumption of jurisdiction where none exists, and lastly, acting with illegality or material irregularity. Where there is no question of jurisdiction in this manner, the decision cannot be corrected because a court has jurisdiction to decide wrongly as well as rightly.[43]

(*b*) *Error of fact and error of law*

As stated above, the revisional powers of the High Court are limited to the question of jurisdiction only and the decision of the subordinate court on all questions of law and fact *not touching its jurisdiction* is final.[44] (emphasis supplied)

In other words, Section 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.[45]

(*c*) *Error of law and error of jurisdiction*

There is, however, a distinction between cases in which on a wrong decision the court has assumed jurisdiction which is not vested in it and those in which in exercise of its jurisdiction the court has arrived at a conclusion erroneous in law or in fact. In the former class of cases, revisional power is permissible, while in the latter class of cases it is

[41] AIR 1964 SC 497: (1964) 4 SCR 409.

[42] *Ibid*, at p. 501 (AIR). See also *Custodian of E.P.* v. *Nasir Uddin*, AIR 1962 Punj 218 (FB); *Paruchuru Thirumala Satyanarayana* v. *Vannava Ramalingam*, AIR 1952 Mad 86 (FB); *B. Manmohan Lal* v. *B. Raj Kumar Lal*, AIR 1946 All 89 (FB).

[43] *Per* Hidayatullah, J. in *Major S.S. Khanna* v. *Brig. F.J. Dillon*, *supra*, at p. 505 (AIR). *See also supra*, "Nature and scope"; *Manick Chandra Nandy* v. *Debdas Nandy*, *supra*.

[44] *S. Rama Iyer* v. *Sundaresa Ponnapoondar*, AIR 1966 SC 1431 at p. 1432: (1966) 3 SCR 474.

[45] *J.R. Datar* v. *Dattatraya Balwant*, C.A. 585 of 1964, decided on 7 September 1966; *Pandurang Dhondi v. Maruti Hari*, *supra*; *D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh*, *supra*; *M.L. Sethi* v. *R.P. Kapoor*, *supra*; *M.K. Palanippa* v. *A. Pennuswami*, (1970) 2 SCC 290 at pp. 292-93.

not.[46] Thus, if by an erroneous decision on a question of fact or law touching its jurisdiction, e.g. on a preliminary or jurisdictional fact upon the existence of which its jurisdiction depends, the subordinate court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to the revisional jurisdiction of the High Court under Section 115.[47] (As observed by the Privy Council[48], wherever jurisdiction is given to a court by an Act of Parliament and such jurisdiction is only given upon certain specified terms contained in that Act, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise.

In the leading case of *R.* v. *Commr. for Special Purposes of Income Tax*[49], Lord Esher, M.R. observed:

> "When an inferior court or tribunal or body which has to exercise the power of deciding facts is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."[50]

It is submitted that the following observations of the Supreme Court in the case of *Mohd. Hasnuddin* v. *State of Maharashtra*[51] lay down correct law on the point and, therefore, are worth quoting:

> "Every tribunal of limited jurisdiction is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within the limits of its special jurisdiction and whether the jurisdiction of such tribunal is depend-

[46] *N.S. Venkatagiri* v. *Hindu Religious Endowments Board, supra; Joy Chand* v. *Kamalaksha*, AIR 1949 PC 239: (1948-49) 76 IA 131; *Ratilal* v. *Ranchhodbhai*, AIR 1966 SC 439 at pp. 441-42: *Vora Abbasbhai* v. *Gulamnabi*, AIR 1964 SC 1341 at pp. 1347-48: (1964) 5 SCR 157.

[47] *J.R. Datar* v. *Dattatraya Balwant*, C.A. 585 of 1964, decided on 7 September 1966; *Pandurang Dhondi v. Maruti Hari, supra; D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh, supra; M.L. Sethi* v. *R.P. Kapoor, supra; M.K. Palanippa* v. *A. Pennuswami*, (1970) 2 SCC 290 at p. 292-93.

[48] *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan*, (1855) 6 Moo IA 134.

[49] (1888) 21 QB 313: 36 WR 776.

[50] *Ibid*, at p. 319. See also *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Mohd. Hasnuddin* v. *State of Maharashtra, infra.*

[51] (1979) 2 SCC 572: AIR 1979 SC 404.

ent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it and that statute also defines the conditions under which the tribunal can function, it goes without saying that *before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen.*"[52] (emphasis supplied)

(d) Exercise of jurisdiction not vested by law: Clause (a)

Where a subordinate court exercises jurisdiction not vested in it by law, a revision lies. In such cases, a subordinate court assumes jurisdiction which it does not possess by misconstruing statutory provisions or by wrongly assuming existence of preliminary or collateral facts which do not exist. The High Court in such cases will interfere with the orders passed by a subordinate court.[53]

The following cases have been held to be cases of unauthorised assumption of jurisdiction by the subordinate court: (*i*) where the lower court assumes jurisdiction which it does not possess on account of the pecuniary or territorial limits or by reason of the subject-matter of the suit;[54] or (*ii*) entertains an appeal from an order which is not appealable;[55] or (*iii*) entertains a suit or appeal which it has no jurisdiction to entertain;[56] or (*iv*) makes an order which it has no jurisdiction to make;[57] or (*v*) grants an injunction without considering whether a *prima facie* case is made out;[58] or (*vi*) allows withdrawal of a suit on a

[52] *Mohd. Hasnuddin* v. *State of Maharashtra*, (1979) 2 SCC 572 at p. 584: AIR 1979 SC 404 at p. 412. See also Author's, *Lectures on Administrative Law* (2008) Lecture VII.

[53] *S. Rama Iyer* v. *Sundaresa Ponnapoondar*, AIR 1966 SC 1431: (1966) 3 SCR 474; *Pandurang Mahadeo* v. *Annaji Balwant*, (1971) 3 SCC 530: AIR 1971 SC 2228; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *Ujjam Bai* v. *State of U.P.*, AIR 1962 SC 1621: (1963) 1 SCR 778; *Raja Anand Brahma* v. *State of U.P.*, AIR 1967 SC 1081: (1967) 1 SCR 373; *Shrisht Dhawan* v. *Shaw Bros.*, (1992) 1 SCC 534.

[54] *Keshardeo Chamria* v. *Radha Kissen Chamria, supra*; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh*, (1969) 3 SCC 807: AIR 1971 SC 2324; *Kuldip Singh* v. *State of Punjab*, AIR 1956 SC 391 at p. 399: 1956 SCR 125.

[55] *Narasinga Gowda* v. *Subramanya Saralava*, AIR 1972 Mys 346; *Avirah Ouseph* v. *Karthiyayanr Amma Ammukutty*, AIR 1965 Ker 179.

[56] *Ibid*, *United Bank of India* v. *Ram Raj Goala*, (1980) 1 LLJ 290.

[57] *Renuka Batra* v. *Grindlays Bank Ltd.*, AIR 1980 Punj 146; *Bai Moti Vela* v. *Bai Ladhi Vela*, AIR 1974 Guj 52; *Delhi Financial Corpn.* v. *Ram Parshad*, AIR 1973 Del 28.

[58] *Bihar SEB* v. *Jawahar Lal*, AIR 1976 Pat 323; *Vellakutty* v. *Karthyayani*, AIR 1968 Ker 179.

ground not contemplated under Order 23 Rule 1;[59] or (*vii*) directs a subordinate court to try a suit not triable by it;[60] etc.

(e) Failure to exercise jurisdiction: Clause (b)

A revision also lies where a subordinate court has failed to exercise jurisdiction vested in it by law. A court having jurisdiction to decide a matter, thinks erroneously under a misapprehension of law or of fact that it has no such jurisdiction and declines to exercise it; the High Court can interfere in revision.[61]

The following cases have been held to be cases of failure to exercise jurisdiction by a subordinate court: (*i*) refusal by the court to summon the deponent of an affidavit for cross-examination;[62] or (*ii*) failure of the executing court to construe the decree;[63] (*iii*) failure on the part of the court in considering the principles for the grant of *ad interim* injunction and refusing to grant it;[64] or (*iv*) refusal to entertain or rejection of a plaint, application, memorandum of appeal or review application on the erroneous view that it has no jurisdiction to entertain;[65] or (*v*) rejection of a counterclaim on the ground that the original suit is dismissed for default;[66] or (*vi*) refusal to make a reference under Order 46 Rule 7;[67] or (*vii*) an erroneous interpretation of statutory provisions as obligatory instead of directory;[68] etc.

(f) Exercise of jurisdiction illegally or with material irregularity: Clause (c)

Finally, a revision also lies where the subordinate court has acted in the exercise of its jurisdiction illegally or with material irregularity.

But then, what is meant by the expressions "illegally" and "material irregularity"? Though no precise definition or meaning can be giv-

[59] *Ramrao Bhagwantrao* v. *Babu Appanna*, AIR 1940 Bom 121 (FB); *Paira Ram* v. *Ganesh Dass*, AIR 1967 Punj 237; *Jagdish Chander* v. *Karam Chand*, AIR 1968 Del 181.

[60] *Nizakat Ali* v. *Shaukat Husain*, AIR 1943 All 300; *Vuppuluri Atchayya* v. *Kanchumarti Venkata*, AIR 1915 Mad 1223 (FB).

[61] *Joy Chand* v. *Kamalaksha*, AIR 1949 PC 239: (1948-49) 76 IA 131; *Kasturi & Sons (P) Ltd.* v. *N. Salivateswaran*, AIR 1958 SC 507: 1959 SCR 1; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492: 1959 Supp (1) SCR 733; *State of M.P.* v. *Azad Bharat Finance Co.*, AIR 1967 SC 276: 1966 Supp SCR 473.

[62] *Sripathi Rajyalakshmi* v. *Sripati Seetamahalakshmi*, AIR 1973 AP 203.

[63] *Bhavan Vaja* v. *Solanki Hanuji Khodaji*, (1973) 2 SCC 40: AIR 1972 SC 1371.

[64] *Chandrama Singh* v. *Yasodanandan Singh*, AIR 1972 Pat 128; *Sankara Pillai* v. *Inez Rosario*, AIR 1971 Ker 27.

[65] *Kasturi & Sons (P) Ltd.* v. *N. Salivateswaran*, AIR 1958 SC 507: 1959 SCR 1; *Ram Niranjan Prasad* v. *Chhedilal Saraf*, AIR 1976 Pat 90; *Munikrishna Reddy* v. *S.K. Ramaswami*, AIR 1969 Mad 389; *Pratap Chandra Biswas* v. *Union of India*, AIR 1956 Ass 85; *Vasant Jaiwantrao* v. *Tukaram Mahadaji*, AIR 1960 Bom 485.

[66] *Lingaraju Maharana* v. *Motilal Brothra*, (1973) 39 Cut LT 611.

[67] *Cantonment Board* v. *Phulchand*, AIR 1932 Nag 70.

[68] *State of M.P.* v. *Azad Bharat Finance Co.*, AIR 1967 SC 276: 1966 Supp SCR 473.

en to these words, after referring to the leading cases[69], the Supreme Court observed in the case of *Keshardeo* v. *Radha Kissen*[70], "The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."[71] They do not refer to the decision arrived at but the manner in which it is reached. In that case, the Supreme Court approved the following observations of the Privy Council in the leading case of *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*[72]:

> "The question then is, did the judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. *It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.*"
>
> (emphasis supplied)

In *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa*[73] also, the Privy Council observed, "It (the lower court) made a sad mistake it is true; but a court has jurisdiction to decide wrong as well as right."[74] In *D.L.F. Housing and Construction Co. (P) Ltd.* v. *Sarup Singh*[75], the Supreme Court observed:

> "The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the court to try the dispute itself... . The words 'illegally' and 'with material irregularity' as used in this clause [cl. (*c*)] do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. *The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affect-*

[69] *Rajah Amir Hassan* v. *Sheo Baksh Singh*, (1883-84) 11 IA 237: ILR (1885) 11 Cal 6 (PC); *Balakrishna Udayar* v. *Vasudeva Aiyar*, AIR 1917 PC 71: (1916-17) 44 IA 261; *N.S. Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board*, AIR 1949 PC 156; *Joy Chand* v. *Kamalaksha*, AIR 1949 PC 239: (1948-49) 76 IA 131; *Narayan Sonaji* v. *Sheshrao Vithoba*, AIR 1948 Nag 258.

[70] AIR 1953 SC 23: 1953 SCR 136.

[71] *Ibid*, at p. 28 (AIR). See also *Satyanarayan* v. *Mallikarjun Bhavanappa*, AIR 1960 SC 137 at p. 142: (1960) 1 SCR 890; *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*, AIR 1959 SC 492 at pp. 497-98: 1959 Supp (1) SCR 733; *M.K. Palaniappa* v. *A. Pennuswami*, (1970) 2 SCC 290; *Ratilal* v. *Ranchhodbhai*, AIR 1966 SC 439.

[72] (1883-84) 11 IA 237: ILR (1885) 11 Cal 6 (PC).

[73] (1899-1900) 27 IA 216: ILR (1901) 25 Bom 337 (PC).

[74] *Ibid*, at p. 225 (IA).

[75] (1969) 3 SCC 807: AIR 1971 SC 2324.

ing the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with."[76]

(emphasis supplied)

In the following cases, it has been held that the court had exercised its jurisdiction illegally or with material irregularity: (*i*) where it decides a case without considering the evidence on record;[77] or (*ii*) decides on evidence not legally taken or otherwise inadmissible;[78] or (*iii*) decides a case without recording reasons for its judgment;[79] or (*iv*) does not apply its mind to the facts and circumstances of the case;[80] or (*v*) fails to follow a decision of the High Court to which it is subordinate;[81] or (*vi*) follows a decision which does not apply to the facts of the case;[82] or (*vii*) decides a case in the absence of the party or without giving an opportunity of being heard to the party whose rights are adversely affected by such decision;[83] or (*viii*) in framing issues wrongly places burden of proof;[84] or (*ix*) orders the execution of a decree which is not executable;[85] or (*x*) orders attachment before judgment in absence of any material to support such order or without following the procedure under Order 38;[86] or (*xi*) grants or refuses to grant temporary injunction without considering and applying the provisions of Order 39;[87] or (*xii*) confirms an execution sale under Order 21 Rule 92 without disposing of an application to set aside the sale under Order 21 Rule 90;[88] or (*xiii*) passes a decree on the compromise by the guardian *ad litem* without enquiring whether it was for the benefit of the minor;[89] or (*xiv*) proceeds with the later suit ignoring the provisions of Section 10 of the Code;[90] or (*xv*) consolidates two suits for hearing without consent of parties even though the parties are not common and the issues are also different;[91]

[76] *Ibid*, at pp. 811-12 (SCC): at pp. 2327-28 (AIR).

[77] *Shambhu Dayal* v. *Basdeo Sahai*, AIR 1970 All 525; *Kochrabhai* v. *Gopalbhai*, AIR 1973 Guj 29 (FB).

[78] *Ramnath Singh* v. *Ram Bahadur*, AIR 1973 All 290.

[79] *Ratna Devi* v. *Vidya Devi*, AIR 1977 NOC 146 (All).

[80] *Ajantha Transports (P) Ltd.* v. *T.V.K. Transports*, (1975) 1 SCC 55: AIR 1975 SC 123; *Probodh Kumar* v. *Mohit Kumar*, AIR 1978 Cal 505.

[81] *Rajeshwar Dayal* v. *Padam Kumar*, AIR 1970 Raj 77.

[82] *Tila Mohammad* v. *Municipal Committee*, AIR 1941 Pesh 76.

[83] *Hardeva* v. *Ismail*, AIR 1970 Raj 167: ILR 1970 Raj 20: 1970 Raj LW 316 (FB); *Vankar Kuber* v. *Vankar Lilaben*, (1979) 20 Guj LR 584: 1979 Hin LR 559; *Ratna Devi* v. *Vidya Devi*, *supra*.

[84] *Bihar SEB* v. *Jawahar Lal*, AIR 1976 Pat 323.

[85] *Shah Mohd. Khan* v. *Hanwant Singh*, ILR (1898) 20 All 311.

[86] *Vasu* v. *Narayanan*, AIR 1962 Ker 261. *See also supra*, Pt. II, Chap. 11.

[87] *Ibid*, *see also supra*, Pt. II, Chap. 11.

[88] *Nirendra Nath* v. *Birendra Nath*, AIR 1942 Cal 480.

[89] *Hardeo Bakhsh Singh* v. *Bharath Singh*, AIR 1935 Oudh 287.

[90] *Mugli* v. *Khaliq Dar*, AIR 1979 J&K 84.

[91] *Minor Bhopo* v. *Mani*, AIR 1961 Guj 192: (1961) 2 Guj LR 179.

or (*xvi*) omits to draw up a decree in accordance with the judgment;[92] or (*xvii*) orders for the appearance of a *pardanashin* lady in public;[93] or (*xviii*) erroneously shuts out the evidence of a party;[94] or (*xix*) does not consider condonation of delay under Section 5 of the Limitation Act, 1963;[95] or (*xx*) remands a case after framing issues which do not arise in the case;[96] or (*xxi*) admits additional evidence in appeal without considering the provisions of Order 41 Rule 27 of the Code;[97] or (*xxii*) acts in violation of Section 113 of the Code by holding an Act of Parliament to be *ultra vires*;[98] or (*xxiii*) accepts a plaint without court fees;[99] or (*xxiv*) makes an order ignoring an earlier order passed by the court;[100] or (*xxv*) grants a relief not prayed for by a party,[101] etc.

17. ALTERNATIVE REMEDY

Exercise of revisional jurisdiction is in the discretion of the court and no party can claim it "as of right". Before exercising revisional powers, the High Court may consider several circumstances and decide whether power under Section 115 of the Code should be exercised in favour of the applicant before the court. One of the factors which the court usually considers is availability of an alternative remedy to the aggrieved party. Where such aggrieved party has alternative and efficacious remedy, the court may not entertain a revision under Section 115 of the Code.[102]

18. OTHER LIMITATIONS OF REVISIONAL JURISDICTION

It should, however, be remembered that exercise of revisional jurisdiction by the High Court is discretionary and the High Court is not bound to interfere merely because the conditions laid down in clause (*a*), (*b*) or (*c*) of Section 115 are satisfied.[103] An applicant invoking the re-

[92] *Baliram* v. *Manohar*, AIR 1943 Nag 204; *Sidhnath* v. *Ganesh Govind*, (1912) 37 Bom 60.

