

CHAPTER XIII

EXECUTION OF DECREES

Purpose of law is JUSTICE and adjudication of a dispute in favour of a litigant in itself does not mean complete discharge of satisfaction of state's duties under administration of justice. The benefits provided under the adjudication have to actually reach the litigant. Then alone his faith in the system, which constitutes strongest foundation for advent, survival and growth of the system, can continue.

The word 'Execution' has varied meanings. In its widest sense it signifies the enforcement of or giving effect to the judgements or orders of courts of justice. In a narrower sense it means enforcement of those orders or judgements by a public officer under the orders and directives of the court.**1

Execution is the act of carrying into effect the final judgement of a court or other tribunal. The writ authorising a particular officer to carry such judgement is called execution.**2

In its rational and practical sense execution is the formal method prescribed by law, whereby the parties entitled to the benefit of the judgement or any other equivalent obligations may obtain, that benefit.**3

Execution is the last stage of a suit whereby possession/recovery of anything/amount recovered by a judgement is obtained .It is styled as final process.

**1 HALSBURY'S LAWS OF ENGLAND, 4TH EDITION

**2 BOVVIET'S LAW DICTIONARY.

**3 BINGHAN JUDGEMENT AND EXECUTION REFERRED BY BANERJEE ON LAW OF EXECUTION AT PAGE 2.

The word execution of criminal means enforcing death sentence.**4

The word execution embraces all the appropriate means by which a decree is enforced and includes all processes and proceedings in aid of or supplemental to execution.**5 Carrying out some act or course of conduct to its completion is execution. It carries the order in operation. In case of money decree it is the legal process of enforcing the judgement, usually by seizing and selling property of the debtor.**6 In chronological terms execution is the final destination of what began with litigation in Civil law and prosecution under Penal Law.

The word "Execution" is not defined under Civil Procedure Code. It 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 decree.**7

I

MEANING OF DECREE AND VARIOUS TYPES OF DECREES

The essential elements by which a decision of court can be termed as decree are:-

- (i) There must be an adjudication.
- (ii) Such adjudication must have been given in a suit.
- (iii) It must have determined the rights of the parties with regard to all or any of the matters in dispute in the suit.
- (iv) Such determination must be of conclusive nature and

**4 WHARTON'S LAW LEXICON, SWEET AND MAXWELL, 14TH EDITION PAGE 387.

**5 RAMNARAYAN V/s. ANANDILAL AIR 1970 M P 110 AT 118

**6 BLACK'S LAW DICTIONARY, 6TH EDITION PAGE 568.

**7 STATE OF RAJASTHAN V/s. SAVAKSHA AIR 1972 GUJARAT 1719.

(v) There must be a formal expression of such adjudication.**8

A decision on a matter of administrative nature, or an order dismissing a suit for default can not be termed as decree because they do not judicially deal with the matter. Order passed by officer who is not a court is not by decree.**9

The Decree should be in a suit. It is a civil proceeding initiated by presentation of a plaint, decision of a Tribunal even though described as 'decree' under the Act is a decree passed by Tribunal and not Court.**10

The words 'formal expression' means it must be deliberate and given in the manner provided by law. Decree follows the judgement and must be drawn up separately.**11

An 'order' on the other hand is formal expression of decision of civil court, which is not a decree.

The decree conclusively decides the rights of the parties with regard to the matters. An order is a decision made at interim stage during the progress of suit.

**8 CIVIL PROCEDURE BY JUSTICE C. K. THAKKAR, AT PAGE 9 4TH EDITION.

**9 DEEP CHAND V/s. LAND ACQUI. OFFICER, (1994) 4 SCC 99 (102).

**10 DIWAN BRUS. V/s. CENTRAL BANK OF INDIA. AIR 1976 SC. 1518

**11 SHAKUNTALADEVI V/s. KUNTALKUMARI, AIR 1969 SC 575.

II

DIFFERENT TYPES OF DECREES

The various types of decrees that can be passed under the Civil Procedure Code are as follows :-

<u>DECREE</u>	<u>PARTICULARS.</u>
(i) Decree in original	Not falling under any specific class listed below.
(ii) Preliminary Decree	When further proceedings have to be taken before the suit is disposed off. Preliminary decree are not executable. It is only final decree which can be executed.**12
(iii) Final Decree	When adjudication completely disposes off the Suit.**13
(iv) Partly Preliminary and Partly final.	A Decree for possession and mesne profits can be preliminary for mesne profits and final for possession.
(v) Order rejecting a plaint	It does not include order returning a plaint.
(vi) Order or adjudication determining question under sec.47 or 144	Order 47 deals with questions to be determined by court executing decree and 144 with application for restitution.
(vii) Consent Decree	A consent decree can never be a contract only though it requires free consent of both the parties. It is the result of adjudication and reason of such adjudication is consent of parties.**14