[93] *Gyarsibai* v. *Mangilal*, AIR 1958 MP 25.

[94] *Conceicao Antonio Fernandes* v. *Dr. Arfanode L.P. Furtado*, AIR 1975 Goa 27.

[95] *Seva Samaj Sanchalak* v. *State of Kerala*, AIR 1972 Ker 184; *Bhaktipada Majhi* v. *SDO*, AIR 1971 Cal 204.

[96] *Brijlal* v. *Tikhu*, AIR 1956 HP 37; *Hemsingh* v. *Motisingh*, AIR 1955 Raj 127.

[97] *Seth Kunjilal* v. *Shankar Nanuram*, AIR 1943 Nag 289.

[98] *Delhi Financial Corpn.* v. *Ram Parshad*, AIR 1973 Del 28.

[99] *Chandappa* v. *Sadruddin Ansari*, AIR 1958 Mys 132.

[100] *State of Bihar* v. *Bhagwati Singh*, AIR 1976 Pat 295.

[101] *Saida Begam* v. *Sabir Ali*, AIR 1962 All 9.

[102] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497: (1964) 4 SCR 409; *Printers (Mysore) (P) Ltd.* v. *Pothan Joseph*, AIR 1960 SC 1156; *Mechelec Engineers & Manufacturers* v. *Basic Equipment Corpn.*, (1976) 4 SCC 687: AIR 1977 SC 577; *Municipal Corpn. of Delhi* v. *Suresh Chandra*, (1976) 4 SCC 719: AIR 1977 SC 2621.

[103] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 501: (1964) 4 SCR 409; *Brij Gopal* v. *Kishan Gopal*, (1973) 1 SCC 635 at p. 638: AIR 1973 SC 1096 at pp. 1097-98;

visional jurisdiction of the High Court must, therefore, show not only that there is a jurisdictional error but also that the interests of justice call for interference.[104]

At the same time, however, it cannot be overlooked that the revisional powers under Section 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice.[105] As a general rule, where substantial justice has been done by the order of the lower court, the High Court will not interfere with it in revision notwithstanding the fact that the reasons for the order are not correct or the order is improper or irregular.[105] On the other hand, where the order passed by a lower court results in grave injustice or hardship or substantial failure of justice, the High Court will interfere.[106] Again, the High Court will generally not interfere in favour of a party who has an alternative remedy available against the order passed by the lower court,[107] or who suppresses material facts from the court,[108] or who is not vigilant about his rights and where there is great and unexplained delay and laches on the part of the applicant.[109]

It is submitted that the following observations of Shah, J. (as he then was) in the case of *Major S.S. Khanna* v. *Brig. F.J. Dillon*[110] lay down the general principles regarding the ambit and scope of the revisional powers of the High Court under Section 115 of the Code and, therefore, require to be quoted:

> "That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate court and the conditions in clause (*a*), (*b*) or (*c*) are satisfied. Exercise of jurisdiction is discretionary, the High Court is not bound to interfere merely because the conditions are satisfied. *The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order*

Rami Manprasad v. *Gopichand*, (1973) 4 SCC 89 at pp. 93-94: AIR 1973 SC 566.

[104] *Ibid*, see also *Indian Agricultural Research Institute* v. *Vidya Sagar*, AIR 1973 HP 29; *Lonand Grampanchayat* v. *Ramgiri Gosavi*, AIR 1968 SC 222 at pp. 223-24: (1967) 3 SCR 774.

[105] *Kedarnath Mattulal* v. *Baboolal*, AIR 1976 MP 62; *D.V. Shindagi* v. *Saraswatibai*, AIR 1969 Mys 77; *Shah Jagmohandas* v. *Jamnadas*, AIR 1965 Guj 181: (1965) 6 Guj LR 49.

[106] *Food Corpn. of India* v. *Birendra Nath*, AIR 1978 Cal 264; *Orugunati Ranganayakamma* v. *Maduri Lakshminarasamma*, AIR 1979 AP 8.

[107] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 501: (1964) 4 SCR 409.

[108] *Jitendra Nath* v. *Tarakchandra*, AIR 1947 Cal 28; *Welcom Hotel* v. *State of A.P.*, (1983) 4 SCC 575: AIR 1983 SC 1015.

[109] *Sita Bai* v. *Vidhyawati*, AIR 1972 MP 198; *Ram Narayan* v. *Rajeshwari Devi*, AIR 1978 All 214; *T.N. Mahajan* v. *Janta Steel & Metal Coop. Industrial Society Ltd.*, AIR 1976 Punj 324; *Jaichand Lal* v. *Gopal Prasad*, AIR 1973 Pat 441.

[110] AIR 1964 SC 497: (1964) 4 SCR 409.

made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction."[111] (emphasis supplied)

The proviso to sub-section (1) of Section 115, as amended by the Code of Civil Procedure (Amendment) Act, 1999 expressly states that the High Court shall not vary or reverse any order passed in the course of a suit or other proceedings except where the order, if it had been made in favour of the applicant, it would have finally disposed of the suit or other proceedings.[112]

Again, sub-section (2) now prohibits the High Court from interfering in revision if an appeal against the order or decree sought to be reversed lies to the High Court or to any court subordinate to the High Court.[113]

Sub-section (3) as inserted by the Amendment Act of 1999 clarifies that mere filing to revision in the High Court would not operate as stay of suit or other proceedings before the court where such suit or proceedings are pending unless such stay is granted by the High Court.

19. FORM OF REVISION

No particular form of revision is prescribed in the Code. Such petition, however, must contain grounds as to error of jurisdiction covered by Section 115 of the Code.[114]

20. LIMITATION

The period of limitation for preferring a revision application is ninety days from the decree or order sought to be revised.[115]

21. SUO MOTU EXERCISE OF POWER

Normally, a High Court will exercise revisional powers on the application of an aggrieved party, but in appropriate cases where the conditions laid down in this section are satisfied, it may *suo motu* (of its own motion) call for any record and pass necessary orders. There is no bar on the power of the High Court in exercising revisional jurisdiction unless a prayer is made by a party. A person other than a party to a

[111] *Major S.S. Khanna* v. *Brig. F.J. Dillon*, AIR 1964 SC 497 at p. 501 (*per* Shah, J.). See also *Brij Gopal* v. *Kishan Gopal*, (1973) 1 SCC 635 at p. 638: AIR 1973 SC 1096 at pp. 1099-98; *Rami Manprasad* v. *Gopichand*, (1973) 4 SCC 89 at p. 98: AIR 1973 SC 566; *Manick Chandra* v. *Debdas Nandy*, (1986) 1 SCC 512 at pp. 516-17: AIR 1986 SC 446.

[112] Proviso to S. 115 (1); see also *Ram Narayan* v. *Rajeshwari Devi*, AIR 1978 All 214; *Food Corpn. of India* v. *Birendra Nath*, AIR 1978 Cal 264; *Ram Narain* v. *Seth Sao*, AIR 1979 Pat 174.

[113] *Khem Chand* v. *Hari Singh*, AIR 1979 Del 7.

[114] For Model Revision, *see*, Appendix "F".

[115] Art. 131, Limitation Act, 1963.

proceeding can also bring illegality or irregularity to the notice of the High Court.[116]

In *Swastik Oil Mills Ltd.* v. *CST*[117], the Supreme Court stated, "Whenever a power is conferred on an authority to revise an order, the authority is entitled to examine the correctness, legality and propriety of the order and to pass such suitable orders as the authority may think fit in the circumstances of the particular case before it. When exercising such powers, there is no reason why the authority should not be entitled to hold an enquiry or direct an enquiry to be held and, for that purpose, admit additional material. The proceedings for revision, if started *suo motu*, must not, of course, be based on a mere conjecture and there should be some ground for invoking the revisional powers. Once those powers are invoked, the actual interference must be based on sufficient grounds, and, if it is considered necessary that some additional enquiry should be made to arrive at a proper and just decision, there can be no bar to the revising authority holding a further enquiry or directing such an enquiry to be held by some other appropriate authority."[118]

22. REVISION UNDER OTHER LAWS

Revisional jurisdiction under Section 115 CPC is limited to "errors of jurisdiction". In other statutes, however, revisional powers may not be confined or circumscribed to errors of jurisdiction only. Thus, where revisional powers can be exercised to decide "legality" or "propriety", or "correctness" of the decision, the jurisdiction is wider than the jurisdiction under Section 115 CPC. The scope of revisional jurisdiction thus depends upon the language of the statute conferring jurisdiction on the court.[119]

23. INTERLOCUTORY ORDERS

Interim or interlocutory orders fall into two classes:

(*i*) Interlocutory orders which are appealable; and

(*ii*) Interlocutory orders which are non-appealable.

The orders falling under the former class are appealable under Section 104 and, hence, no revision lies, whereas the orders falling under the

[116] *Swastik Oil Mills Ltd.* v. *CST, infra*; *Percy Wood* v. *Samuel*, AIR 1943 Nag 333; *Avirah Ouseph* v. *Karthiyayanr Amma Ammukutty*, AIR 1965 Ker 179; *Katragadda China* v. *Chiruvella Venkanraju*, AIR 1954 Mad 864 (FB); *Sarat Chandra* v. *Narasingha Patra*, AIR 1988 Ori 4; *State of Kerala* v. *N. Avinasiappan*, (2004) 1 SCC 344.

[117] AIR 1968 SC 843: (1968) 2 SCR 492.

[118] *Ibid*, at pp. 845-46 (AIR).

[119] *Rajbir Kaur* v. *S. Chokesiri and Co.*, (1989) 1 SCC 19: AIR 1988 SC 1845. For detailed discussion and case law, *see*, Author's, *Code of Civil Procedure* (Lawyers' Edn.) Vol. II at pp. 685-86.

latter class are subject to revision under Section 115, if the conditions laid down in the section are fulfilled.[120]

24. DEATH OF APPLICANT

The provisions of Order 22 do not apply to revision applications. A revision, therefore, does not abate on the death of the applicant or on account of failure on the part of the applicant to bring on record the heirs of the deceased opponent.[121]

25. DOCTRINE OF MERGER

Revisional jurisdiction is a part of appellate jurisdiction of the High Court. Revision is but one of the modes of exercising powers conferred by a statute. Basically and fundamentally, it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. Hence, when the aid of the High Court is invoked on the revisional side, it is because it is a superior court. The doctrine of merger, therefore, applies to orders passed in revision and the order passed by a subordinate court gets merged in the order passed by the High Court.[122]

26. PROCEDURE

No specific or express procedure is prescribed in the Code which is required to be followed in revision. Grounds of revision can be couched as in an appeal. They should, however, contain objections as to jurisdiction.[123] Ordinarily a certified copy of the order impugned should be filed in the revision.[124] No cross-objections can be filed in revision.[125] But if the High Court feels that a particular finding recorded by the subordinate court is uncalled for, it can interfere *suo motu*.[126] Once a revision is admitted, it ought to have been decided on merits.[127] It

[120] *Khushro S. Gandhi* v. *N.A. Guzder*, (1969) 1 SCC 358: AIR 1970 SC 1468.

[121] *Nathooram* v. *Karbansilal*, AIR 1983 AP 278; *Totonio* v. *Maria*, AIR 1975 Goa 2; *Mohd. Sadaat Ali* v. *Corpn. of City of Lahore*, AIR 1949 Lah 186 (FB); *S.M.A. Samad* v. *Shahid Hussain*, AIR 1963 Pat 375.

[122] *Shankar Ramchandra* v. *Krishnaji Dattatreya*, (1969) 2 SCC 74: AIR 1970 SC 1; *S.K. Saldi* v. *U.P. State Sugar Corpn. Ltd.*, (1997) 9 SCC 661: AIR 1997 SC 2182; *State of Madras* v. *Madurai Mills Co. Ltd.*, AIR 1967 SC 681: (1967) 1 SCR 732; *S. Shanmugavel Nadar* v. *State of T.N.*, (2002) 8 SCC 361: AIR 2002 SC 3484.

[123] S. 115(1)(*a*), (*b*), (*c*); see also *Rawalpindi Theatres (P) Ltd.* v. *Patanjal*, AIR 1967 Punj 241.

[124] *Mahesh Chander* v. *Darshan Kaur*, AIR 1982 NOC 69 (Delhi); *Shafiq Ahmad* v. *Shah Jehan Begum*, AIR 1981 Del 202.

[125] *Venkatarama* v. *Ramaswami*, AIR 1952 Mad 504: (1951) 2 Mad LJ 32.

[126] *Jia Lal* v. *Mohan Lal*, AIR 1960 J&K 22; *Pattammal* v. *Krishnaswami Iyer*, AIR 1928 Mad 794.

[127] *Hukumchand Amolikchand Lodge* v. *Madhava Balaji*, 1984 Supp SCC 600: AIR 1983 SC 540.

should not be dismissed on the ground that it ought not to have been admitted.[128] If the High Court holds that revision is not maintainable or is barred by limitation, it should not make any observations on merits.[129]

27. DISMISSAL IN LIMINE

Where several contentions have been raised by the applicant, *normally*, a High Court should not dismiss the revision *in limine* (summarily) by one word ("Dismissed"). It should record reasons in brief.[130]

28. RECORDING OF REASONS

Where the parties are present before the High Court and specific pleas as to error of jurisdiction has been raised, the High Court should not dismiss the revision summarily without recording reasons.[131]

There is another reason also as to why the High Court should pass speaking order. Absence of reasons deprives the Supreme Court from knowing the reasons and circumstances which weighed with the High Court in dismissing the revision *in limine*. The necessity to give reasons, however brief, in support of its conclusion is too obvious to be emphasised. Obligation to record reasons introduces clarity and excludes, or at any rate minimizes, the chances of arbitrariness and enables the higher forum to test correctness and relevance of those reasons. If no reasons are recorded, the order is liable to be set aside.[132]

29. LETTERS PATENT APPEAL

No letters patent appeal lies from an order made in the exercise of revisional jurisdiction.[133]

[128] *Ibid*, see also *Mohd. Ibrahim* v. *State Transport Appellate Tribunal*, (1971) 1 Mad LJ 76; *National Fertilizers Ltd.* v. *Municipal Committee, Bhatinda*, AIR 1982 Punj 432; *J.P. Ojha* v. *R.R. Tandan*, AIR 1962 All 485.

[129] *Narendra Babu* v. *Vidya Sagar*, AIR 1965 SC 338: AIR 1978 All 415.

[130] *Harbans Sharma* v. *Pritam Kaur*, (1982) 3 SCC 386 (2); *Fauja Singh* v. *Jaspal Kaur*, (1996) 4 SCC 461; *Dev Pal Kashyap* v. *Ranjit Singh*, (2000) 9 SCC 420; *Kaushalya Devi* v. *Mohinder Lal*, (2000) 9 SCC 417; *see also infra*, "Recording of reasons".

[131] *Ibid*, see also *Fauja Singh* v. *Jaspal Kaur*, (1996) 4 SCC 461; *Dev Pal Kashyap* v. *Ranjit Singh*, (2000) 9 SCC 420.

[132] *Ibid*, see also *Harbans Sharma* v. *Pritam Kaur*, (1982) 3 SCC 386 (2). For detailed discussion and case law, *see*, Author's, *Lectures on Administrative Law* (2008) Lecture VI; *see also*, V.G. Ramachandran, *Law of Writs* (2006) Vol. I, Pt. II, Chap. 6.

[133] *J&K Coop. Bank* v. *Shams-ud-din Bacha*, AIR 1970 J&K 190; *Munikrishna Reddy* v. *S.K. Ramaswami*, AIR 1969 Mad 389; *Sukhendu* v. *Hare Krishna*, AIR 1953 Cal 636.

30. REVISION

A Single Judge of the High Court cannot be said to be a court subordinate to the High Court. Hence, no revision lies against an order passed by a Single Judge of the High Court.[134]

[134] *Debendra Nath* v. *Bibudhendra*, (1916) 43 Cal 90; *Jamna Doss* v. *A.M. Sabapathy*, ILR (1911) 36 Mad 138.

Part Four
Execution

PART IV

1 Execution in General

SYNOPSIS

1. Execution: Meaning	587	4. Law Commission's view	588
2. Nature and scope	587	5. Scheme of execution: Important heads	588
3. Execution proceedings under CPC	588		

1. EXECUTION: MEANING

THE TERM "execution" has not been defined in the Code. In its widest sense, the expression "execution" signifies the enforcement or giving effect to a judgment or order of a court of justice.[1] Stated simply, "execution" means the process for enforcing or giving effect to the judgment of the Court.[2] In other words, execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realise the fruits of the decree.[3] The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order.[4]

2. NATURE AND SCOPE

A files a suit against *B* for Rs 10,000 and obtains a decree against him. Here *A* is the judgment-creditor or decree-holder. *B* is the judgment-debtor, and the amount of Rs 10,000 is the judgment-debt or the decretal amount. Since the decree is passed against *B*, he is bound to pay Rs 10,000 to *A*. Suppose in spite of the decree, *B* refuses to pay the decretal amount to *A*, *A* can recover the said amount from *B* by *executing* the

[1] *Halsbury's Laws of England* (4th Edn.) Vol. 17 at p. 232; *Concise Oxford English Dictionary* (2002) at p. 497; *Shorter Oxford Dictionary* (1990) Vol. 1 at p. 669; P.R. Aiyar, *Advanced Law Lexicon* (2005) Vol. II at pp. 1702-03.

[2] *Overseas Aviation Engineering, In re*, (1962) 3 All ER 12: 1963 Ch D 24 (*per* Lord Denning).

[3] *Sreenath Roy* v. *Radhanath Mookerjee*, ILR (1882) 9 Cal 773 at p. 776; *Ghosh* v. *Banerjee*, 79 CWN 76; *State of Rajasthan* v. *Rustamji Savkasha*, AIR 1972 Guj 179.