**12 VENKATTA REDDY V/s. PETTY REDDY, AIR 1963 SC 992.

**13 SHANKAR V/s. CHANDRAKANT, AIR 1995 SC 1211

**14 TRIBHUVAN LALLUBHAI SHAH V/s. CHHITALAL SHAH, AIR 1963 GUJARAT 256.

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|--------|-----------------------------------|--|
| (viii) | Exparte Decree | Decree passed in absence of a Defendant. |
| (ix) | Decree passed in appeal | It is an appellate decree although an appeal is
Continuation of litigation between the parties. |
| (x) | Decree on compromise
petition. | It is passed in petition filed by both parties. |
| (xi) | Conditional Decree | Decree with inbuilt conditions forming part of
the decree. |

Under the Civil Procedure Code Preliminary Decrees can be passed under following provisions.

PROVISIONS

PARTICULARS.

Order 20, rule 2	Suit for possession and mense profits.
Order 20, Rule 13	Administration Suits.
Order 20, Rule 14	Suit for Pre emption.
Order 20, Rule 15	Dissolution of partnership.
Order 20, Rule 16	Suits for accounts between principal and Agent.
Order 20, Rule 18	Suit for partition and separate possession.
Order 34, Rule 2 – 3	Foreclosure of mortgage
Order 34, Rule 4 –5	Sale of mortgaged property.
Order 34, Rule 7 – 8	Redemption of mortgage.

The decrees cover various subjects like decree to orders passed by the court, in context of the word "Execution", the enforcement of orders passed under various other laws also can be included.

As on 31/3/93, all banks in India taken together had 5,41,813 cases pending for execution involving Rs.984.93 Crores.

The illustrative lists of such orders, which can be executed, are as under :-

- (i) Order under section 27 of Administrative Tribunals Act finally disposing off an appeal.
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- (ii) An order under Arbitration and Conciliation Act, 1996, which can be enforced in manner as provided under Civil Procedure Code.
- (iii) Orders under Companies Act can be enforced in same manner as decree of a Civil Court.**15
- (iv) Order under article 226, 227, 32 of Constitution of India read with Section 12 of Contempt of Courts Act.
- (v) Order under section 25 of Consumer Protection Act, 1986.
- (vi) Orders passed by co-operative Tribunals under Co-operative Societies Act.
- (vii) Order for recovery under Section 8, 8-B, 8G of Employees Provident Fund Act, 1952.
- (viii) Orders under Section 45, 45-C, 74 and 75 of E.S.I. Act can be enforced as decree.**16 Orders passed under Family Courts Act 1984 can be executed as decree
- (ix) Order under Section 222 to 226, 232 of Income Tax Act, 1981 can be so enforced.
- (x) Award of a Tribunal or Labour Court.**17 including an arbitration award can be enforced
- (xi) Under Section 26(2) of Guardians and Wards Act award of Court under that Act shall be deemed to be a decree
- (xii) Under Motor Vehicles Act, 1988, **18 the amount due under an award can be recovered as arrears of land revenue.
- (xiii) The claims of Municipalities can also be enforced in this manner.
- (xiv) Public Moneys can be recovered by issue of recovery certificate.**19
- (xv) Under Section 31 of Workman Compensation Act amount payable can be recovered as arrears of land revenue.

**15 SECTION 634 OF THE COMPANIES ACT.

**16 INSERTED IN E.S.I. ACT w.e.f. 1/9/91.

**17 SECTION 11-B, I.D.ACT AMENDED w.e.f. 22/7/87

**18 SECTION 174 OF M. V. ACT.

**19 GUJARAT PUBLIC MONEYS RECOVERY ACT.

The purpose of citing the aforesaid list which is not exhaustive is to elaborate those statutory provisions where the claim can be recovered in as effective manner as decree though they are not passed by Civil Courts.

III

COURTS WHICH MAY EXECUTE THE DECREE

The general rules as laid down Under Section 38 of CPC is that, 'the decree may be executed either by the court, which passed it, or by the court to which it is sent for execution.

The words 'Court which passed the decree' needs further ellaboration and the expression includes the following courts :-

1. The Court which actually passed the decree (Court of first instance)
2. Court of first instance in appellate decree.
3. The court of first instance if it ceases to exist the court which would have jurisdiction to try the suit at the time of execution.
4. Where the court of first instance have ceased to have jurisdiction to execute the decree the court which at the time of execution would have had the jurisdiction to try the suit.**20

If court A passes the decree and thereafter part of the area within the jurisdiction of that court is transferred to court B, the Supreme Court has held that the court which actually passed the decree does not loose its jurisdiction to execute it by reason of the subject matter being transferred to jurisdiction of another court. The position whether B court can also execute the decree is not very clear because there are conflicting judgements of High Courts on that point.**21

**20 RAMAKUTTY V/s. AVARA 1994 2 SCC 642.

**21 MERLA RAMANMA V/s. NALLPA RAJU AIR 1956 SC 87

As a general rule territorial jurisdiction is a condition precedent for a court to execute decree. Neither the court which passed the decree nor the court to which it is sent for execution can execute it in respect of property lying outside territorial jurisdiction. However if the bond is executed before a court it remains in operation till formally discharged by registrar of concerned court.**22 Another important point is that a decree passed by court without jurisdiction is nullity and its invalidity can be set up whenever and wherever it is sought to be enforced even at the stage of execution. A defect of jurisdiction whether pecuniary or territorial strikes at the very authority of the court to pass a decree and such a defect can not be cured even by consent of parties.**23 Generally an executing court is not required to go behind the decree and it has to execute the decree as it is. It can however examine the issue whether the decree was passed by a court without jurisdiction and may not execute the decree if it finds so.**24 The objection as to dispute on jurisdiction has to be taken at earlier stage and when the judgement debtor did not raise objection on receiving execution application, the execution can be proceeded with.**25 From the point of view of delays the opportunity to challenge at the stage of execution sometimes opens another round of litigation. Objections as to such jurisdictions are raised in mechanical manner, which deprives the decree holder of the fruits of the decree.

In respect of territorial jurisdiction, if it is lacking the decree can not be executed. As held by Calcutta High Court, the High Court has no power to attach or sell property situated outside territorial limits of its Civil Jurisdiction.**26 The court which passed a decree may on the application of the decree holder send it for execution to another court of competent jurisdiction under the provisions relating to transfer of decree.

**22 CITIBANK.N.A.V/s.INDO AMERICAN ELECTRICAL LTD.AIR1981DELHI 27

**23 KIRAN SINGH V/s. CHAMAN AIR 1954 SC 840.

**24 KUBER BANK LTD, V/s. STATE OF WEST BENGAL 63 C.W.N. AT PG-21.

**25 BEDAMI V/s. ANAND BHAVAN BANK 1954 PAJ. L W 571

**26 DEKUNIA BANKING CORP. 58 CWN AT PAGE 61.

IV

TRANSFER OF DECREE

Situations warrant that the decree may have to be transferred to some other court for the purpose of execution. The court which passes a decree may on application of a decree holder send it for execution to another court under following circumstances: -

1. If the person against whom the decree is passed actually and voluntarily resides or carries on business or personally works for gain within the jurisdiction of such other court.
2. If the person does not have property within the local limits of the jurisdiction of the court, which passed the decree sufficient to satisfy such decree and has property within local limits of jurisdiction of such other court.
3. If the decree directs the sale or delivery of immovable property situated outside the local limits of the jurisdiction of the court.
4. If the court which passed the decree considers for any other reason to be recorded in writing the decree should be executed by such other court.

The word Court means court of competent jurisdiction.**27

The court to which decree is transferred for execution shall have same powers as the original court and persons disobeying or obstructing the execution of decree are punishable in the same manner. The transferee court however can not travel beyond the decree.**28

If the matter is transferred from one court to other for administrative reasons say from second court to fourth court both courts are competent.**29

**27 SECTION 39 OF CPC

**28 GANGARAM V/s. MAHESH AGRAWAL AIR 1984 DELHI 233

**29 STATE BANK OF HYDERABAD 1963 2 ANDHRA WEEKLY REPORT
PAGE 292.

From various decided cases on execution of decrees the following principles can be worked out:-

<u>ISSUE INVOLVED</u>	<u>LEGAL POSITION</u>
Territorial Jurisdiction	It is a condition precedent for executing a decree and therefore court can not execute a decree in respect of property which is situated outside its territorial jurisdiction.**30
Legality of Decree	The executing court has to take the decree as it stands and has no power to vary or modify its terms or de novo examine its correctness.**31
Inherent lack of jurisdiction	Decree passed is a nullity if there is Inherent lack of jurisdiction and there is no question of going behind it.**32
Effect of Death	If a decree is otherwise executable death of judgement debtor does not affect its validity.**33
Operation of Law	If by operation of law a decree becomes inexecutable, by subsequent amendment it can again become executable.**34