[4] *Overseas Aviation Engg. (G.B.) Ltd., In re*, (1962) 3 WLR 594: 1963 Ch D 24: (1962) 3 All ER 12 (CA).

decree through the judicial process. The principles governing execution of decrees and orders are dealt within Sections 36 to 74 (substantive law) and Order 21 of the Code (procedural provisions). Order 21 contains 106 Rules and is the longest of all orders in the Code.

3. EXECUTION PROCEEDINGS UNDER CPC

In *Ghan Shyam Das* v. *Anant Kumar Sinha*[5], dealing with the provisions of the Code relating to execution of decrees and orders, the Supreme Court stated, "So far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of Order 21 of the Code take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the civil court. *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.*[6] (emphasis supplied)"

4. LAW COMMISSION'S VIEW

The Law Commission considered the difficulties realized by the decree-holders after obtaining decree from a competent court of law. It also went into the reasons for unsatisfactory state of affairs and made several recommendations and suggestions.[7]

5. SCHEME OF EXECUTION: IMPORTANT HEADS

The subject of execution of decrees and orders may be discussed under the following heads:

(1) Courts which may execute decrees
(2) Application for execution
(3) Stay of execution
(4) Mode of execution
(5) Arrest and detention

[5] (1991) 4 SCC 379: AIR 1991 SC 2251.

[6] *Ibid*, at p. 383 (SCC): at pp. 2253-54 (AIR). *Shaukat Hussain* v. *Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528; *Court of Wards* v. *Coomar Ramaput*, (1872) 14 MIA 605: 17 WR 195 (PC); *Shyam Singh* v. *Collector, Distt. Hamirpur*, 1993 Supp (1) SCC 693; *Marshall Sons & Co. (I) Ltd.* v. *Sahi Oretrans (P) Ltd.*, (1999) 2 SCC 325: AIR 1999 SC 882; *Kuer Jang Bahadur* v. *Bank of Upper India Ltd.*, AIR 1925 Oudh 448; *Vigneshwar* v. *Gangabai Kom Narayan*, AIR 1997 Kant 149.

[7] Law Commission's Fourteenth Report (1958) at p. 431; Law Commission's Twenty-seventh Report (1964) at pp. 174-210; Law Commission's Fifty-fourth Report (1973) at pp. 72-92.

(6) Attachment of property
(7) Questions to be determined by executing court
(8) Adjudication of claims
(9) Sale of property
(10) Delivery of possession, and
(11) Distribution of assets.

PART IV

2 Courts which may execute Decrees

SYNOPSIS

1. General	590	6. Execution of Indian decrees in foreign territory: Section 45	594
2. Court passing a decree: Section 37	590	7. Execution of decree at more than one place	594
3. Courts by which decrees may be executed: Section 38	591	8. Procedure in execution	594
4. Transfer of decree for execution: Sections 39-42, Order 21 Rules 3-9	592	9. Powers of transferor court	595
5. Execution of foreign decrees in India: Sections 43 to 44-A	593	10. Powers of transferee court	595
		11. Powers of executing court	595
		12. General principles	596

1. GENERAL

SECTION 38 of the Code enacts that a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 37 defines the expression "court which passed a decree" while Sections 39 to 45 provide for the transfer for execution of a decree by the court which passed the decree to another court, lay down conditions for such transfer and also deal with powers of executing court. All these sections, therefore, need to be read together.

2. COURT PASSING A DECREE: SECTION 37

Section 37 defines the expression "court which passed a decree". The section enlarges the scope of the expression "court which passed a decree" with the object of giving greater facilities to a decree-holder to realise the fruits of the decree passed in his favour.[1] The following courts fall within the said expression:

(*i*) The court of first instance which actually passed the decree;

(*ii*) The court of first instance in case of appellate decrees;

[1] *Kasturi Rao* v. *Mehar Singh*, AIR 1959 Punj 350 at p. 351; *Faiz Mohideen* v. *Sreevamulu*, (1997) 2 Mad LJ 78.

(*iii*) Where the court of first instance has ceased to exist, the court which would have jurisdiction to try the suit at the time of execution; and

(*iv*) Where the court of first instance has ceased to have jurisdiction to execute the decree, the court which at the time of execution would have had jurisdiction to try the suit.[2]

3. COURTS BY WHICH DECREES MAY BE EXECUTED: SECTION 38

A decree may be executed either by the court which passed it, or by the court to which it is sent for execution.[3] A court which has neither passed a decree, nor a decree is transferred for execution, can execute it.[4]

Where the court of first instance has ceased to exist or ceased to have jurisdiction to execute the decree, the decree can be executed by the court which at the time of making the execution application would have jurisdiction in the matter.[5]

Sometimes a peculiar situation arises. Suppose court *A* passed a decree, and thereafter a part of the area within the jurisdiction of court *A* is transferred to court *B*. In such a situation the following two questions arise:

(*a*) whether court *A* continues to have jurisdiction to entertain an application for execution? and

(*b*) whether court *B* (to which the area is transferred) can also entertain an application for execution without a formal transmission of the decree from court *A* to court *B*?

The first question must now be answered in the affirmative after the pronouncement of the Supreme Court in the case of *Merla Ramanna* v. *Nallaparaju*[6], wherein the court held:

> "[I]t is settled law that the court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter thereof being transferred subsequently to the jurisdiction of another court."[7]

But with regard to the second question, there were conflicting decisions. The High Court of Calcutta[8], on the one hand, had taken the view that in this situation both the courts (*A* and *B*) would be competent

[2] *Mahijibhai Mohanbhai* v. *Patel Manibhai*, AIR 1965 SC 1477 at pp. 1484-85: (1965) 2 SCR 436; *Ramankutty Guptan* v. *Avara*, (1994) 2 SCC 642.

[3] S. 38.

[4] *Ghantesher* v. *Madan Mohan*, (1996) 11 SCC 446: AIR 1997 SC 471.

[5] *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938.

[6] *Ibid.*

[7] *Ibid*, at p. 93 (AIR).

[8] *Latchman Pundeh* v. *Maddan Mohun*, ILR (1881) 6 Cal 513; *Jahar* v. *Kamini Debi*, ILR (1901) 28 Cal 238; *Udit Narain* v. *Mathura Prasad*, ILR (1908) 35 Cal 974.

to entertain an application for execution; the High Court of Madras[9], on the other hand, had taken a contrary view by holding that in the absence of an order of transfer by the court which passed the decree (court *A*), that court alone can entertain an application for execution and not the court to whose jurisdiction the subject-matter has been transferred (court *B*). The Supreme Court in *Merla Ramanna*[6] referred to the above conflict of decisions but left the point open and did not express any final opinion as to which of the two views is correct by observing thus, *"It is not necessary in this case to decide which of these two views is correct"*; because according to the Supreme Court even assuming that the opinion expressed in the *Madras case*[10] was correct since the transferee court had no inherent lack of jurisdiction, the objection to it ought to have been taken at the earliest opportunity and as it was not taken at that stage, it must be deemed to have been waived and cannot be raised at any later stage of the proceedings.[11] (emphasis supplied)

The Explanation added to Section 37 by the Amendment Act of 1976 gives effect to the Calcutta view and makes it clear that both the courts would be competent to entertain an application for execution of a decree.

4. TRANSFER OF DECREE FOR EXECUTION: SECTIONS 39-42, ORDER 21 RULES 3-9

As stated above, a decree may be executed either by the court which passed it or by the court to which it is sent for execution. Section 39 provides for the transfer of a decree by the court which has passed it and lays down the conditions therefor.

As a general rule, the court which passed the decree is primarily the court to execute it, but such court may send the decree for execution to another court either *suo motu* (of its own motion)[12] or on the application of the decree-holder if any of the following grounds exists:[13]

(*i*) The judgment-debtor actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such court; or

(*ii*) The judgment-debtor does not have property sufficient to satisfy the decree within the local limits of the jurisdiction of the

[9] *Ramier* v. *Muthu Krishna Ayyar*, AIR 1932 Mad 418: ILR (1932) 55 Mad 801.

[10] *Ramier* v. *Muthu Krishna Ayyar*, AIR 1932 Mad 418: ILR (1932) 55 Mad 801.

[11] *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87 at p. 93: (1955) 2 SCR 938.

[12] S. 39(2).

[13] S. 39(1); see also *Firm Hansraj Nathuram* v. *Firm Lalji Raja & Sons*, AIR 1963 SC 1180: (1963) 2 SCR 619; *Lalji Raja & Sons* v. *Firm Hansraj Nathuram*, (1971) 1 SCC 721: AIR 1971 SC 974; *Narhari Shivram* v. *Pannalal Umediram*, (1976) 3 SCC 203: AIR 1977 SC 164.

court which passed the decree but has property within the local limits of the jurisdiction of such other court; or

(*iii*) The decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of such other court; or

(*iv*) The court which passed the decree considers it necessary for any other reason to be recorded in writing that the decree should be executed by such other court.

The provisions of Section 39 are, however, not mandatory[14] and the court has discretion in the matter which will be judicially exercised by it.[15] The decree-holder has no vested or substantive right to get the decree transferred to another court. The right of the decree-holder is to make an application for transfer which is merely a procedural right.[16] By the Amendment Act of 1976, sub-section (3) has been added to Section 39. It clarifies that the transferee court must have pecuniary jurisdiction to deal with the suit in which the decree was passed. Likewise, sub-section (4) of Section 39, as added by the Code of Civil Procedure (Amendment) Act, 2002 further clarifies that the court passing the decree has no power to execute such decree against a person or property outside the local limits of its territorial jurisdiction.

5. EXECUTION OF FOREIGN DECREES IN INDIA: SECTIONS 43 TO 44-A

A combined reading of Sections 43 to 44-A shows that Indian courts have power to execute the decrees passed by (1) Indian courts to which the provisions of the Code do not apply;[17] (2) the courts situate outside India which are established by the authority of the Central Government;[18] (3) revenue courts in India to which the provisions of the Code do not apply;[19] and (4) superior courts of any reciprocating territory.[20]

[14] *Laxmi Narain* v. *Firm Ram Kumar Suraj Bux*, AIR 1971 Raj 30; *Tarachand* v. *Misrimal*, AIR 1970 Raj 53; *Manmatha Pal* v. *Sarada Prosad*, AIR 1939 Cal 651 at pp. 654-55.

[15] *Manmatha Pal Choudhury* v. *Sarada Prosad Nath* (*ibid.*).

[16] *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354 at pp. 360, 363: AIR 1981 SC 416.

[17] S. 43; see also *Raj Rajendra Sardar Moloji Nar Singh* v. *Shankar Saran*, AIR 1962 SC 1737: (1963) 2 SCR 577.

[18] *Ibid*, see also *Raj Rajendra Sardar Moloji Nar Singh* v. *Shankar Saran*, AIR 1962 SC 1737: (1963) 2 SCR 577.

[19] S. 44.

[20] S. 44-A.

6. EXECUTION OF INDIAN DECREES IN FOREIGN TERRITORY: SECTION 45

Section 45 deals with a converse case. It provides for the execution in foreign territory of the decrees passed by Indian courts in certain circumstances.[21]

7. EXECUTION OF DECREE AT MORE THAN ONE PLACE

The Code does not prevent a decree-holder from executing a decree simultaneously at more than one place against the property of the judgment-debtor.[22] Such power, however, should be exercised sparingly and in exceptional cases after issuing notice to the judgment-debtor.[23]

8. PROCEDURE IN EXECUTION

Where a decree is sent for execution to another court, the court which passed the decree shall send a decree to such court with (*i*) a copy of the decree; (*ii*) a certificate of non-satisfaction or part-satisfaction of the decree; and (*iii*) a copy of an order for the execution of the decree, or if no such order is passed, a certificate to that effect.[24] The court executing the decree, on receiving the copies of the decree and other certificates, shall cause the same to be filed without further proof.[25] Such court shall have the same powers in executing the decree as if it had been passed by itself.[26] Such court shall certify to the court which passed the decree the fact of such execution or the circumstances attending its failure to execute it.[27] Where the court to which the decree is sent for execution is a district court, it may be executed by itself or transferred by it to any subordinate court of competent jurisdiction.[28] Where such court is a High Court, the decree shall be executed as if it had been passed by itself in the exercise of its original jurisdiction.[29] Where a decree is sent for execution in another State, it shall be executed by such court and in such manner as may be prescribed by rules in force in that State.[30] Where immovable property forms one estate or tenure and is situate within the territorial jurisdiction of two or more

[21] See also *Kishendas* v. *Indo-Carnatic Bank Ltd.*, AIR 1958 AP 407.

[22] *Prem Lata* v. *Lakshman Prasad*, (1970) 3 SCC 440: AIR 1970 SC 1525.

[23] *Ibid*, see also *Lakshman Hari* v. *V.G. Virkar*, AIR 1939 Bom 258.

[24] R. 6.

[25] R. 7.

[26] S. 42. See also *Jai Narain* v. *Kedar Nath*, AIR 1956 SC 359: 1956 SCR 62; *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354: AIR 1981 SC 416.

[27] S. 41.

[28] R. 8.

[29] R. 9.

[30] S. 40.

courts, any of such courts has jurisdiction to attach and sell the whole of such estate or tenure.[31]

9. POWERS OF TRANSFEROR COURT

Once a court which has passed a decree transfers it to another competent court, it would cease to have jurisdiction and cannot execute the decree.[32] It is only a transferee court to which an application for execution would lie. The limitation, however, is to the extent of the transfer and not in respect of other matters.[33]

10. POWERS OF TRANSFEREE COURT

Once a decree is transferred for execution to another court, the transferee court shall have all powers to execute the decree as if it had been passed by the transferee court itself.[34] After the transfer of a decree, it is the transferee court which will decide all questions arising in execution proceedings.[35] Its jurisdiction remains till it certifies to the transferor court of the execution of the decree.[36]

11. POWERS OF EXECUTING COURT

Section 42 of the Code expressly confers upon the court executing a decree sent to it the same powers as if it had been passed by itself.[37] It is thus power and duty of the executing court to see that the defendant gives the plaintiff the very thing the decree directs and nothing more or nothing less.[38]

At the same time, the Code requires that the court executing the decree does not exercise power in respect of the matters which could be determined only by the court which passed the decree.[39] To put it differently, the powers to be exercised by the executing court relate to *procedure* to be followed in execution of a decree and do not extend to *substantive* rights of the parties. The executing court cannot convert itself into the court passing the decree.[40]

[31] R. 3; *see also*, R. 5.

[32] *Maharajah of Bobbili* v. *Narasaraju*, AIR 1916 PC 16: (1915-16) 43 IA 238.

[33] *Ibid*, see also *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938; *S. Sundara Rao* v. *B. Appiah Naidu*, AIR 1954 Mys 1.

[34] Ss. 41-42; see also *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938; *Jonalagadda* v. *Shivaramakrishna*, AIR 1944 Mad 144.

[35] *Ibid*, see also *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354: AIR 1981 SC 416.

[36] *Ibid*, see also *Sital Prasad* v. *Clements Robson & Co.*, AIR 1921 All 199.

[37] S. 41(1), (2), (3).

[38] *Jai Narain* v. *Kedar Nath*, AIR 1956 SC 359 at p. 363: 1956 SCR 62 (*per* Bose, J.).

[39] S. 42(4).

[40] *Jai Narain v. Kedar Nath*, *supra*; *see also infra*, "General Principles"; *Shaukat Hussain* v. *Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528.

12. GENERAL PRINCIPLES

With regard to the powers and duties of executing courts, the following fundamental principles should be borne in mind:

(1) *As a general rule*, territorial jurisdiction is a condition precedent to a court executing a decree, and, therefore, no court can execute a decree in respect of property situate entirely outside its local jurisdiction.[41]

(2) An executing court cannot go behind the decree. It must take the decree as it stands and execute it according to its terms. It has no power to vary or modify the terms.[42] It has no power to question its legality or correctness.[43] This is based on the principle that a proceeding to enforce a judgment is *collateral* to the judgment and, therefore, no inquiry into its regularity or correctness can be permitted in such a proceeding.[44]

(3) In case of inherent lack of jurisdiction, the decree passed by the court is a nullity and its invalidity could be set up wherever and whenever it is sought to be enforced, whether in execution or in collateral proceedings.[45] In such a case, there is

[41] S. 39(4); see also *Prem Chand* v. *Mokhoda Debi*, ILR (1890) 17 Cal 699; *Bhagwati Prasad* v. *Jai Narain*, AIR 1958 All 425; *Tarachand* v. *Misrimal*, AIR 1970 Raj 53; *Ittyavira Mathai* v. *Varkey Varkey*, AIR 1964 SC 907 at p. 910: (1964) 1 SCR 495; *Delhi Cloth and General Mills Co. Ltd.* v. *Ramjidas*, AIR 1982 Cal 34; *Mohd. Naseem* v. *Chaman Ara*, (1998) 7 DLT 130. For detailed discussion about "Territorial Jurisdiction", *see supra*, Pt. II, Chap. 4.

[42] *C.F. Angadi* v. *Y.S. Hirannayya*, (1972) 1 SCC 191: AIR 1972 SC 239; *State of Punjab* v. *Krishan Dayal Sharma*, AIR 1990 SC 2177; *Hiralal Moolchand* v. *Barot Raman Lal*, (1993) 2 SCC 458: AIR 1993 SC 1449; *V. Ramaswami* v. *Kailasa Thevar*, AIR 1951 SC 189: 1951 SCR 292; *State of M.P.* v. *Mangilal Sharma*, (1998) 2 SCC 510: AIR 1998 SC 743.

[43] *V. Ramaswami Aiyengar* v. *Kailasa Thevar*, AIR 1951 SC 189 at p. 192: 1951 SCR 292; *Topanmal* v. *Kundomal*, AIR 1960 SC 388 at pp. 390-91; *Vasudev Dhanjibhai Modi* v. *Rajabhai Abdul Rehman*, (1970) 1 SCC 670: AIR 1970 SC 1475; *Nagindas* v. *Dalpatram*, (1974) 1 SCC 242 at pp. 252-53: AIR 1974 SC 471 at p. 477; *Sunder Dass* v. *Ram Prakash*, (1977) 2 SCC 662 at p. 667: AIR 1977 SC 1201 at p. 1204; *SBI* v. *Indexport Registered*, (1992) 3 SCC 159 at p. 169: AIR 1992 SC 1740.

[44] *Basant Singh* v. *Tirloki Nath*, AIR 1960 Punj 610; *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; *Urban Improvement Trust* v. *Gokul Narain*, (1996) 4 SCC 178: AIR 1996 SC 1819; *Bhawarlal* v. *Universal Heavy Mechanical Lifting Enterprises*, (1999) 1 SCC 558.

[45] *Kiran Singh* v. *Chaman Paswan*, AIR 1954 SC 340 at p. 342: (1955) 1 SCR 117; *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747; *Bombay Gas Co. Ltd.* v. *Gopal Bhiva*, AIR 1964 SC 752 at p. 755: (1964) 3 SCR 709; *Kaushalya Devi* v. *K.L. Bansal*, (1969) 1 SCC 59 at pp. 60-61: AIR 1970 SC 838 at p. 839; *Sunder Dass* v. *Ram Prakash*, *supra*: *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354: AIR 1981 SC 416; *Hiralal Moolchand* v. *Barot Raman Lal*, (1993) 2 SCC 458; *Chiranjilal* v. *Jasjit Singh*, (1993) 2 SCC 507; *Urban Improvement Trust* v. *Gokul Narain*, *supra*; *Jaipur Development Authority* v. *Radhey Shyam*, (1994) 4 SCC 370.

no question of going behind the decree, for really in the eye of the law there is no decree at all.[46]

(4) Inherent lack of jurisdiction, however, must appear on the face of the record.[47] Hence, if the decree on the face of it discloses some material on the basis of which the court could have passed the decree, it would be valid. In such a case, the executing court must accept and execute the decree as it stands and cannot go behind it. To allow the executing court to go behind that limit would be to exalt it to the status of a superior court sitting in appeal over the decision of the court which has passed the decree.[48]

(5) A decree which is otherwise valid and executable, does not become inexecutable on the death of the decree-holder or of the judgment-debtor and can be executed against his legal representatives.[49]

(6) When the terms of a decree are vague or ambiguous, an executing court can construe the decree to ascertain its precise meaning.[50] For this purpose, the executing court may refer not only to the judgment, but also the pleadings of the case.[51]

(7) An executing court can go into the question of the executability or otherwise of the decree and consider whether, by any subsequent developments, the decree has ceased to be executable according to its terms.[52]

[46] *Sunder Dass* v. *Ram Prakash, supra; Surinder Nath* v. *Union of India,* 1988 Supp SCC 626 at p. 634: AIR 1988 SC 1777; *S.P. Chengalvaraya Naidu* v. *Jagannath,* (1994) 1 SCC 1 at p. 2: AIR 1994 SC 853; *Bhawarlal* v. *Universal Heavy Mechanical Lifting Enterprises,* (1999) 1 SCC 558.

[47] *Hira Lal* v. *Kali Nath, supra; Vasudev Dhanjibhai Modi* v. *Rajabhai Abdul Rehman, supra.*

[48] *Nagindas* v. *Dalpatram, supra,* at pp. 252-53 (SCC): at p. 477 (AIR); *K.K. Chari* v. *R.M. Seshadri,* (1973) 1 SCC 761: AIR 1973 SC 1311; *Sabitri Dei* v. *Sarat Chandra Rout,* (1996) 3 SCC 301.

[49] *Parbati Debi* v. *Mahadeo Prasad,* (1979) 4 SCC 761: AIR 1979 SC 1915; *V. Uthirapathi* v. *Ashrab Ali,* (1998) 2 SCC 727: AIR 1998 SC 1168.

[50] *V. Ramaswami* v. *Kailasa Thevar,* AIR 1951 SC 189 at p. 1921: 1951 SCR 292; *Topanmal Chhotamal* v. *Kundomal Gangaram,* AIR 1960 SC 388 at p. 390; *Bhavan Vaja* v. *Solanki Hanuji Khodaji, infra; Surinder Nath* v. *Union of India, supra.*

[51] *Bhavan Vaja* v. *Solanki Hanuji Khodaji,* (1973) 2 SCC 40: AIR 1972 SC 1371 at p. 1374; *Topanmal* v. *Kundomal,* AIR 1960 SC 388.

[52] *Jai Narain* v. *Kedar Nath,* AIR 1956 SC 359 at p. 363: 1956 SCR 62; *Haji Sk. Subhan* v. *Madhorao,* AIR 1962 SC 1230 at p. 1235: 1962 Supp (1) SCR 123; *Sudhir Kumar* v. *Baldev Krishna,* (1969) 3 SCC 611: (1970) 3 SCR 114; *Vidya Sagar* v. *Sudesh Kumari,* (1976) 1 SCC 115: AIR 1975 SC 2295; *Bai Dosabai* v. *Mathurdas Govinddas,* (1980) 3 SCC 545 at pp. 552-54: AIR 1980 SC 1334 at pp. 1339-41; *Tiko* v. *Lachman,* 1995 Supp (4) SCC 582; *Maguni Charan* v. *State of Orissa,* (1976) 2 SCC 134: AIR 1976 SC 1121.

(8) A decree which becomes inexecutable by operation of law, may become executable by virtue of a subsequent amendment in the statute and can be executed after such amendment.[53]

(9) The executing court has power to mould the relief granted to the plaintiff in accordance with the changed circumstances.[54]

(10) The court executing the decree transferred to it has the same powers in executing such decree as if it had been passed by itself.[55]

[53] *Dularey Lodh* v. *ADJ, Kanpur*, (1984) 3 SCC 99 at pp. 103, 106: AIR 1984 SC 1260; *Narhari Shivram* v. *Pannalal Umediram*, (1976) 3 SCC 203: AIR 1977 SC 164.

[54] *Yashpal Singh* v. *ADJ*, (1992) 2 SCC 504 at p. 506; *Haji Sk. Subhan* v. *Madhorao*, AIR 1962 SC 1230 at p. 1237: 1962 Supp (1) SCR 123.

[55] S. 42. See also supra, *Jai Narain v. Kedar Nath*; *Mahadeo Prasad* v. *Ram Lochan*, (1980) 4 SCC 354: AIR 1981 SC 416.

PART IV

3 Application for Execution

SYNOPSIS

1. General	599	8. Procedure on receiving application	602
2. Who may apply?: Rule 10	599	(a) Admission: Rule 17	602
3. Who cannot apply?	601	(b) Hearing of application: Rules 105-106	603
4. Against whom execution may be taken out	601	(c) Notice of execution: Rule 22	603
5. To whom application may be made	601	(d) Procedure after notice: Rule 23	605
6. Contents of application: Rule 11	602	9. Limitation	605
7. Form	602	10. Execution application and res Judicata	605

1. GENERAL

EXECUTION is the enforcement of a decree by a judicial process which enables the decree-holder to realise the fruits of the decree passed by a competent court in his favour. All proceedings in execution commence with the filing of an application for execution. Such application should be made to the court which passed the decree or, where the decree has been transferred to another court, to that court.[1] Rules 10-25 and 105-106 of Order 21 deal with execution applications.

2. WHO MAY APPLY?: RULE 10

The following persons may file an application for execution:

(*i*) Decree-holder.[2]

(*ii*) Legal representative of the decree-holder, if the decree-holder is dead.[3]

(*iii*) Representative of the decree-holder.[4]

[1] *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131; *State of Rajasthan* v. *Rustamji Savkasha*, AIR 1972 Guj 179; *Ghulam Nabi* v. *Gaffer Wagey*, AIR 1983 J&K 67: 1982 Kash LJ 423.

[2] R. 10.

[3] S. 146; see also *Ram Murti Devi* v. *Ralla Ram*, AIR 1987 HP 1; *Jagdish Dutt* v. *Dharam Pal*, (1999) 3 SCC 644: AIR 1999 SC 1694; *Jugalkishore* v. *Raw Cotton Co. Ltd.*, AIR 1955 SC 376: 1955 SCR 1369.

[4] S. 146; *see also ibid.*

(*iv*) Any person claiming under the decree-holder.[5]

(*v*) Transferee of the decree-holder, if the following conditions are satisfied[6]:

(*a*) the decree must have been transferred by an assignment in writing or by operation of law;

(*b*) the application for execution must have been made to the court which passed the decree;

(*c*) notice and opportunity of hearing must have been given to the transferor and the judgment-debtor in case of assignment by transfer.

The provision of giving a notice is mandatory and in the absence of it, all the proceedings in the execution would be void.[7] The object of issuing a notice is to determine once and for all and in the presence of the parties concerned the validity or otherwise of the assignment or transfer.[8]

(*vi*) One or more of the joint decree-holders, provided the following conditions are fulfilled:[9]

(*a*) the decree should not have imposed any condition to the contrary;

(*b*) the application must have been made for the execution of the whole decree; and

(*c*) the application must have been for the benefit of all the joint decree-holders;

(*vii*) Any person having special interest.

In the case of a decree in a representative suit, a person represented in such suit may apply for execution, even if he is not on record.[10] A real beneficiary may also maintain an execution application.[11] In a partition suit, the defendant is also a decree-holder to the extent of his share and can file an application for execution.[12] A receiver appointed by a court may apply for execution on behalf of the decree-holder.[13] An insolvent may make such an application before he is adjudicated an

[5] S. 146; see also *Ram Murti Devi* v. *Ralla Ram*, AIR 1987 HP 1 (*ibid.*).

[6] S. 49, O. 21 R. 16; see also *Dhani Ram* v. *Lala Sri Ram*, (1980) 2 SCC 162: AIR 1980 SC 157; *Padmanabhan Pillai* v. *Sulaiman Kunju*, AIR 1987 Ker 125.

[7] *See infra*, "Notice against execution".

[8] *Brajabashi* v. *Manik Chandra*, AIR 1927 Cal 694; *Ramapai* v. *Thrinethran*, 1954 KLT 434.

[9] R. 15.

[10] *Swaminatha* v. *Kumarswami*, AIR 1923 Mad 472; *Ghulam Nabi* v. *Gaffer Wagey*, AIR 1983 J&K 67: 1982 Kash LJ 423.

[11] *Babu Satyendra Narain* v. *Wahiduddin Khan*, AIR 1940 Pat 472.

[12] *Chunilal* v. *Mulchand*, AIR 1923 Bom 23: (1923) 46 Bom 937.

[13] *Jugalkishore* v. *Raw Cotton Co. Ltd.*, AIR 1955 SC 376: 1955 SCR 1369.

insolvent.[14] An agent of the decree-holder can maintain an application for execution.[15]

3. WHO CANNOT APPLY?

A person who is neither a decree-holder nor has a right to execute a decree cannot apply for execution of decree.[16] Similarly, a third party or a stranger has no right to apply for execution even if he is a beneficiary under a compromise.[17] In absence of transfer of interest by a trustee in favour of beneficiary, the latter cannot invoke Section 146 of the Code.[18] A receiver appointed by a court may file execution application. But if he is dead, his son cannot continue the proceedings.[19]

4. AGAINST WHOM EXECUTION MAY BE TAKEN OUT

Execution may be taken out against the following persons:

(*i*) Judgment-debtor.[20]

(*ii*) Legal representatives of the judgment-debtor, if the judgment-debtor is dead.[21] (They shall, however, be liable to the extent of the property of the deceased judgment-debtor which has come to their hands.)[22]

(*iii*) Representative of or the person claiming under the judgment-debtor.[23]

(*iv*) Surety of the judgment-debtor.[24]

5. TO WHOM APPLICATION MAY BE MADE

An application for execution may be filed in the court which passed the decree, or in the court to which the decree has been transferred for execution.[25] Where territorial jurisdiction of a court is transferred after passing a decree, an execution application may be filed either in the court which had passed the decree, or in the court to which territorial jurisdiction was transferred.[26]

[14] *Sankaranarayana Ayyar Firm* v. *Yegnalakshmi Ammal*, AIR 1939 Mad 196.

[15] *Lilavati* v. *Municipal Corpn. of Greater Bombay*, (1966) 68 Bom LR 868: 1967 Mah LJ 112.

[16] *Babu Satyendra Narain* v. *Wahiduddin Khan*, AIR 1940 Pat 472.

[17] *Abidunnissa Khatoon* v. *Amirunnissa Khatoon*, ILR (1877) 2 Cal 327 (PC).

[18] *Baisnab Das* v. *Bholanath*, (1984) 88 CWN 860.

[19] *Krishnaswami Naicker* v. *Naranappa Naicker*, AIR 1959 Mad 209.

[20] S. 50, Or. 21 R. 15; see also *Jagdish Dutt* v. *Dharam Pal*, (1999) 3 SCC 644: AIR 1999 SC 1694; *Kaikhushroo* v. *C.P. Syndicate Ltd.*, AIR 1950 FC 8: 1949 FCR 501.

[21] Ss. 50, 52, 53.

[22] S. 53.

[23] S. 146.

[24] S. 150.

[25] S. 38; see also *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131.

[26] *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87: (1955) 2 SCR 938.

6. CONTENTS OF APPLICATION: RULE 11

Except in the case of a money decree, every application for execution shall be in writing, signed and verified by the applicant or by some other person acquainted with the facts of the case. It shall contain the necessary particulars like the number of the suit, the names of the parties, the date of the decree, the amount of the decree, etc.[27]

Where an application is made for attachment of movable property belonging to a judgment-debtor but not in his possession, the application for execution must be accompanied by an inventory of the property to be attached, containing a reasonably accurate description of the same.[28] Where the application is for the attachment of growing crop it shall specify the time at which it is likely to be harvested.[29]

Where the application is for attachment of immovable property of the judgment-debtor, it shall contain (*a*) the description of such property sufficient to identify the same; and (*b*) the specification of the judgment-debtor's share or interest therein.[30] Rule 13

Where the application is for arrest and detention in prison of the judgment-debtor, it shall state or be accompanied by an affidavit stating the grounds on which arrest is applied for.[31] Rule 11-A

Where the application is for the attachment of land, registered in the office of the Collector, the court may require the applicant to produce a certified extract from such register.[32] R-14

7. FORM

An application for execution shall be in Form No. 6 of Appendix E to the First Schedule. But even if an application is not in the proper form, the defect is not vital or material.[33]

8. PROCEDURE ON RECEIVING APPLICATION

(a) Admission: Rule 17

Rule 17 prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the court to ascertain whether the execution application complies with the requirements of Rules 11 to 14. If they are complied with, the court must admit

[27] R. 11.
[28] R. 12.
[29] R. 45(1).
[30] R. 13.
[31] R. 11-A.
[32] R. 14.
[33] *Ashalata Debi* v. *Jadu Nath Roy*, AIR 1954 SC 409: (1955) 1 SCR 150; *Jugalkishore* v. *Raw Cotton Co. Ltd.*, AIR 1955 SC 376: 1955 SCR 1369; *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65: 1953 SCR 377; *Jiwani* v. *Rajmata Basantika Devi*, 1993 Supp (3) SCC 217: AIR 1994 SC 1286.

and register the application. If they are not complied with, the court shall allow the defect to be remedied then and there or within a time fixed by it. If the defect is not remedied within that period, the court shall reject the application. The provisions of this rule are procedural and they should be interpreted liberally.[34]

(b) Hearing of application: Rules 105-106

Rules 105 and 106 have been inserted by the Amendment Act of 1976. Rule 105 provides that the court before which an application is pending may fix a date for hearing of such application. When the application is called out for hearing and the applicant is not present, the court may dismiss the application. On the other hand, if the applicant is present and the opposite party is not present, the court may hear the application *ex parte* and pass such order as it thinks fit.

Rule 106 lays down that if the application is dismissed for default or an *ex parte* order is passed under Rule 105, then the aggrieved party may apply to the court to set aside such order. The court shall set aside such order if sufficient cause is shown.

An order rejecting an application under Rule 106(1) is appealable.[35]

(c) Notice of execution: Rule 22

Rule 22 provides for the issue of show-cause notices to persons against whom execution is applied for in certain cases. As a general rule, the law does not require any notice to be issued for execution.

In the following cases, however, such notice must be issued:

(*i*) Where an application is made two years after the date of the decree; or more than two years after the date of the last order made on any previous application for execution; or

(*ii*) Where an application is made against the legal representative of the judgment-debtor; or

(*iii*) Where an application is made for the execution of a decree passed by a court of reciprocating territory;[36] or

(*iv*) Where an application is made against the assignee or receiver of insolvent judgment-debtor; or

(*v*) Where the decree is for payment of money and the execution is sought against the person of the judgment-debtor;[37] or

[34] *Jiwani* v. *Rajmata Basantika Devi*, 1993 Supp (3) SCC 217: AIR 1994 SC 1286; *Jugalkishore* v. *Raw Cotton Co. Ltd.*, AIR 1955 SC 376: 1955 SCR 1369; *Mohanlal Goenka* v. *Benoy Krishna*, AIR 1953 SC 65: 1953 SCR 377.

[35] Or. 43 R. 1(*ja*); see also *V.A. Narayana* v. *O.R.M.M.SV.M. Meyyappa*, AIR 1975 Mad 36.

[36] S. 44-A; see also *Jharkhand Mines & Industries Ltd.* v. *Nand Kishore*, AIR 1969 Pat 228.

[37] S. 37.

(*vi*) Where an application is made against a person who has furnished security or given a guarantee for the performance of a decree or for the restitution of property or for the payment of money, to render him personally liable or to sell his property;[38] or

(*vii*) Where an application is made by the transferee or assignee of the decree-holder.[39]

The underlying object of giving notice to the judgment-debtor is not only to afford him an opportunity to put forward objections, if any, against the maintainability of the execution application but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him.[40]

The provision is not *ultra vires* Article 14 of the Constitution.[41] Issue of a notice under Rule 22 is intended to safeguard the interest of the judgment-debtor. It is a fundamental part of the procedure touching upon the jurisdiction of the executing court to take further steps in execution. It is, therefore, mandatory and is a condition precedent to the validity of execution proceedings.[42]

Omission to give notice is a defect which goes to the root of the proceedings and renders them null and void and without jurisdiction unless the judgment-debtor waives such notice.[43]

Sub-rule (2) of Rule 22, however, empowers the court to dispense with such notice, if it would cause unreasonable delay or would defeat the ends of justice.[44] But where a notice is dispensed with, the reasons for such dispensation should be recorded.[45]

special permission

[38] S. 145; see also *Amar Chand* v. *Bhano*, 1995 Supp (1) SCC 550: AIR 1995 SC 871.