**30 MATHAI V/s. VARKEY AIR 1964 SC 907.

**31 STATE BANK OF INDIA V/s. INDEXPORT REGD.(1992)3 SCC-169

**32 CHANGAL VAREYA V/s. JAGANNATH – 1994, 1 SCC - 2

**33 PARBATIDEVI V/s. MAHADEV PRASAD. AIR 1979 SC 1915.

**34 DULAREY V/s. THIRD ADDL., DIST.JUDGE 1084, 3 SCC 99

Subsequent Development	The executing court can look into question of executability or otherwise of the decree and examine whether the decree has become inexecutable by subsequent developments of fact or law.**35
Vague and ambiguous terms In decree	In such case the executing court can construe the decree to ascertain its precise meaning and for that purpose can refer to judgement and pleadings.**36
Amendment of Decree in Appeal	Where a decree is transferred for execution and it is modified in appeal court can execute modified decree after amendment of execution application.
Provisions in Civil Procedure Code	Provisions relating to Transfer of Decree are purely procedural and lays down the adjective law for execution of decree and can not therefore regulate substantive rights of parties.**37
Change in relief granted	Even if there is change in circumstances the executing court has no power to mould relief granted to plaintiff.
Powers of Transferee court	The court to which decree is transferred for execution has the same powers as if it had passed the decree itself.**38

**35 SUDHIR V/s. BALDEV 1969 3 SCC 611.

**36 BHAWAN WAJA V/s. HANUJI KEODAJI AIR 1972 SC 1374.

**37 RAM RAO V/s. VENKATRAO AIR 1963 A P 154.

**38 LAW RELATING TO EXECUTION BY M. S. PAI, REVISED BY DR. N. MEHRA SWAMY, 2ND EDITION PAGE 68

Properties at Different places	If immovable property forms one estate and is situate within jurisdiction of two or more courts anyone of such courts can attach and sell the whole estate.
Transfer to other state	If the decree is sent for execution to other state it will be executed by such courts in such manner as may be in force in that state (and not in as per the rules of state where decree was originally passed.) **39

Hence the overall position about the decree being immune from challenges is quite uncertain and even at the stage of execution there is sufficient scope for the other side to dispute the validity of decree and thereby delay the proceedings.

V

EXECUTION IN CASE OF DEATH **OF JUDGEMENT DEBTOR**

The Average life of litigation in India is substantially long and hence there are several cases where the judgement debtor has expired by the time the decree is passed and execution proceedings are initiated. The decision as to how decree can be executed involves interpretation of not only the Civil Procedure Code and other substantive laws but also of the personal laws of the community to which the judgement debtor belonged.

Under the Hindu Law, where the son (or his descendents) are joint with their father and debts have been contracted by the father in his capacity as manager and head of the family for family purpose, the sons as members of joint family are bound to pay the debts to the extent of their interest in coparcenary property. Hence the liability is not personal and is only to the extent of estate inherited.**40

**39 SECTION 40 OF CIVIL PROCEDURE CODE.

**40 MULLA, HINDU LAW, 17TH EDITION, BUTTER WORTHS, PG. 442 VOL.I

The position regarding mortgage is settled by a case where father mortgaged property to discharge his antecedent debt and the bank filed suit on mortgage interalia against the father and his minor son. There was partition of joint family property subsequent to mortgage and before filing of suit by the bank. Mortgage was held binding on the son.**41

The position under the Mohammedan Law is that when a Mohammedan dies Intestate the vesting of estate will be proportionate to their respective shares of inheritance. The heirs hold the estate subject to the payment of all the prior claims. The estate can be distributed among the heirs anytime after death.**42

Decree passed in ignorance of death of plaintiff is mere irregularity and it can still be executed. The executing court can not refuse execution of the decree on the ground that decree is passed after death of a person. When a legal representative of the deceased creditor files application for being substituted in the execution proceedings initiated by the creditor, the application is undoubtedly one for execution of decree.**43

In case of death of judgement-debtor before issuing of notice to him, his legal representatives must be brought on record and be served with notice. Failure to do so makes the sale inoperative **44. However where a sale proclamation has been legally drawn up after notice to the judgement debtors under this rule and one of the judgement debtors dies subsequently, a fresh proclamation need not be drawn up after notice is already issued to persons who are entered as his heirs.