[39] R. 16.

[40] *Erava* v. *Sidramappa Pasare*, (1897) 21 Bom 424 (FB); *Lall* v. *Rajkishore*, AIR 1933 Pat 658; *Ramsaran Sah* v. *Deonandan Singh*, AIR 1957 Pat 433; *A.K. Narayanan Nambiar* v. *State of Kerala*, AIR 1964 Ker 158; *Satyanarain Bajoria* v. *Ramnarain Tibrewal*, (1993) 4 SCC 414: AIR 1994 SC 1583; *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131.

[41] *Thota Pichayya* v. *Govt. of A.P.*, AIR 1957 AP 136: 1956 AnWR 322.

[42] *Raghunath Das* v. *Sundar Das*, AIR 1914 PC 129: (1913-14) 41 IA 251; *Chandra Nath* v. *Nabadwip Chandra*, AIR 1931 Cal 476; *Odhavji* v. *Sakarchand*, AIR 1949 Bom 63 (FB); *Bandu Hari* v. *Bhagya Laxman*, AIR 1954 Bom 114; *Fakhrul Islam* v. *Bhubaneshwari Kuer*, AIR 1929 Pat 79; *Ajab Lal Dubey* v. *Hari Charan Tiwari*, AIR 1945 Pat 1 (FB); *Satyanarain Bajoria* v. *Ramnarain Tibrewal*, (1993) 4 SCC 414 at p. 420; *Desh Bandhu Gupta* v. *N.L. Anand*, *infra*.

[43] *Raghunath Das* v. *Sundar Das Khetri* (*ibid.*); *A.K. Narayanan Nambiar* v. *State of Kerala*, *supra*; *Bandu Hari* v. *Bhagya Laxman* (*ibid.*); *Rajagopala Aiyar* v. *Ramanujachariyar*, AIR 1924 Mad 431 (FB); *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131 at pp. 144-45.

[44] *Raghunath Das* v. *Sundar Das Khetri* (*ibid.*); *Jharkhand Mines & Industries Ltd.* v. *Nand Kishore Prasad*, *supra*; *Rajagopala Aiyar* v. *Ramanujachariyar* (*ibid.*); *A.K. Narayanan Nambiar* v. *State of Kerala*, *supra*.

[45] *Satyanarain Bajoria* v. *Ramnarain Tibrewal*, (1993) 4 SCC 414: AIR 1994 SC 1583; *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131; *Raghunath Das* v. *Sundar Das*, AIR 1914 PC

There is, however, conflict of opinion as to the effect of omission to record reasons by the court. According to some High Courts, it is a mere irregularity and does not invalidate the proceedings.[46] While, according to some other High Courts, it is a defect which goes to the very root of the matter and renders all the proceedings void for want of jurisdiction.[47]

(d) Procedure after notice: Rule 23

If the person to whom the notice is issued under Rule 22 does not appear or does not show cause against execution, the court shall, unless it sees any cause to the contrary, issue process for the execution of the decree.[48] But where such person offers his objections against the execution of the decree, the court shall consider them and pass such order as it thinks fit.[49]

9. LIMITATION

The period of limitation for the execution of a decree (other than a decree granting a mandatory injunction) is twelve years from the date of the decree.[50] The period of limitation for the execution of a decree for mandatory injunction is three years from the date of the decree.[51]

10. EXECUTION APPLICATION AND RES JUDICATA

As stated above,[52] even before the Amendment Act of 1976, the doctrine of *res judicata* was judicially held applicable to execution proceedings. Explanation VII to Section 11 as added by the Amendment Act of 1976 now specifically provides that the provisions of *res judicata* will apply to execution proceedings also.

But before an earlier decision can operate as *res judicata*, the execution application must have been heard and finally decided by the Court.[53] Hence, if an execution application is dismissed for default

129: (1913-14) 41 IA 251; *Jharkhand Mines & Industries Ltd.* v. *Nand Kishore Prasad, supra*; *P.R. Srinivasa* v. *M.D. Narayana*, AIR 1918 Mad 645.

[46] *Yakub Harunkhan* v. *Mahadev Narayan*, AIR 1932 Bom 509; *Manindra Chandra* v. *Rahatannessa Bibi*, AIR 1931 Cal 555; *Kamala Dutta* v. *Ballygunge Estates (P) Ltd.*, AIR 1974 Cal 75: 77 CWN 839; *Rajagopala Aiyar* v. *Ramanujachariyar*, AIR 1924 Mad 431 (FB); *Chacko Pyli* v. *Iype Varghese*, AIR 1956 TC 147: ILR 1955 TC 823: 1955 KLT 739 (FB).

[47] *U Nyo* v. *U Po Thit*, AIR 1935 Rang 42; *Mansaram* v. *Kamarali*, AIR 1954 Nag 78.

[48] Rr. 23(1), 24, 25; *Desh Bandhu Gupta* v. *N.L. Anand, supra.*

[49] R. 23(2).

[50] Art. 136, Limitation Act, 1963.

[51] Art. 133, Limitation Act, 1963.

[52] *Supra*, Pt. II, Chap. 2.

[53] *Pulavarthi Venkata* v. *Valluri Jagannadha*, AIR 1967 SC 591: (1964) 2 SCR 310; *Shivashankar Prasad* v. *Baikunth Nath*, (1969) 1 SCC 718: AIR 1969 SC 971.

of appearance,[54] or for non-prosecution,[55] or as being premature,[56] or as being belated,[57] or on the ground that it is not pressed,[58] or is not maintainable,[59] the order will not operate as *res judicata* and a fresh execution application on the same ground for the same prayer is not barred.

[54] *Shivashankar Prasad* v. *Baikunth Nath (ibid.).*

[55] *Ibid*, see also *Jagadeo Nawasji* v. *Coop. Society Mahalungi No. 2*, AIR 1951 Nag 210.

[56] *Brij Behari Lal* v. *Phunni Lal*, AIR 1938 All 377; *Taluqdar Khan* v. *Khairulnisa*, AIR 1928 Oudh 38.

[57] *G.B. Solano* v. *Kumari Umeshwari*, AIR 1938 Pat 216.

[58] *Firm Lachiram Santhokchand Ameechand* v. *Firm Tarachand Jayarupji*, AIR 1937 Mad 289.

[59] *Ameena Amma* v. *Sundaram Pillai*, (1994) 1 SCC 743; *see also supra*, Pt. II, Chap. 2.

PART IV

4 Stay of Execution

SYNOPSIS

1. When court may stay execution?: Rule 26 — 607
2. Staying of order and quashing of order: Distinction — 608
3. Revival of execution proceedings: Rule 27 — 608
4. Stay of execution pending suit: Rule 29 — 608
5. Order of injunction and order of stay: Distinction — 610

1. WHEN COURT MAY STAY EXECUTION?: RULE 26

PROVISIONS for stay of execution of a decree are made in Rule 26 of Order 21. This rule lays down that the executing court shall, on sufficient cause being shown and on the judgment-debtor furnishing security or fulfilling such conditions, as may be imposed on him, stay 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 power to stay execution of a decree by a transferee court is not similar to the power of the court which passes a decree. Whereas the transferor court can grant absolute stay, the transferee court can stay execution 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. Such order can be made on the application of the judgment-debtor. A transferee court cannot invoke inherent powers to grant stay.[1]

Where the judgment-debtor applies for stay of execution, the transferee court must obtain security from the judgment-debtor or impose such conditions as it may think fit. The provision is thus mandatory and imperative.[2]

[1] *Shaukat Hussain* v. *Bhuneshwari Devi*, (1972) 2 SCC 731: AIR 1973 SC 528.

[2] Or. 21 R. 26(3).

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.[3]

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.[4]

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.[5]

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.[6]

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.[7]

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-

[3] 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.

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

[5] R. 27; see also supra, *Shaukat Hussain* v. *Bhuneshwari Devi.*

[6] *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.

[7] *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.[8]

The provisions of Rule 29 are not peremptory but discretionary.[9] The discretion, however, must be exercised judicially and in the interests of justice and not mechanically and as a matter of course.[10] No hard and fast rule can be laid down in what cases stay would be granted or refused.[11] 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.[12]

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.[13] 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.[14] 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 co-gent 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.[15] The discretion of the court under Rule 29 has to be exercised with "very great care" and only in "special cases".[16] It cannot be exercised so as to allow a party to abuse the process of law.[17]

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 Talifiqur Rahman* v. *Sital Prasad*, AIR 977 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. 9.

[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.[18] 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.[19]

It is submitted that the following observations of Misra, J. (as he then was) in the case of *Judhistir* v. *Surendra*[20] 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.*"[21]
>
> (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.[22]

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.[23]

[18] *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.

[19] R. 29; see also *H.L. Nantha* v. *T.C. Ramalingam*, AIR 1978 Mad 269.

[20] AIR 1969 Ori 233.

[21] *Ibid*, at p. 234. See also *Subhas Kumar Singh* v. *Sheo Balak Singh*, *supra*; *Quazi Toufiqu Rahman* v. *Nurbanu Bibi*, AIR 1976 Gau 39; *Quazi Talifiqur Rahman* v. *Sital Prasad*, AIR 1977 Gau 25.

[22] *Teja Singh Mehta and Co.* v. *Grindlays Bank Ltd.*, (1982) 3 SCC 199.

[23] *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 611
2. Choice of mode of execution 612
3. Simultaneous execution 613
4. Discretion of court 615
5. Modes of executing decrees 615
   (1) Delivery of property 615
      (a) Movable property: Section 51(a), Rule 31 615
      (b) Immovable property: Rules 35 and 36 615
   (2) Attachment and sale of property: Section 51(b) 617
   (3) Arrest and detention: Section 51(c) 618
   (4) Appointment of receiver: Section 51(d) 618
   (5) Partition: Section 54 620
   (6) Cross-decrees and cross-claims: Rules 18-20 620
      (a) Cross-decrees: Rules 18 and 20 620
      (b) Cross-claims: Rules 19-20 622
   (7) Payment of money: Rules 2, 30 622
      (a) Nature and scope 622
      (b) Modes of paying money 623
      (c) Payment in court 623
      (d) Payment out of court 623
      (e) Certification of payment 624
      (f) Effect of payment 625
      (g) Uncertified payment 625
   (8) Specific performance of contract: Rule 32 625
   (9) Injunction: Rule 32 626
   (10) Restitution of conjugal rights: Rules 32-33 626
   (11) Execution of document: Rule 34 627
   (12) Endorsement of negotiable instrument: Rule 34 628
   (13) Attachment of rent, mesne profits, etc.: Rule 42 628
   (14) Liability of surety: Section 145 628
   (15) Decree against corporation: Rule 32 629
   (16) Decree against firm: Rules 49 and 50 630
   (17) Attachment of decree: Rule 53 630
   (18) Payment of coins or currency notes: Rule 56 631

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.

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.[2]

2. CHOICE OF MODE OF EXECUTION

The Code allows more than one mode of execution of decrees.[3] 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.[4] It is for him to decide in which mode he will execute his decree. This power, however, is "subject to such conditions and limi-

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

[3] 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."

[4] *Mahadeo Prasad Singh* v. *Ram Lochan*, *supra*.

tations as may be prescribed" by the Code.[5] It is also subject to the discretion of the court.[6]

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.*[7], 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. Negativing 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.*"[8] (emphasis supplied)

In *Shyam Singh* v. *Collector, Distt. Hamirpur*[9] 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*[10], 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.*"[11] (emphasis supplied)

[5] S. 51; see also supra, *Mahadeo Prasad Singh* v. *Ram Lochan; Shyam Singh* v. *Collector, Distt. Hamirpur, infra.*

[6] *Ibid, see also infra,* "Discretion of court".

[7] (1969) 1 SCC 485: AIR 1969 SC 897.

[8] *Ibid,* at pp. 489-90 (SCC): at p. 901 (AIR) (*per* Shah, J.).

[9] 1993 Supp (1) SCC 693.

[10] *Padrauna Rajkrishna Sugar Works Ltd.* v. *Land Reforms Commr.,* (1969) 1 SCC 485: AIR 1969 SC 897.

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

It 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.[12]

In *Anandi Lal* v. *Ram Sarup*[13], 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."[14]

In *Shyam Singh* v. *Collector, Distt. Hamirpur*[15], 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*[16], 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.*"[17]
>
> (emphasis supplied)

[12] Or. 21 R. 21; see also supra, *Shyam Singh* v. *Collector, Distt. Hamirpur.*

[13] AIR 1936 All 495: 1936 All LJ 605 (FB).

[14] *Ibid*, at p. 502 (AIR) (*per* Sulaiman, C.J.).

[15] 1993 Supp (1) SCC 693 at p. 702.

[16] AIR 1935 Cal 127: 154 IC 606: 38 CWN 1085.

[17] *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".[18]

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.[19] The words *specific movable* (property) do not include money and, therefore, a decree for money cannot be executed under Rule 31.[20] 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.[21]

(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.[22] 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.[23] Possession delivered in this manner is known as *khas* or *actual* possession. But if such property is in

[18] 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.*

[19] R. 31.

[20] *Netumprakkot Kumath* v. *Nelumprokkotti Kumath,* AIR 1914 Mad 572: (1914) 37 Mad 381; *Karnani Industrial Bank Ltd.* v. *Baraboni Coal Concern Ltd.,* AIR 1938 Cal 471.

[21] *Pudmanund Singh* v. *Chundi Dat,* (1896) 1 CWN 170.

[22] For detailed discussion, *see infra,* Chap. 10.

[23] *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*[24] 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."[25]

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.[26]

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.[27]

[24] AIR 1971 All 117.

[25] *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.

[26] R. 35(2).

[27] 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.[28] A subtenant is bound by a decree of ejectment passed against a tenant.[29] Similarly, a decree passed against a *benamidar* binds the real owner.[30]

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.[31]

(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.[32] It is immaterial that the place of business of the judgment-debtor is outside the jurisdiction of the court.[32]

The words *attachment* and *sale* in clause (*b*) of Section 51 are to be read disjunctively.[33] Therefore, the attachment of the property is not a condition precedent.[34] Hence, sale of property without an attachment is not void or without jurisdiction and does not vitiate the sale. It is merely an irregularity.[35]

An order of attachment takes effect from the moment it is brought to the notice of the court.[36] Rule 54 provides for the attachment of immovable property and the procedure for the proclamation of such attachment.[37] 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.[38]

[28] *Sk. Yusuf* v. *Jyotish Chandra*, AIR 1932 Cal 241; *Patel Naranbhai* v. *Dhulabhai*, (1992) 4 SCC 264: AIR 1992 SC 2009.

[29] *Shri Jagadguru Gurushiddaswami G.G. 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.

[30] *Patel Naranbhai* v. *Dhulabhai*, (1992) 4 SCC 264: AIR 1992 SC 2009.

[31] *Ibid*, at p. 271 (SCC).

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

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

[34] *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.

[35] *Rahim Bux Haji & Sons* v. *Firm Samiullah & Sons*, AIR 1963 All 320.

[36] *Viswanathan* v. *Muthuswamy Gounder*, AIR 1978 Mad 221.

[37] For detailed discussion, *see infra*, Chaps. 9, 10.

[38] *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.[39]

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.[40]

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.[41]

(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.[42] It cannot be

[39] 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.

[40] Proviso to S. 51; see also supra, *Jolly George Varghese* v. *Bank of Cochin*.

[41] See "Arrest and detnetion", *supra*. For detailed discussion and case law, *see infra*, Chap. 7.

[42] *Kerr on Receivers* (1972) at pp. 37-39; *Shephard, Re*, (1889) 43 Ch D 131 (CA); *Saileshwar Lakhaiyar* v. *Kanti Kumar*, AIR 1965 Pat 238; *Dhirendra Nath* v. *Santasila Debi*, AIR 1969 Cal 406.

claimed as of right.[43] 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.[44] 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.[45] 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.[46]

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.[47] Again, this mode of execution cannot be resorted to in order to circumvent the statutory provisions.[48]

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.[46] 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.[49] A receiver can be appointed even before the attachment of the property,[50] and even in respect of the property situate outside the territorial jurisdiction of the court.[51]

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

[43] *Ibid*, see also *Onkarlal* v. *V.S. Rampal*, AIR 1961 Raj 179.

[44] *Bhagwati Bai* v. *Padma Bai*, AIR 1955 Ajm 58; *Onkarlal* v. *V.S. Rampal* (*ibid.*); *Dhirendra Nath* v. *Santasila Devi*, *supra*.

[45] *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*.

[46] *Toolsa Golal* v. *John Antone*, (1887) 11 Bom 448; *Partap Singh* v. *Delhi & London Bank Ld.*, ILR (1908) 30 All 393.

[47] *Hemendra Nath Roy* v. *Prokash Chandra*, AIR 1932 Cal 189; *Nawab Bahadur* v. *Karnani Industrial Bank Ltd.*, *supra*; *Onkarlal* v. *V.S. Rampal*, *supra*.

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

[49] *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.

[50] *Nawab Bahadur* v. *Karnani Industrial Bank Ltd.*, *supra*; *Vakharia & Sons* v. *Kantilal*, (1970) 11 GLR 1069.

[51] *Dhirendra Nath* v. *Santasila Debi*, AIR 1969 Cal 406.

[52] 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.[53]

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[54], 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.[55]

(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 *A*'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*

[53] S. 54; see also *Sanjay Dinkar* v. *State of Maharashtra*, (1986) 1 SCC 83: AIR 1986 SC 414; *Ramrathibai* v. *Surajpal*, AIR 1995 Bom 445; *Chintaman* v. *Shankar*, (1999) 1 SCC 76.

[54] *Bhimangauda Konapgauda Patil* v. *Hanmant Rangappa Patil*, AIR 1918 Bom 206.

[55] *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[56], 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.*"[57]

(emphasis supplied)

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

(*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.[60]

[56] AIR 1937 PC 39: (1936-37) 64 IA 67.

[57] *Ibid*, at p. 41 (AIR) (*per* Sir George Rankin).

[58] R. 20.

[59] *Lakshmichand* v. *State of A.P.*, (1987) 1 SCC 19 at p. 22: AIR 1987 SC 20.

[60] *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.[61]

(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.[62]

(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.[63]

(v) Material date for satisfaction.—The material date for the satisfaction of the decree is the date of decree itself.[64]

(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.[65]

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

[61] *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.

[62] R. 20; see also *Lakshmichand* v. *State of A.P.*, (1987) 1 SCC 19 at p. 22: AIR 1987 SC 20.

[63] *Mahendra Singh* v. *Dataram Jagnnath*, (1998) 9 SCC 28 at pp. 37-38: AIR 1998 SC 1219 at p. 1225.

[64] *Sreepathi Achariyar* v. *Sankaranarayana Iyer*, 1961 Ker LT 875: (1961) 2 Ker LR 478.

[65] R. 30.

[66] *Saraswatibai* v. *Govindrao Keshavrao*, AIR 1961 MP 145 (FB): 1961 MP LJ 256 (FB).

[67] *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.[68]

(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.[69]

(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.[70] This is an enabling provision for the benefit of judgment-debtors.[71]

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.[72] On the amount being paid, interest shall cease from the date of service of the notice.[73]

(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.[74]

When the payment is made out of court, the following particulars must be accurately stated:[75]

(*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;

[68] *Saraswatibai* v. *Govindrao Keshavrao*, AIR 1961 MP 145 (FB): 1961 MP LJ 256 (FB).

[69] 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.

[70] *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.

[71] *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131.

[72] R. 1(2).

[73] *Saraswatibai* v. *Govindrao Keshavrao*, AIR 1961 MP 145 (FB): 1961 MP LJ 256 (FB).

[74] R. 1(*b*); see also *Ramanathan Chettiar* v. *Ramanathan Chettiar*, AIR 1968 SC 1047: (1968) 3 SCR 367.

[75] 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.[76]

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.[77]

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.[78] 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.[79]

(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.[80]

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.[81]

[76] R. 1(4), (5).

[77] Proviso to R. 1(5).

[78] R. 2(1).

[79] R. 2(2).

[80] R. 2(2-A).

[81] *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.[82] 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.[83]

(g) Uncertified payment

The Code prohibits the executing court from recognising any payment or adjustment which has not been certified or recorded.[84] 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.[85] 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.[86]

(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.[87]

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.[88] Where the decree does not specify the time for performance of the contract, it should be performed within reasonable time.[89] Even if the decree for specific performance does not provide for delivery of possession, the court can deliver possession

[82] *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.

[83] *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.

[84] *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.

[85] 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.

[86] *Ram Dass* v. *Mathura Lal*, (1982) 3 SCC 198.

[87] R. 32(1); see also *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562.

[88] *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.

[89] *Hungerford Investment Trust Ltd.* v. *Haridas Mundhra*, *supra*.

as incidental to the execution of the sale deed.[90] 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.[91]

(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.[92]

The provision applies to prohibitory as well as mandatory injunctions.[93]

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.[94]

(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.[95]

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.[96]

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

[90] *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.

[91] R. 32(2).

[92] R. 32(1).

[93] *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).

[94] R. 32(2).

[95] R. 32(1); see also *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562.

[96] *Sheo Kumari* v. *Mathura Ram*, AIR 1936 All 657; *Vankar Kuber* v. *Vankar Lilaben*, (1979) 20 Guj LR 584: 1979 Hin LR 559.

[97] *M.J. Sivarama* v. *V. Veerappa*, AIR 1914 Mad 219.

by wife to live with her husband in unequivocal terms amounts to wilful disobedience.[98]

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.[99]

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.[100]

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.*[101]
(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.[102]

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

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 scruti-

[98] *Pedapudi Nookaratnam* v. *Pedapudi Venkata*, AIR 1949 Mad 374; *M.P. Shreevastava* v. *Veena*, AIR 1965 Punj 54: ILR (1964) 2 Punj 803.

[99] *Sreevastava* v. *Veena*, AIR 1965 Punj 54: ILR (1964) 2 Punj 803.

[100] *Saroj Rani* v. *Sudarshan Kumar Chadha*, (1984) 4 SCC 90: AIR 1984 SC 1562 (*per* Mukharji, J.).

[101] *Ibid*, at p. 1568 (AIR) (para 17).

[102] R. 34; see also *Pratibha Singh* v. *Shanti Devi*, (2003) 2 SCC 330: AIR 2003 SC 643.

[103] *Saudamini Dasi* v. *Behary Lal*, (1920) 25 CWN 68: 61 IC 535.

[104] *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.

nize the document and may also make alterations in the draft to bring it in conformity with the terms of the decree.[105]

An order made under this provision is appealable.[106]

(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.[107]

An order made under this provision is appealable.[108]

(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.[109] Such attachment, however, cannot affect any interest created in the property prior to the attachment.[110] The expression "any other matter" should be construed *ejusdem generis*.[111] 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.[112] A decree-holder applying for attachment under this provision can claim rateable distribution.[113]

(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

[105] *Sashimohan* v. *Monomohan*, AIR 1971 A&N 118: 1970 Ass LR 52.

[106] Or. 43 R. 1(*i*).

[107] R. 34.

[108] Or. 43 R. 1(*i*).

[109] R. 42.

[110] *Paul Bros.* v. *Ashim Kumar*, (1990) 3 SCC 726 at p. 733: AIR 1991 SC 796.

[111] *Dasarathi* v. *Krishna*, (1961) 27 Cut LT 412.

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

[113] *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 him.[120] 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. *Raghumal*, 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.[123]

(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.[124]

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.[125] Such determination operates as a decree.[126]

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.[127] 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.[128] 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.[129]

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.[130]

(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.[131] 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.[132]

[123] R. 32(2).

[124] 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.

[125] R. 50(2). See also *Gajendra Narain* v. *Johrimal* (*ibid.*).

[126] R. 50(3).

[127] R. 49(1).

[128] R. 50(4). See also *Ravindra Finance* v. *Yaanai Tobacco Co.*, AIR 1979 Mad 25.

[129] *Ravindra Finance* v. *Yaanai Tobacco Co.* (*ibid.*).

[130] *Gambhir Mal* v. *J.K. Jute Mills Co. Ltd.*, AIR 1963 SC 243: (1963) 2 SCR 190.

[131] R. 53(1), (2), (3).

[132] 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.[133]

(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.[134]

Zamindari Compensation Bonds are not coins or currency notes.[135]

[133] *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).

[134] R. 56.

[135] 1962 All NR (HC) 18.

PART IV

6 Arrest and Detention

SYNOPSIS

1. General	632	7. Opportunity to judgment-debtor of satisfying decree	635
2. Nature and scope	632	8. Power and duty of court	635
3. When arrest and detention may be ordered?	633	9. Recording of reasons	637
4. Who cannot be arrested?: Sections 56, 58, 135, 135-A	633	10. Period of detention: Section 58	637
5. Procedure	633	11. Release of judgment-debtor: Sections 58-59	637
6. Notice: Order 21 Rules 37 & 40	634	12. Rearrest of judgment-debtor	637

1. GENERAL

ONE OF THE modes of executing a decree is arrest and detention of the judgment-debtor in a civil prison.[1] The decree-holder has an option to choose a mode for executing his decree and, *normally*, a court of law in the absence of special circumstances, cannot compel him to invoke a particular mode of execution.[2] Sections 55 to 59 and Rules 30 to 41 deal with arrest and detention of the judgment-debtor in civil prison.

2. NATURE AND SCOPE

The Code enumerates various modes of execution.[3] One of such modes is arrest and detention of the judgment-debtor in a civil prison. The substantive provisions[4] deal with rights and liabilities of the decree-holder and judgment-debtor and procedural provisions lay down conditions thereof.[5]

1 S. 51(*c*).
2 *See supra*, "Mode of execution", Chap. 5.
3 For detailed discussion, *see supra*, Chap. 5.
4 Ss. 55-59.
5 Or. 21 Rr. 30-41.

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.[6] Likewise, in case of a decree for specific performance of a contract or for injunction, a judgment-debtor can be arrested and detained.[7] 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.[8]

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;[9]

(*ii*) judicial officers, while going to, presiding in, or returning from their courts;[10]

(*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;[11]

(*iv*) members of legislative bodies;[12]

(*v*) any person or class of persons, whose arrest, according to the State Government, might be attended with danger or inconvenience to the public;[13]

(*vi*) a judgment-debtor, where the decretal amount does not exceed rupees two thousand.[14]

5. PROCEDURE

A judgment-debtor may be arrested at any time and on any day in execution of a decree.[15] 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.[16] No judgment-debtor may be arrested unless and until the decree-holder pays into court the subsistence allowance as fixed by the court.[17]

Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released at once.[18]

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.[19] 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.[20]

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.[21] Again, a decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman,[22] or a minor, or a legal representative of a deceased judgment-debtor.[23]

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.[24] The purpose of issuing notice is to afford protection to honest debtors incapable of paying dues for reasons beyond their control.[25]

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.[26] It has an impact on

[16] S. 58(1-A).

[17] R. 39.

[18] *See infra*, "Release of judgment-debtor".

[19] R. 11-A.

[20] *I.K. Merchants Ltd.* v. *Indra Prakash*, AIR 1973 Cal 306 at p. 314.

[21] *Ibid*, see also *P.G. Ranganatha* v. *Mayavaram Financial Corpn.*, AIR 1974 Mad 1.

[22] S. 56.

[23] Ss. 50, 52.

[24] R. 37(1).

[25] *Jogendra Missir* v. *Ramnandan Singh*, AIR 1968 Pat 218 at pp. 221-22.

[26] *Jolly George Varghese* v. *Bank 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.[27]

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.[28]

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.[29] 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.[30]

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.[31]

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.[32]

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.[33] 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] *Amulya 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 Lal*, 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.[34] Mere omission to pay, however, cannot result in arrest or detention of the judgment-debtor.[35] 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*[36], 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."[37] (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."[38]

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

[34] *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 Ammal*, AIR 1972 AP 292; *Shyam Singh* v. *Collector, Distt. Hamirpur*, 1993 Supp (1) SCC 693.

[35] *Jolly George Varghese* v. *Bank of Cochin*, *supra*.

[36] (1980) 2 SCC 360: AIR 1980 SC 470.

[37] *Ibid*, at p. 368 (SCC): at pp. 475-76 (AIR).

[38] *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.[39] Such reasons should be recorded every time and in every proceeding in which the judgment-debtor is ordered to be detained.[40]

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.[41]

Where the decretal amount does not exceed rupees two thousand, no detention can be ordered.[42]

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

A judgment-debtor may be released in the following cases:[43]

(*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);[44]

(*v*) On the ground of illness.[45]

12. REARREST OF JUDGMENT-DEBTOR

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

[39] *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.

[40] *Ibid*, see also *S.K. Kuttalalingam* v. *S.V.N. Chinnakannu Pillai*, AIR 1952 Mad 18.

[41] S. 58(1).

[42] S. 58(1-A).

[43] Proviso to S. 58(1); *see also*, Ss. 57, 59.

[44] S. 58(2).

[45] S. 59.

[46] *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.

[47] *Kesar Singh* v. *Karam 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.[48] 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.[49]

[48] *Malli K. Dhanalakshmi* v. *Malli Krishnamurthi*, AIR 1951 Mad 756: (1951) 1 Mad LJ 515: 1951 Mad WN 220.

[49] *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 639
2. Nature and scope 639
3. Object 640
4. Property which can be attached: Section 60 640
5. Property which cannot be attached: Sections 60 and 61 641
6. Modes of attachment: Section 62, Order 21 Rules 43-54 642
7. Precept: Section 46 645
   (a) Meaning 645
   (b) Nature and scope 645
   (c) Object 645
   (d) Limitations 645
8. Garnishee Order: Rules 46-A to 46-I 646
   (a) General 646
   (b) Meaning 646
   (c) Illustration 647
   (d) Object 647
   (e) Doctrine explained 647
   (f) Notice 647
   (g) Effect of payment 648
   (h) Failure to pay 648
   (i) Costs 648
   (j) Appeal 648
   (k) Wrongful garnishment 648
9. Determination of attachment: Rules 55-58 648
10. Private alienation of property after attachment: Section 64 649
    (a) Nature and scope 649
    (b) Object 649
    (c) Interpretation 650
    (d) Private transfer: Meaning 650

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.[1] Likewise, it also specifies properties which are not liable to be attached or sold.[2] It also prescribes the

[1] S. 60(1).

[2] 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.

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

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

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

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.[9] At the same time, it protects a judgment-debtor by granting exemption to certain properties from attachment and sale.[10]

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

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 Swarup*, 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.[14] The section is not exhaustive.[15] Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence *if it is saleable otherwise.*[16]

(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.[17] 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.[18]

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.[19] Another view was that it was based on public policy and, therefore, cannot be waived by him.[20]

[14] *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 352; *Balkrishan Gupta* v. *Swadeshi Polytex Ltd.*, (1985) 2 SCC 167 at pp. 192-93: AIR 1985 SC 520 at p. 534.

[15] *Ramesh Himmatlal* v. *Harsukh Jadhavji*, (1975) 2 SCC 105: AIR 1975 SC 1470.

[16] *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.

[17] 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.

[18] *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.

[19] *Rajindar Kumar* v. *Chetan Lal*, AIR 1940 Lah 65; *Uzir Biswas* v. *Haradeb Das*, AIR 1920 Cal 424; *Balu 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.

[20] *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.[21] 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.[22]

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:

	Type of Property	*Mode of Attachment*
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.[23]
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".[24]
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.[25]
4.	Negotiable instrument neither deposited in a court nor in the custody of a public officer;	—By actual seizure and bringing it into court.[26]

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.

	Type of Property	*Mode of Attachment*
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.[27]
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.[28]
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.[29]
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.[30]
9.	Partnership property;	—By making an order: (*a*) charging the interest of the partner in the partnership property; (*b*) appointing a receiver of the share of the partner in profits; (*c*) directing accounts and inquiries; and (*d*) ordering sale of such interests.[31]
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.[32]

[27] R. 46(1)(*a*).
[28] R. 46(1)(*b*).
[29] R. 47.
[30] Rr. 47 and 48-A.
[31] R. 49.
[32] R. 52; see also *Kanhaiyalal* v. *Dr. D.R. Banaji*, AIR 1958 SC 725: 1959 SCR 333.

	Type of Property	*Mode of Attachment*
11.	(*i*) Decree for payment of money or sale in enforcement of a mortgage or charge—	
	(*a*) passed by the court executing the decree;	—By an order of such court.[33]
	(*b*) passed by another court;	—By issuing a notice to such court requesting it to stay execution thereof.[34]
	(*ii*) Decree other than that mentioned above;	—By issuing a notice (*a*) to the decree-holder prohibiting him from transferring or charging it in any way; (*b*) to the executing court from executing it until such notice is cancelled.[35]
12.	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.[36]
		—Where application is for the attachment of growing crop, it shall specify the time at which is likely to be harvested.[37] (The object is to enable the court to make necessary arrangements for the custody of the crop.)[38]
13.	Immovable property;	—By an order prohibiting the judgment-debtor from transferring or charging it in any manner and all persons from taking any benefit from such transfer or charge.[39]

[33] R. 53(1)(*a*).
[34] R. 53(1)(*b*).
[35] R. 53(4).
[36] R. 44.
[37] R. 45.
[38] *Mahabir Sah* v. *Emperor*, AIR 1941 Pat 136.
[39] R. 54; see also *M. Marathachalam* v. *Padmavathi Ammal*, (1971) 3 SCC 878; *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131; *Satyanarayana Bajoria* v. *Ramalingam Tibrewal*, AIR 1952 Mad 86 (FB).

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.[40] 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".[41]

(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.[42]

(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.[43]

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.[44] It is for this reason that the effect of the attachment in pursuance of the precept is, as a

[40] S. 62.

[41] *Concise Oxford English Dictionary* (2002) at p. 1125.

[42] S. 46(1).

[43] *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.

[44] *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.[45]

An order of permanent attachment is, therefore, illegal.[46] 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.[47] Again, no attachment can be effected under this section where the property is situate outside India.[48]

8. GARNISHEE ORDER: RULES 46-A TO 46-I

(a) General

Rules 46-A to 46-I 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.[49]

[45] Proviso to S. 46(2). *Hindustan Bicycles* v. *Nath Bank*, AIR 1957 AP 209.

[46] *Gurdiyal Singh case, supra.*

[47] *Chimandas* v. *Mahadevappa Firm*, AIR 1961 AP 417.

[48] *Mela Mal* v. *Bishan Das*, AIR 1931 Lah 723.

[49] *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.[50]

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.[51] Where the garnishee disputes his liability, the court must raise an issue, and determine the liability of the garnishee.[52]

(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

[50] *Mackinnon Mackenzie & Co. (P) Ltd.* v. *Anil Kumar Sen*, AIR 1975 Cal 150.

[51] *Kazim Jawaz Jung* v. *Mir Mohd. Ali*, AIR 1972 AP 70.

[52] 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.[53]

(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.[54]

(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.[55]

(i) Costs

The costs of garnishee proceedings are at the discretion of the court.[56]

(j) Appeal

Orders passed in garnishee proceedings are appealable as "decrees".[57]

(k) Wrongful garnishment

A wrongful garnishment may give rise to an action for damages.[58]

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;[59]

(*ii*) Where the decree is reversed, or is set aside;[60]

(*iii*) Where the court upholds objection against the attachment and makes an order releasing the property;[61]

[53] *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.

[54] Rr. 46-E, 46-F, 46-G.

[55] Rr. 46-B, 46-H; see also *State Bank of Bikaner and Jaipur* v. *District & Sessions Judge*, AIR 2005 Raj 246.

[56] R. 46-G.

[57] R. 46-H.

[58] *Halsbury's Laws of England* (4th Edn.) Vol. 17, para 537 at pp. 335-36.

[59] R. 55 (*a*), (*b*).

[60] R. 55(*c*).

[61] 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.[71] But if the sale deed was executed prior to attachment before judgment, it can be registered subsequently and will prevail over attachment.[72]

(c) Interpretation

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

(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.[75] 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.[76]

[71] *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.