Where the share of a member of an Hindu Undivided Family is attached in execution of decree and he dies thereafter, but before the sale of property in execution, the validity of sale is not affected the failure to bring on record his legal representatives, as the sons who were already on record sufficiently represented

**41 V. PILLAI V/s. CHANDIL BANK AIR 1964 SC 1425

**42 PRINCIPLES OF MOHAMMADAN LAW NISHI PUROHIT 1997 EDITION AT PAGE 422.

**43 A PARTI PANDA V/s. GOVIND SAHU, AIR 1984, CIVIL 1 (6)

**44 BANERJI ON LAW OF EXECUTION PAGE 909.

the estate of the deceased. When the decree is passed the court is approached to proceed on the basis of application for execution. So where a decree holder dies pending the execution proceedings his heirs can be substituted without a succession certificate.**45

Death during pendency of suit also creates various difficulties. The detailed procedure in respect of this point is elaborated under Order 22 of the Civil Procedure Code and is listed in tabular form as under :-

DEATH OF PARTY

LEGAL POSITION

Decree holder	Legal heirs of decree holder can initiate proceedings after moving an application for that purpose.
Judgement debtor	The execution can continue against the legal heirs. The liability of legal heirs is to the extent of estate inherited.
Purchaser of property	If initial deposit is made and thereafter auction purchaser expires, his legal heirs can make remaining payment and acquire the property.

VI

EXECUTION AGAINST SURETY

The word 'Surety' in the context of execution has wider meaning. 'Surety' as defined under the Indian Contract Act means a person who has given guarantee in favour of the creditor for performance of a financial obligation on whose behalf the same is given. His liability is coextensive with that of the principal debtor.**46

**45 LAW OF SUCCESSION, N D BASU.. 6TH EDITION PAGE 1006.

**46 SECTION 126 OF INDIAN CONTRACT ACT.

The decree under execution may however specifically stipulate that the decretal amount is to be realised first from the person and properties of the principal debtor. In such case execution against the guarantor can proceed only if decree-holder fails to realise the decretal amount from the person and properties of the principal debtor.**47

In the cases where decree is against borrower and guarantors and the bank filed execution against the guarantor, the objection by the guarantor that bank has not taken any step against the mortgaged property was turned down by the Supreme Court. Hence a creditor can proceed against any of the judgement debtors whether a principal debtor or otherwise.**48 The trial court or executing court also can not direct that creditor should postpone the execution of decree until exhausting the remedies against the principal debtor or security provided by him.**49

Similarly in a case before Punjab and Haryana High Court, the plea that unless the hypothecated goods are sold the property of guarantor can not be attached was not allowed by the court. Another context in which the word "Surety" is used in Civil Procedure Code is in context of person who stands surety for performance of a decree.

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 decree or
- (c) For the payment of money, or for fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon,

**47 DEEP CHAND V/s PUNJAB NATIONAL BANK, 1990 (ISJ) BANKING- 356.

**48 STATE BANK OF INDIA V/s. INDEXPORT REGD. AND OTHERS. II, (1992) BC 243 (SL)

**49 G. D. RAO V/s. BANK OF INDIA AND OTHERS I (1996) BC 47.

**50 RAJINDERSING V/s. PUNJAB & SIND BANK 1994, ISJ BANKING-P&H-123

The decree or order may be executed in the manner herein provided for execution of decrees, namely :-

- (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 extent of security.

and such person, giving guarantee/furnishing security shall be deemed to be a party to execution.**51

The court may postpone execution proceedings provided third party's immovable property is given as security and when such security is furnished and title deeds also are deposited, it creates equitable mortgage and even without registration such mortgage can hold good.**52

The court can expedite the recovery of money by issuing such orders at the stage of execution. The surety in such case ensures convenience of court and also the decree holder and execution proceedings can certainly be expedited by resorting to this provision. In such cases, the liability of person who stands surety arises because of failure of judgement debtor to comply with his obligation. This ensures an additional mechanism created by the court to ensure performance of the obligation by the judgement debtor through surety.

The surety is required to execute a document called surety bond and it is to be interpreted according to the terms and conditions mentioned in it and not independent of such terms.**53 The surety also can take the plea of fraud, discharge on ground of fulfillment of condition or adjustment, without his consent between creditor and debtor and raise defence to that effect.

**51 SECTION 145, CIVIL PROCEDURE CODE, AS AMENDED w.e.f. 1/2/1977.

**52 ROYAL PRINTING WORKS V/s. ORIENTAL BANK OF COMMERCE AIR-1990-AP-120.

**53 LAWS RELATING TO EXECUTION OF DECREES AND ORDERS M.S.PAI
PAGE – 178 SECOND EDITION.

An order in course of execution can be made against the surety. Such an order also in itself operates as decree and unless appealed and set-aside operates as res judicata.**54 Even if the surety bond is enforced against one out of several sureties or one of them is released it does not operate as discharge of others and liability though joint and several is not distinct.**55

To enforce the liability of surety it is necessary that notice to the surety is a condition precedent for initiating valid proceedings against the surety. Any attachment of his property made otherwise is bad in law.