[72] *Hamda Ayimal* v. *Avadiappa Pathar*, (1991) 1 SCC 715; *Vannarakkal Kallalathil* v. *Chandramaath Balakrishnan*, (1990) 3 SCC 291.

[73] *Manuswami* v. *Pandurang*, AIR 1978 AP 47; *Supreme General Films Exchange Ltd.* v. *Brijnath Singhji*, (1975) 2 SCC 530: AIR 1975 SC 1810.

[74] *Radha Mohan* v. *Wahidan*, AIR 1934 Pat 685; *Subbayya* v. *Kandi Subba Reddi*, AIR 1927 Mad 648.

[75] *Supreme General Films Exchange Ltd.* v. *Brijnath Singhji, supra.*

[76] *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	651	6. Powers of executing court	657
2. Section 47	651	7. Duties of executing court	657
3. Object	652	8. Objection to validity of decree	658
4. Nature and scope	653	9. General principles	658
5. Conditions	653	10. Bar of suit	658
(1) Parties or their representatives	654	11. Appeal	658
(2) Execution, discharge or satisfaction of decree	655	12. Revision	661
		13. Pending matters	661

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.[1]

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. *Indian Airlines*, (1983) 4 SCC 461: AIR 1983 SC 1201; *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131: 1993 AIR SCW 3458.

(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.[2] Section 47, therefore, must be construed liberally.[3]

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.[4] 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.[5]

[2] *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 LR 149 at p. 155 (PC): 18 Suth WR 185; *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.

[3] *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.

[4] *Prosunno Commar* v. *Kasi Das* (*ibid.*); *Kayem Biswas* v. *Bahadur Khan*, AIR 1925 Cal 1258.

[5] *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.[6]

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.[7] It does not matter whether such questions arise before or after the decree has been executed.[8]

The provision is not *ultra vires* Article 14 of the Constitution.[9]

5. CONDITIONS

In order that this section may apply, the following conditions must be satisfied[10]:

(*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.[11]

[6] *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; *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131.

[7] *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.

[8] *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.

[9] *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).

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

[11] *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.[12] 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.[13] 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.[14] 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.[15] 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.[16]

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.[17] 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

[12] *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).

[13] *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.

[14] *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.

[15] Expln. II(*a*); see also *Ameena Bi* v. *Kuppuswami Naidu*, (1993) 2 SCC 405: AIR 1993 SC 1628.

[16] *Sistla Saraswatamma* v. *Paruvada Maki Naidu*, AIR 1940 Mad 881; *Samhut Rai* v. *Sambaran Rai*, AIR 1944 Pat 105.

[17] *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. Dowring*, 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.[18] 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.[19]

(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.[20]

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

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

[19] Sub-s. (3) of S. 47.

[20] *Union of India* v. *S.B. Singh*, AIR 1988 All 225; *see also supra*, Chap. 2.

[21] *Jai Narain v. Kedar Nath*, AIR 1956 SC 359: 1956 SCR 62; *Topanmal* v. *Kundomal*, AIR 1960 SC 388.

[22] *Merla Ramanna* v. *Nallaparaju, supra*; *Pannalal* v. *Naraini*, AIR 1952 SC 170: 1952 SCR 544.

[23] *Jai Narain v. Kedar Nath, supra*; *B.V. Patankar* v. *C.G. Sastry*, AIR 1961 SC 272: (1961) 1 SCR 591.

[24] *Moti Lal Banker* v. *Maharaj Kumar Mahmood Hasan Khan*, AIR 1968 SC 1087: (1968) 3 SCR 158.

[25] *Merla Ramanna* v. *Nallaparaju, supra*.

[26] *Ibid*, see also *Pannalal* v. *Naraini, supra*.

[27] *Ibid, see also infra*, Chaps. 8 and 9.

[28] *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.

[29] *See supra*, "Parties or their representatives".

[30] *Jai Narain v. Kedar Nath, supra*.

of circumstances;[31] (*xii*) whether the decree has been adjusted outside the court;[32] (*xiii*) whether the decree has been validly assigned;[33] (*xiv*) whether the auction-purchaser is entitled to recover possession;[34] (*xv*) the question regarding identity of property;[35] (*xvi*) the question regarding attachment, sale or delivery of property,[36] 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*[37], 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[38], 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;[39] (*ii*) whether the decree has become inexecutable by a compromise subsequent to the passing of the decree in the previous suit;[40] (*iii*) a question relating to the territorial or pecuniary jurisdiction of the court which passed the decree;[41] (*iv*) a question relating to correctness or validity of the decree, except where the decree is a nullity;[42] (*v*) an order of restoration of execution of application dismissed without going into its merits;[43] (*vi*) an order reopening or refusing to reopen a decree;[44] (*vii*) an order granting or refusing to grant instalments;[45] (*viii*) a claim by an auction-purchaser for

[31] *Haji Sk. Subhan* v. *Madhorao*, AIR 1962 SC 1230: 1962 Supp (1) SCR 123.

[32] *M.P. Shreevastava* v. *Veena*, AIR 1967 SC 1193: (1967) 1 SCR 147.

[33] *Chandrika Misir* v. *Bhaiya Lal*, (1973) 2 SCC 474: AIR 1973 SC 2391.

[34] *Harnandrai* v. *Debidutt*, *infra*.

[35] *Jai Narain v. Kedar Nath*, *supra*; *K.L. Selected Coal Concern* v. *S.K. Khanson*, (1971) 3 SCC 965: AIR 1971 SC 437.

[36] *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.

[37] (1973) 2 SCC 467 at p. 471: AIR 1973 SC 2423 at p. 2446.

[38] Law Commission's Twenty-seventh Report at p. 108.

[39] *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.

[40] *Raj Lakshmi* v. *Banamali Sen*, AIR 1953 SC 33: 1953 SCR 154.

[41] *Hira Lal* v. *Kali Nath*, AIR 1962 SC 199 at p. 201: (1962) 2 SCR 747.

[42] *See supra*, Chap. 2.

[43] *Keshardeo* v. *Radha Kissen*, AIR 1953 SC 23: 1953 SCR 136.

[44] *Promode Nath* v. *Raseshwari Dassi*, AIR 1941 Cal 530.

[45] *State of Bombay* v. *L.D. Narayanpure*, AIR 1960 Bom 334.

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

6. POWERS OF EXECUTING COURT

An executing court has plenary power to determine all questions relating to execution of a decree.[55] 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.[56] 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.[57] An executing court can mould relief in the light of changed circumstances.[58]

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.[59] But where the terms of the decree are vague or ambiguous, it is

[46] *Harnandrai* v. *Debidutt, supra.*

[47] *K. Radhakrishna* v. *N. Rajagopal Pillai & Co.*, AIR 1972 Mad 107.

[48] *Srinivasa Mudali* v. *Ramasamy Mudali*, AIR 1916 Mad 809.

[49] *Sinnapappal* v. *Subbana Goundan*, AIR 1958 Mad 414.

[50] *M.P. Shreevastava* v. *Veena*, AIR 1967 SC 1193: (1967) 1 SCR 147.

[51] *Edara Pattabhi Srirama* v. *Thadikammal Veerabhadra*, AIR 1973 AP 24.

[52] *Niyaz Bi* v. *Amdumiyan*, AIR 1949 Nag 375.

[53] *Panchoo Jolaha* v. *Mohd. Ismail*, AIR 1949 All 263; *Mana Devi* v. *Malki Ram*, AIR 1961 All 84.

[54] *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.

[55] *M.P. Shreevastava* v. *Veena*, AIR 1967 SC 1193: (1967) 1 SCR 147.

[56] *Merla Ramanna* v. *Nallaparaju*, AIR 1956 SC 87 at p. 91: (1955) 2 SCR 938.

[57] *Jugalkishore* v. *Raw Cotton Co. Ltd.*, AIR 1955 SC 376: 1955 SCR 1369; *Sugan 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.

[58] *Yashpal Singh* v. *ADJ*, (1992) 2 SCC 504.

[59] *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. Fo

the duty of the executing court to interpret the decree with a view to find out and ascertain the meaning of the terms used.[60] 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.[61]

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.[62]

9. GENERAL PRINCIPLES[63]

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.[64]

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[65] and was, therefore, subject to first appeal under Section 96 and also a second appeal under Section 100. Sub-

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

[60] *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.

[61] *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.

[62] *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 Dei* v. *Sarat Chandra Rout*, (1996) 3 SCC 301; *Urban Improvement Trust* v. *Gokul Narain*, (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.

[63] For detailed discussion, *see supra*, Chap. 2.

[64] *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.

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

section (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.[66]

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[67] 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.*"[68] (emphasis supplied) A similar view was taken by the High Court of M.P.[69] On the other hand, the High Courts of Allahabad[70], Andhra Pradesh[71], Bombay[72],

[66] 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."

[67] *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).]

[68] *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.

[69] *Chuluram* v. *Bhagatram*, AIR 1980 MP 16; *Sitaram* v. *Chaturo*, 1981 Jab LJ 171, [*overruled* in *Babulal* v. *Ramesh Babu*, AIR 1990 MP 317 (FB)].

[70] *Pratap Narain* v. *Ram Narain*, AIR 1980 All 42 (FB).

[71] *Marriddi Janikamma* v. *Hanumantha Vajjula*, AIR 1980 AP 209; *Challa Ramamurty* v. *Pasumarti Adinarayana Sons*, AIR 1985 AP 42.

[72] *Rameshkumar* v. *Rameshwar*, AIR 1983 Bom 378.

Gauhati[73], Gujarat[74], Kerala[75], Madhya Pradesh[76], Madras[77], Orissa[78], Patna[79], Punjab[80] and Rajasthan[81] 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 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);[82] *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[83], 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.[84] It follows, therefore, that the deletion of such a provision in the definition

[73] *Tapan Chandra* v. *Dulal Chandra*, AIR 1980 Gau 3.

[74] *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.

[75] *Mohd. Khan* v. *State Bank of Travancore*, AIR 1978 Ker 201 (FB); *Kuriakose* v. *P.K. Narayanan Nair*, AIR 1981 Ker 18.

[76] *Babulal* v. *Ramesh Babu*, AIR 1990 MP 317 (FB).

[77] *Visalakshi* v. *Muthiah Chettiar*, (1983) 2 MLJ 447.

[78] *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.

[79] *Masomat Narmada Devi* v. *Ram Nandan Singh*, AIR 1987 Pat 33: 1986 Pat LR 1067: 1986 BLJR 799 (FB).

[80] *Ram Niwas* v. *Mithan Lal*, AIR 1979 P&H 262; *Jagat Ram* v. *Jagjit Singh*, AIR 1984 P&H 281.

[81] *Mohan Das* v. *Kamla Devi*, AIR 1978 Raj 127; *Kashiram* v. *Hansraj*, AIR 1983 Raj 145.

[82] "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.

[83] 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.

[84] 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.[85]

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.[86] No writ petition, however, would be maintainable.[87]

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.[88]

[85] *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.

[86] For detailed discussion of "Revisional jurisdiction", *see supra*, Pt. III, Chap. 9.

[87] *Ghan Shyam Das* v. *Anant Kumar Sinha*, (1991) 4 SCC 379: AIR 1991 SC 2251.

[88] 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	662	5. Who may apply?	664
(a) Position prior to Amendment Act, 1976	662	6. Where application lies?	664
(b) Position after Amendment Act, 1976	662	7. Stay of sale	664
2. Scheme	663	8. Suit	664
3. Object	663	9. Appeal	665
4. Section 47 and Order 21 Rule 58: Distinction	664	10. Revision	665
		11. Pending Matters	665

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[1] and it was open to the aggrieved party to institute a suit.[2]

(b) Position after Amendment Act, 1976

Pursuant to the recommendation of the Law Commission[3] 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.[4] 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 delay the proceedings.[5]

[1] *Sawai Singhai Nirmal Chand* v. *Union of India*, AIR 1966 SC 1068: (1966) 1 SCR 986.

[2] *Ibid, see also*, R. 63.

[3] Law Commission's Fourteenth Report, Vol. 1 at pp. 452-53; Law Commission's Twenty-seventh Report, Vol. 1 at p. 198.

[4] R. 58(1)(2); see also *Nancy John* v. *Prabhati Lal*, (1987) 4 SCC 78: AIR 1987 SC 2061.

[5] Proviso to R. 58(1).

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.[6]

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[7], the executing court has to investigate the claims and settle them "finally" in execution proceedings, to avoid protracted litigation.[8] Detailed provisions, therefore, have been made in the Code.

[6] R. 58(3).

[7] S. 47.

[8] 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.[9]

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.[10]

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.[11]

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.[12]

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

[9] *See also supra*, "Scheme", "Suit", *infra*.

[10] *Union of India* v. *Jardine Henderson Ltd.*, (1979) 2 SCC 258: AIR 1979 SC 972.

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

[12] 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.[13]

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.[14]

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.[15] 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.[16]

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.[17]

[13] R. 85(5); see also *Sawai Singhai Nirmal Chand* v. *Union of India*, AIR 1966 SC 1068: (1966) 1 SCR 986.

[14] R. 58(4).

[15] *See supra*, "Appeal".

[16] *See supra*, "Suit".

[17] S. 97(2), Code of Civil Procedure (Amendment) Act, 1976.

PART IV

10 Sale of Property

SYNOPSIS

1. General 667
2. Sale of property: General: Rules 64-73 667
   (a) Power of court: Rules 64-65 667
   (b) Proclamation of sale: Rules 66-67 667
   (c) Time of sale: Rule 68 669
   (d) Adjournment of sale: Rule 69(1), (2) 669
   (e) Stoppage of sale: Rule 69(3) 669
   (f) Default by purchaser: Rule 71 669
   (g) Restrictions to bid: Rules 72-73 670
3. Sale of movable property: Rules 74-78 671
   (a) General 671
   (b) Place of sale 672
   (c) Agricultural produce: Rules 74-75 672
   (d) Negotiable instruments and shares: Rule 76 672
   (e) Payment of price: Rule 77 672
   (f) Irregularity in sale: Rule 78 673
4. Sale of immovable property: Rules 82-94 673
   (a) General 673
   (b) Courts competent to order sale: Rule 82 674
   (c) Postponement of sale: Rule 83 674
   (d) Deposit and payment of price: Rules 84-87 674
   (e) Bid by co-owner: Rule 88 676
   (f) Setting aside sale: Rules 89-92 676
      (I) On deposit: Rule 89 676
         (i) Nature and scope 676
         (ii) Object 677
         (iii) Who may apply? 677
         (iv) Conditions 677
         (v) Limitation 678
         (vi) Notice 678
         (vii) Appeal 678
      (II) For irregularity or fraud: Rule 90 678
         (i) Nature and scope 678
         (ii) Who may apply? 679
         (iii) Grounds 679
            (1) Material irregularity 679
            (2) Fraud 681
            (3) Substantial injury 682
         (iv) Limitation 683
         (v) Notice 683
         (vi) Appeal 683
      (III) Judgment-debtor having no saleable interest: Rule 91 683
         (i) Nature and scope 683
         (ii) Object 683
         (iii) Who may apply? 683
         (iv) Saleable interest 683
         (v) Limitation 684
         (vi) Notice 684
         (vii) Appeal 684
   (g) Effect of setting aside sale: Rule 93 684
   (h) Confirmation of sale: Rule 92 684
   (i) Certificate of sale: Rule 94 685
   (j) Effect of sale: Section 65 685

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.[1]

A duty is thus cast upon the court to sell such property or a portion thereof as necessary to satisfy the decree.[2] "It is a mandate of the Legislature which cannot be ignored."[3] 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.[4] Such proclamation shall be drawn up after notices to the decree-holder and the judgment-debtor and shall state the following details:

[1] *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.

[2] *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.

[3] *Ambati Narasayya* v. *M. Subba Rao*, *supra*.

[4] 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.[5]

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 irremedial injury to the judgment-debtor and sale without such notice will be a nullity.[6]

It is the duty of the court to see that the requirements of Rule 66 are complied with.[7] 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.[8] Such proclamation should also be published in the Official Gazette or in a local newspaper, or in both, if the court so directs.[9]

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.[10]

A sale conducted without publication of proclamation is not merely an irregularity but a nullity.[11] 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.[12] Thus, when the sale was notified in the village by beat of drum and people started coming thereafter and several persons participated

[5] R. 66(2).

[6] *Desh Bandhu Gupta* v. *N.L. Anand*, (1994) 1 SCC 131.

[7] *Shalimar Cinema* v. *Bhasin Film Corpn.*, (1987) 4 SCC 717 at p. 719: AIR 1987 SC 2081 at p. 2082.

[8] R. 67(1); *Desh Bandhu Gupta* v. *N.L. Anand, supra*, at p. 143.

[9] R. 67(2).

[10] *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).

[11] *A. Venkatachalam* v. *E.M. Zackria*, 1987 Supp SCC 124; *Desh Bandhu Gupta* v. *N.L. Anand, supra*, at pp. 143-46.

[12] *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.[13]

(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[14], 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.[15]

(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.[16]

(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.[17]

(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.[18] 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.[19]

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

[13] *Lal Chand* v. *ADJ*, (1997) 4 SCC 356: AIR 1997 SC 2106.

[14] R. 43.

[15] R. 68.

[16] R. 69(1), (2).

[17] R. 69(3); see also R. 59; *Radhey Shyam* v. *Shyam Behari*, (1970) 2 SCC 405: AIR 1971 SC 2337.

[18] R. 71.

[19] *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.[20]

(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.[21] 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.[22]

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

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.[26] 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.[27]

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.[28]

[20] *Annavajhula Venkatachellamayya* v. *Ramagirjee Neelakanta, supra.* For detailed discussion of natural justice, *see,* Author's, *Lectures on Administrative Law* (2008) Lecture VI.

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

[22] R. 72(2), (3).

[23] *Sivathi Ammai* v. *Arulayee Ammal,* AIR 1974 Mad 34 at p. 35: (1973) 2 Mad LJ 325.

[24] *S.K.M. Mohd. Mustafa* v. *Udaianachi Ammal,* AIR 1966 Mad 348: (1966) 1 Mad LJ 373.