The dominant object of the provision is to provide effective summary remedy for enforcement of liability of person who has furnished the security. There is no need to file separate suit by the party for whose benefit the security has been furnished or guarantee has been given and enables him to execute decree as if he were a party to the suit and also a principle debtor.**56

If the defendant fails to appear, or file written statement, an ex parte decree may be passed under Order 9, Rule 8 of Civil Procedure Code and upon application of the defendant it may also be set aside. The court has power to impose condition under such circumstances. In such cases court may direct that a person shall stand as surety for performance of any decree that may be passed on rehearing. If such suit is reheard and decree is passed against the defendant, such decree can be executed against surety also and in such case a separate suit for enforcing it is not necessary. The summary procedure applies to the surty for performance of any decree whether original or appellate.**57

**54 BANERJEE = LAW OF EXECUTION, 4TH EDITION, PAGE 513.

**55 SARKAR – CIVIL COURT PRACTICE MANUAL, 10TH EDITION 1997, P.340. BY SUDIPTO SARKAR / V R MANOHAR.

**56 STATE BANK OF INDIA V/s. SARKARIA SUGAR MILLS(1986), 2SCC 145.

**57 MULLA, CIVIL PROCEDURE CODE, 12TH EDITION, PAGE – 376.

The position can be summed up by saying that the power to direct for producing surety/furnishing security if exercised judiciously can prove of great help in solving the delays involved in execution. Ex parte decrees or execution proceedings should not be set aside unless the reciprocal obligation is created on defendant to comply with this provision.

The Law Commission has observed that inordinate delays do frequently occur at various stages of the execution application. They can be attributed to personal factors, procedural factors and defects in law relating to execution which provides too many safeguards against the law relating to execution.**58

VII

SATISFACTION OF DECREE BY PAYMENT

It is not necessary that the payment should be made only after decree is passed and execution is applied for.

The Civil Procedure Code provides an inbuilt mechanism under which the defendant in a suit to recover a debt or damages may, at any stage of the suit, deposit in court such sum of money as he considers sufficient for satisfaction in full of the claim. The notice of such deposit shall be sent to plaintiff. The plaintiff is not entitled to any interest on such amount after the notice. The plaintiff may also accept such amount and prosecute his case for the balance or accept it in full satisfaction of the claim.**59

The tender of money under this provision has to be unconditional for the interest cease. The tender also should be not a mere intent but accompanied by payment. The tender to be valid must also be for the entire amount and must be kept good, that means the bonafide intention to pay must

**58 LAW COMMISSION OF INDIA, 14TH REPORT, VOL.I, PAGE 435.

**59 ORDER 25, CIVIL PROCEDURE CODE.

appear and money has to be actually deposited or tendered.**60 After the decree is passed, at the stage of execution also, scope for an amicable, out of court settlement is left open.

If any money payable under a decree of any kind is paid out of court or the decree of any kind is adjusted elsewhere in whole or in part to the satisfaction of the decree holder, the decree holder has to certify such payment or adjustment before the court and it will constitute payment towards decree.

If the decree holder does not inform then judgement debtor may inform the court about such payment or adjustment and on his application, court may issue notice to the decree holder as to why such payment should not be recorded.

The payment under a decree can be made in any of the following modes :-

- (i) By depositing into executing court or by postal order or through bank.
- (ii) Out of court by Postal money order or through bank.
- (iii) Otherwise as directed under the decree.

If the payment validly made is refused, then the interest shall cease to run. To enable the judgement debtor to make payment through bank or out of court, Law Commission of India had recommended that such payment should be given due recognition and law is amended accordingly. **61 Whenever payment is so received it is to be applied first towards interest and thereafter to the principal Amount.**62

**60 CODE OF CIVIL PROCEDURE BY SIR WOODROFFE AND AMIRALI, 3RD EDITION, PAGE – 2306.

**61 27TH REPORT OF LAW COMMISSION OF INDIA AT PAGE 174.

**62 LIFE INSURANCE CORPORATION OF INDIA LTD. V/s. GADADHAR AIR 1978, CAL.419.

The concept of "Cessation of interest" which is consistent theme underlying all the provisions, indicates conclusively that the payment has to be first applied towards interest. As per Himachal Pradesh High Court the words "any payment" does not admit any exception and should be given its natural meaning.**63 If any compromise is arrived at between the parties, it also amounts to adjustment as contemplated and unless it is properly recorded as per prescribed procedure, no recognition can be given to it. The words "Decree for payment of Money" does not include within its ambit the mortgage decrees. A decree for sale of property in mortgage suit or for mense profits is not a decree for payment of money. In simple mortgage and other mortgages whenever expressly stipulated, the decree for payment of money may be passed and such decree is a money decree for which the rules stated above can apply. A payment made in accordance with these rules constitutes valid discharge.