[25] *Sivathi Ammal* v. *Arulayee Ammal, supra.*

[26] *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.

[27] *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.*)

[28] *Jaswantlal Natvarlal* v. *Sushilaben Manilal,* 1991 Supp (2) SCC 691 at pp. 692-93: AIR 1991 SC 770 at p. 771.

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.[29] 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.[30]

An order setting aside or refusing to set aside sale is appealable.[31]

(*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.[32] This is a mandatory requirement.[33] 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.[34]

(*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.[35] 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

[29] *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.

[30] *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.

[31] Or. 43 R. 1(*j*).

[32] R. 72-A.

[33] *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.

[34] Statement of Objects and Reasons; *see also*, Law Commission's Fifty-fourth Report at pp. 183-84.

[35] 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.[36]

(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.[37] 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.[38] Such sale shall be postponed by the court, if (*i*) fair price is not offered; or (*ii*) the owner thereof applies for such postponement.[39]

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

(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.[42] On such sale, the purchaser acquires a title.[43]

(e) Payment of price: Rule 77

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

[36] *Lakshmibai* v. *Santapa Revapa Shintre*, ILR (1889) 13 Bom 22 at pp. 24-25.

[37] R. 74(1); see also *Lakshmibai* v. *Santapa Revapa Shintre* (*ibid.*).

[38] Proviso to R. 74(1).

[39] R. 74(2).

[40] R. 75(1).

[41] R. 75(2).

[42] R. 76; see also *Seth Banarsi Dass* v. *District Magistrate and Collector, Meerut*, (1996) 2 SCC 689: AIR 1996 SC 2311.

[43] *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.*

[44] R. 77(1). See also *Thacker's Press & Directories Ltd.* v. *Metropolitan Bank Ltd.*, 67 Cal WN 350.

[45] R. 77(2).

[46] 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[47] and the defaulting purchaser would be liable for the deficiency in price on such resale.[48]

(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.[49] 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.[50] 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.[51]

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.[52] Again, an application to set aside a sale of movable property lies where the court had no jurisdiction to order the sale.[53] 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.[54]

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.[55]

(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.[56] 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.[57] Therefore, an application for postponement of sale will not be allowed where the judgment-debtor had sufficient time to pay the decretal amount,[58] or where by private alienation the decree will not be satisfied in full.[59]

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.[60] Again, this provision applies only before the sale has taken place and not afterwards.[61] Further, such postponement of sale must only be for a reasonable period.[62] Finally, a sale privately effected is not a complete transaction unless and until it is sanctioned and confirmed by the court.[63]

(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

[55] R. 82; see also *Jibon Krishna* v. *New Beerbhum Coal Co. Ltd.*, AIR 1960 SC 297: (1960) 2 SCR 198.

[56] R. 83.

[57] *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.

[58] *Kora Lal* v. *Punjab National Bank Ltd.*, AIR 1921 Lah 384; *Banarsi Das* v. *Gopi Chand*, AIR 1924 Lah 132.

[59] *Gurusami* v. *Venkatasami*, ILR (1891) 14 Mad 277; *Banarsi Das* v. *Gopi Chand* (*ibid.*).

[60] *Ravi Nagabhushanam* v. *Neti Gopala Krishna*, AIR 1969 AP 184 at p. 187.

[61] *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).

[62] *Gurusami* v. *Venkatasami*, *supra*; *Mohinee* v. *Rama Kant*, (1871) 15 WR 322.

[63] Second Proviso to R. 83(2).

by the court.[64] The provision regarding the deposit is mandatory and non-compliance with it will make the sale a nullity.[65] In case of failure on the part of the purchaser to deposit the amount, the property will forthwith be resold[66] and the defaulting purchaser will be liable for the deficiency in price.[67]

The balance of the purchase money must be paid by the purchaser within fifteen days from the date of the sale.[68] 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,[69] 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.[70] 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." [71]

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.[72] The court has no jurisdiction to extend the time for the payment of the balance price.[72] In case of default of such payment, the court has discretion to forfeit the deposit.[62] The court must order resale of the property. This is an imperative obligation on the part of the court.[72] A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property.[72]

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

[64] R. 84; see also *Manilal Mohanlal* v. *Sardar Sayed Ahmed*, AIR 1954 SC 349 at pp. 351-52: (1955) 1 SCR 108.

[65] *Manilal Mohanlal* v. *Sardar Sayed Ahmed* (*ibid.*); *Sardara Singh* v. *Sardara Singh*, (1990) 4 SCC 90 at p. 96.

[66] R. 84(1).

[67] R. 71.

[68] R. 85.

[69] Rr. 86, 87.

[70] *Balram* v. *Ilam Singh*, (1996) 5 SCC 705: AIR 1996 SC 2781.

[71] *Ibid*, at p. 713 (SCC): at p. 2785 (AIR).

[72] *Manilal Mohanlal* v. *Sardar Sayed Ahmed*, AIR 1954 SC 349: (1955) 1 SCR 108.

Court in *Manilal Mohanlal* v. *Sardar Sayed Ahmed*[73] 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 nullity.*"[74] (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.[75]

(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.[76] But an application to set aside sale of immovable property cannot be made on any other ground not covered by Rules 89 to 91.[77] 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

[73] AIR 1954 SC 349: (1955) 1 SCR 108.

[74] *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.

[75] R. 88; see also *Munnalal* v. *Gopilal Nathuram*, AIR 1940 Nag 337: 1940 Nag LJ 453.

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

[77] *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.[78] 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.[79] The rule being in the nature of a concession must be strictly complied with.[80] 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.[81]

(*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.[82]

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.[83]

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

[78] *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.

[79] *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.

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

[81] *P.K. Unni* v. *Nirmala Industries*, (1990) 2 SCC 378 at p. 381: AIR 1990 SC 933.

[82] *Onkar Nath* v. *Ramanand Prasad*, AIR 1970 Pat 368.

[83] *Nani Gopal Paul* v. *T. Prasad Singh*, (1995) 3 SCC 579: AIR 1995 SC 1971.

decree is simultaneously satisfied.[84] 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.[85]

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.[86] Such deposit must be unconditional and not under protest.[87] Further, it must be in cash and not by cheque or Government promissory note.[88]

(*v*) *Limitation.*—An application to set aside a sale must be made within a period of sixty days from the date of the sale.[89] 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.[90]

(*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.[91] 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.[92]

(*vii*) *Appeal.*—An order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable.[93]

(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

[84] *Tribhovandas* v. *Ratilal*, AIR 1968 SC 372 at p. 375: (1968) 1 SCR 455.

[85] *Tribhovandas* v. *Ratilal, supra.*

[86] *Ibid*, see also supra, *P.K. Unni* v. *Nirmala Industries.*

[87] *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.

[88] *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.

[89] Art. 127, Limitation Act, 1963; see also *Kishori Devi* v. *Ram Narain*, (1969) 1 SCWR 133.

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

[91] Proviso to R. 92(2).

[92] *Charn Chandra Ghosh* v. *Rai Behari Lal*, AIR 1925 Cal 157; *Kanda Veloo* v. *Kumaran Govindan*, AIR 1953 TC 529.

[93] 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.[94] 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.[95]

(*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.[96]

(*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.[97] 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;

[94] 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.

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

[96] *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.

[97] *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;[98]
(*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,[99] 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.[100]

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

[98] 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.

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

[100] *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.[101]

(2) *Fraud*

"Fraud" means that "which is dishonest and morally wrong".[102] 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.[103] 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.[104]

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.[105]

As held by the Privy Council,[106] 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.*"[107] (emphasis supplied)

[101] *Mobarak Ali* v. *Dinabandhu Sahu*, AIR 1953 Ori 296; *Yeturu Dasaratharami* v. *Yeturu Pajjamma*, AIR 1979 AP 111.

[102] *Paresh Nath* v. *Hari Charan*, ILR (1911) 38 Cal 622 at p. 626.

[103] *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.

[104] *Ibid.*

[105] *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.

[106] *Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt*, (1866) 10 Moo IA 454 (PC).

[107] *Ibid*, at p. 474.

In the leading case of *Satish Chandra* v. *Kumar Satish Kantha*[108], 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.*"[109]
>
> (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.[110] 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.[111] If the price is substantially inadequate, there is both material irregularity and injury.[112] Since the burden of proving substantial injury is on the applicant, it should be alleged in the application.[113]

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

[108] AIR 1923 PC 73: 171 IC 391: (1924) 39 Cal LJ 165 (PC).

[109] *Ibid*, at p. 76 (AIR): at p. 171 (CLJ) (*per* Lord Atkinson).

[110] *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.

[111] *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.

[112] *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).

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

circumstances alleged.[114] Whether or not the injury suffered by the applicant is substantial depends upon the facts of each case.[115] 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.[116]

(iv) Limitation[117]

(v) Notice[118]

(vi) Appeal[119]

(III) Judgment-debtor having no saleable interest: Rule 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).[120]

(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.[121]

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

(iv) Saleable interest.—The expression "no saleable interest" means *no saleable interest at all*.[125]

[114] *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.

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

[116] *Radhey Shyam* v. *Shyam Behari*, (1970) 2 SCC 405: AIR 1971 SC 2337; *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.

[117] *See supra*, under that head.

[118] *See supra*, under that head.

[119] *See supra*, under that head.

[120] *Ahmedabad Municipal Corpn.* v. *Haji Abdulgafur*, (1971) 1 SCC 757 at pp. 759-60: AIR 1971 SC 1201 at pp. 1202-03.

[121] *Kumarasami Chetti* v. *T.R. Subramania*, AIR 1953 Mad 671; *Baijnath Marwari* v. *Bhutto Krishna Ray*, AIR 1933 Pat 684: 145 IC 929.

[122] *Kumarasami Chetti v. T.R. Subramania (ibid.).*

[123] *Ram Gopal* v. *Ram Kunwar*, AIR 1935 All 910; *Muthukumarasamia* v. *Muthusami*, AIR 1927 Mad 394; *T. Keshavan* v. *Bipathumma*, AIR 1935 Mad 340.

[124] *Umed* v. *Jas Ram*, ILR (1907) 29 All 612.

[125] *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.[126]

(*v*) *Limitation*[127]

(*vi*) *Notice*[128]

(*vii*) *Appeal*[129]

(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.[130] An application under this rule can be filed within three years from the date of the order setting aside the sale.[131]

(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.[132] Once the order is made under Rule 92 confirming the sale, the title of the auction-purchaser relates back to the date of sale.[133]

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.

[126] *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.

[127] *See supra*, under that head.

[128] *See supra*, under that head.

[129] *See supra*, under that head.

[130] 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.

[131] Art. 137, Limitation Act, 1963.

[132] 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. *Devi 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.

[133] 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.*[134] (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.[135]

(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.[136] Such certificate is conclusive in nature.[137]

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.[138] Issuance of a certificate is a ministerial act.[139]

(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.[140] In other words, the purchaser's title relates back to the date of the sale and not the confirmation of sale.[141]

[134] *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.

[135] Statement of Objects and Reasons, Law Commission's Fifty-fourth Report at p. 207.

[136] R. 94. See also supra, *Sardar Govindrao* v. *Devi Sahai*; *Desh Bandhu Gupta* v. *N.L. Anand*.

[137] *P. Udayani Devi* v. *V.V. Rajeshwara*, (1995) 3 SCC 252.

[138] *Municipal Corpn. of Delhi* v. *Pramod Kumar*, (1991) 1 SCC 633 at p. 636: AIR 1991 SC 401.

[139] *Sagar Mahila Vidyalaya* v. *Pandit Sadasiv Rao*, (1991) 3 SCC 588 at p. 598: AIR 1991 SC 1825.

[140] S. 65. See also S. 66.

[141] *Janak Raj* v. *Gurdial Singh*, AIR 1967 SC 608: (1967) 2 SCR 77.

PART IV

11 Delivery of Property

SYNOPSIS

1. General 686
2. Delivery of property: Rules 79-81, 95 and 96 686
3. Resistance to delivery of possession: Rules 97-103 688
   (a) Nature and scope 688
   (b) Rules 97 to 106: Scheme 688
   (c) Application by decree-holder or auction-purchaser: Rule 97 689
   (d) Application by any other person: Rule 99 689
   (e) Hearing of application: Rules 105 and 106 689
   (f) Inquiry and adjudication: Section 74, Order 21 Rules 97-101 689
   (g) Transferee pendente lite: Rule 102 690
   (h) Appeal: Rule 103 690
   (i) Pendency of suit: Rule 104 690

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:

	Kinds of Property	*Mode of Delivery*
(*a*)	*Movable property*:	
	(i) Movable property actually seized;	By delivering it to the purchaser.[1]
	(ii) 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.[2]
	(iii) 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.[3]
	(iv) Share in a corporation;	By an order prohibiting (*a*) the shareholder from transferring it to any person except the purchaser, or receiving dividend or interest thereon; and (*b*) the officers of the corporation from permitting such transfer or making payment to any person except the purchaser.[4]
	(v) Negotiable instruments and shares;	By executing a document or making an endorsement in the prescribed form transferring in favour of the purchaser.[5]
	(vi) Any other property not otherwise provided for;	By an order vesting such property in the purchaser.[6]
(*b*)	*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.[7]
	(ii) 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.[8]

[1] R. 79(1).
[2] R. 79(2).
[3] R. 79(3).
[4] R. 79(3).
[5] R. 80.
[6] R. 81.
[7] R. 95.
[8] R. 96; see also *Dev Raj* v. *Gyan Chand*, (1981) 2 SCC 675: AIR 1981 SC 981; *Jaswantlal Natvarlal* v. *Sushilaben Manilal*, 1991 Supp (2) SCC 691: AIR 19[illegible] SC 770.

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.[9]

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).[10]

(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 question 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.

[9] Law Commission's Fourteenth Report at pp. 453-54 and Law Commission's Twenty-seventh Report at pp. 208-09.

[10] 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.[11]

(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.[12]

(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.[13] 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.[14]

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.[15]

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.[16]

[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.[17]

(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.[18]

(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.[19]

(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.

[17] R. 100.

[18] R. 102; see also *Usha Sinha* v. *Dina Ram*, (2008) 7 SCC 144.

[19] R. 103.

PART IV

12 Distribution of Assets

SYNOPSIS

1. General	691	12. Priority of government debts	695
2. Nature and scope	692	(a) Nature and scope	695
3. Illustrations	692	(b) Object	695
4. Object	692	(c) Constitutional validity	696
5. Conditions	693	(d) Procedure	696
6. Interpretation	693	(e) Determination of claim	696
7. Assets available for rateable distribution: Illustrative cases	693	(f) Commercial activities of Government	697
8. Assets not available for rateable distribution: Illustrative cases	694	(g) Waiver	697
9. Cost of realisation	694	(h) Conclusions	697
10. Mode of distribution	694	13. Appeal	697
11. Suit for refund	694	14. Revision	698
		15. Concluding remarks	698

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).

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.[4]

In *Shankar Sarup* v. *Mejo Mal*,[5] 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.[6]

[4] *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.

[5] (1900-1901) 28 IA 203: ILR (1901) 23 All 313 (PC).

[6] *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.[7]

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.[8]

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.[9]

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;

[7] *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.

[8] *PL. CT. PL. Palaniappa* v. *A.RM.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.

[9] *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.[10]

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.[11]

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.[12] The cause of action for such suit

[10] 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.

[11] *Coop. Society, Central Bank* v. *Ganpat*, AIR 1935 Nag 214; *Kesheorao Balwantrao* v. *Mulchand Shekulal*, AIR 1937 Nag 383.

[12] *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.[13] The period of limitation for such suit is three years from the date of payment.[14]

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.[15] It recognizes the English Common Law doctrine that Crown debts are entitled to priority.[16]

(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.[17]

In *Excise and Taxation Officer* v. *Gauri Mal Butali Trust*[18], 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'etre for such a privileged status given to the State, in view of its functions and duties, has to continue.*"[19] (emphasis supplied)

[13] *Ram Chandra* v. *Raghunath Saran*, AIR 1918 All 327; *Hart* v. *Tara Prasanna Mukherji*, (1885) 11 Cal 718.

[14] 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.

[15] *State of U.P.* v. *Kotak & Co.*, AIR 1973 All 230.

[16] *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.

[17] *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.*

[18] AIR 1961 Punj 292: ILR 1960 Punj 809.

[19] *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.[20]

(d) Procedure

The Government must make an application under Section 73(3) before the assets are paid over to the decree-holder.[21] 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.*[22] (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.*[23]

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.[24] The prior attachment fastens itself to the proceeds of a sale pursuant to the later attachment.[25] 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.[26]

[20] *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).

[21] *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.

[22] *Union of India* v. *Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40 at p. 42: AIR 1985 SC 407.

[23] *Kotak & Co.* v. *State of U.P.*, (1987) 1 SCC 455 at p. 458: AIR 1987 SC 738.

[24] *Union of India* v. *Somasundram Mills (P) Ltd.*, (1985) 2 SCC 40 at p. 42: AIR 1985 SC 407.

[25] *Zumberlal* v. *Sitaram*, AIR 1937 Nag 80 (*per* Vivian Bose, J.).

[26] *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.[27]

(g) Waiver

Though commencing as an attribute of monarchial 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.[28]

(h) Conclusions

It is submitted that the following observations of Leach, C.J. in *Manickam* v. *ITO, Madras*[29] 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."[30]

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.[31] However, after deletion of the word and figure "Section 47"

[27] *Murli Tahilram* v. *T. Asoomal & Co.*, AIR 1955 Cal 423 at p. 429: (1955) 59 CWN 701.

[28] *Excise and Taxation Officer* v. *Gauri Mal Butali Trust*, AIR 1961 Punj 292: ILR 1960 Punj 809.

[29] AIR 1938 Mad 360: ILR 1938 Mad 744: (1938) 1 Mad LJ 351 (FB).

[30] *Ibid*, at p. 363 (AIR).

[31] *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.[32]

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.[33]

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*:[34]

> "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."[35]

[32] For detailed discussion, *see supra*, Pt. I, Chap. 2.

[33] *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.

[34] (1991) 4 SCC 379: AIR 1991 SC 2251.

[35] *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.