The court has a discretion, in case of decree for payment of money, to postpone period of payment or grant instalments. The general tendency on part of judgement debtors is to pray for maximum number of instalments and this is one of the reasons for delay. Even when the court is inclined to grant instalments, some balancing acts in form of security/surety from which full payment can be recovered in case of default in payment of instalments is needed. The ends of justice perhaps do not meet by enabling the judgement debtor to delay the execution infinitely.

It is a settled position of law that the power of granting instalments does not apply to mortgage decrees. In case of usufructory mortgage the practice in England is to grant annual rests in respect of mortgagee in possession and total amount of rents and profits are chargeable to mortgagee against whole amount due. The practice in India, compels the mortgagee to receive his money by one single payment and has the effect of preventing great injustice to the mortgagor.**64

**63 PUNJAB NATIONAL BANK V/s. P. S. CHAUDHARY, AIR 1988 H P 33.

**64 RASBEHARY GHOSE ON LAW OF MORTGAGE, 7TH EDITION PAGE 613.

When decree is for payment in instalments, limitation runs from the date of each default. **65 To prevent multiplicity of proceedings and give some additional relief to decree holder against defaulting judgement debtor, terms of the decree may provide that in default of payment of specified instalments the whole amount under the decree shall fall due at once and the decree holder can seek enforcement of such clause upon happening of event so specified. A money decree by itself does not create any charge, lien, claim or right over the property of judgement debtor. No vested right is created by virtue of decree. The decree holder has to follow all the procedures stipulated under the law to create such exclusive rights in his favour.

The judgement debtor who makes payment also has to comply with procedural formalities as stipulated under the law. Even when he makes payment by deposit, notice/intimation to decree holder is mandatory. Mere deposit in absence of any notice and intimation will not entitle the judgement debtor to plead that he is not liable to pay interest. **66 If the payment is made for limited purpose of complying condition imposed by court while granting stay of execution, such payment will not constitute a payment or deposit towards satisfaction of decree.**67

The validity of payment made by cheque was examined by the Bombay High Court in one of the cases from Baroda. In that case compensation awarded by Joint Dist. Judge, Baroda (MACT Tribunal), stipulated 31/7/84 as last date.

**65 LIMITATION ACT, ART.136.

**66 M. MATHAI V/s. HINDUSTAN ORGANIC CHEMICALS LTD. AIR 1995, SC 1572.

**67 STATE OF GUJARAT V/s. GANGAJ, 1996(2) CURRENT CIVIL CASES P.325, GUJ.

The cheque deposited was realised on 27/8/84 and claimants prayed for interest. The Bombay High Court held that payment made by tender of cheque on last day should be considered good tender within time and it was error on part of executing court to direct payment of further interest.**68 With the advanced technology for remittance of funds by the banks cheques (if realised) should constitute valid mode of payment.**69

The time involved in realisation of cheque also results in disadvantage to the decree holder. The realisation of cheques takes several weeks to months and till such time the cheque is actually debited in judgement debtor's accounts he enjoys the funds. Hence payment by Demand Draft/Banker's cheques seems to be more balanced and just.

With effect from 1/4/89, the Negotiable Instruments Act has been amended and bouncing of cheque for insufficient funds constitutes criminal offence. When such cheque is given towards payment of decree it is necessary that prosecution under the provisions of Section 138 is initiated in case of bouncing, so that judgement debtor does not benefit by having one more round of litigation.

VIII

EXECUTION APPLICATION AND PROCESS

Execution application is the first step towards enforcement of decree through the machinery of court of law.

The execution application can be filed by the following :-

- (i) Decree holder himself.
- (ii) Legal representatives of decree holder if the decree holder is dead.

**68 UNION OF INDIA V/s. JAGVANTI BAI, 1995(4) CCC 451 451 (BOM.)

**69 AIR 1989 SC 1551.

- (iii) Any person claiming under the Decree holder.
- (iv) Transferee of Decree holder who has given notice to transferor and judgement debtor.
- (v) Any one or more of the Decree holders where it is for benefit of all and no contrary intention is indicated.

The execution can be applied against:-

- (i) The judgement debtor if he is alive.
- (ii) Against legal representatives of judgement debtor.

The legal heirs shall however be liable only to the extent of property of deceased, which has come to their hands.**70 Rules 11 of Civil Procedure Code lays down detailed requirements as to seeking enforcement of decree in various modes. The application for execution has to be in form No.6 of appendix E to the First Schedule. The defect in form is not fatal. The application for execution should be in accordance with law.

The execution application must contain in tabular form the following particulars :- **71

- (a) The number of the suit.
- (b) The names of the parties.
- (c) The date of the Decree.
- (d) Whether any appeal is preferred from the decree
- (e) Whether any payment or other adjustment is made.
- (f) Whether any previous application is made for execution of decree.
- (g) The amount with interest due upon the decree.
- (h) The amount of costs (if any) awarded.
- (i) Name of persons against whom execution of decree is sought.
- (j) The mode in which assistance of court is required.

**70 CIVIL PROCEDURE, BY JUSTICE C. K . THAKKAR PAGE 362.

**71 ORDER 21, RULE 11 CIVIL PROCEDURE CODE.

Court may also require the applicant to produce a certified copy of the decree.

The various stages of procedure after filing of application have been given in tabular form as under :-

<u>STAGE</u>	<u>PARTICULARS</u>
Scrutiny and Admission	The court will ascertain whether execution application Complies with the requirements and if so it will admit and register it. Time will be given to rectify defects involved.
Hearing	Court before which the application is pending will fix a date for hearing and pass order as it deems fit.
Show Cause Notice	The law as a general rule does not require any notice to be issued for execution. However in certain cases such notice has to be issued. **72 It will be necessary when.
	<ul style="list-style-type: none"> ⇒ If application is made two years after date of decree or more than 2 years after the date of last order made on any previous application. ⇒ Where application is made against legal representatives of a judgement debtor. ⇒ Decree is passed by any of the superior courts of any reciprocating territory. ⇒ Application is made against assignee or receiver in insolvency. ⇒ Decree is for payment of money and execution is sought against person of judgement debtor. ⇒ Application is made against a person who has furnished security or given guarantee.

****72 ORDER 21, RULE 22 OF CIVIL PROCEDURE CODE.**

⇒ Application is made by transferee or assignee of decree holder.

The compliance of aforesaid provisions is mandatory and is a condition precedent for validity of proceedings.**73

Procedure after notice	If the person to whom notice is sent does not appear and when the court sees no cause to the contrary process will be issued for execution of decree
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It is not mandatory that the execution applications must be accompanied by certified copy of the decree.**74 If in execution of mortgage decree there is an omission to give notice to one of the legal representatives of the mortgagor then the execution is not wholly void but should be set aside to the extent of share of the concerned legal representative.

IX

STAY OF EXECUTION

As is evident from voluminous datas from various courts submitted in the thesis, the decree is passed after several years of contested litigation. The decree constitutes final adjudication of dispute as far as that court is concerned. If such a decree, obtained after long drawn legal battle can be stayed, it will be great injustice and harm not only to the concerned litigant but even to the very cause of judicial system because any dispute should atleast have a finality.

Justice Misra of Gauhati High Court has therefore held...

**73 SATYANARAYAN (1993). 4 SCC 414.

**74 REHMAN V/s. TRIPURA MODERN BANK AIR 1972, GAUHATI 61.

".. a decree has been obtained by a party and he should not be deprived of the fruits of decree except for good reasons. Until the 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 may 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 earlier decree is not nullified"***75

The stay orders granted in casual manner were causing serious embarrassment to decree holders. Hence under the amended provision if decree is for payment of money and court grants stay without requiring security, it shall have to record reasons for such order.**76 The provisions of Civil Procedure Code regarding stay of suit try to balance the conflicting interest of the judgement debtor and the decree holder.

The execution of decree, if it is final decree, can therefore be stayed only under following circumstances :-

- (i) The executing court shall on sufficient cause being shown and on the judgement debtor furnishing security or fulfilling such condition, as may be imposed, stay execution of decree for reasonable time to enable the judgement debtor to apply to court which passed the decree on the appellate court for stay of execution. Such order does not prevent the court from restarting the proceedings. The executing court is bound by the order of court, which passed decree.**77

**75 JUDHISTHIR V/s. SURENDRA AIR 1969, ORI 233.

**76 TEJA SINGH V/s. GRINDLAYS BANK LTD. (1982), 3 SCC 199.

**77 GURINDER SINGH V/s. HAMALA KAUR, (1982) 2 SCC 54.

- (ii) If a suit is pending between the decree holder and the judgement debtor, the court, in which the suit is pending, may upon judgement debtor furnishing security or otherwise stay execution. The purpose is to enable the parties to adjust their claims against each other and to prevent multiplicity of execution proceedings.

The Supreme Court has held that for stay of execution the following conditions need to be satisfied: -

- (i) There must be two simultaneous proceedings in one court.
- (ii) The proceedings are by judgement debtor against the decree holder and by decree holder against the judgement debtor.**78

The powers are discretionary, so that frivolous litigations just to thwart the execution proceedings can be controlled.

X

VARIOUS TYPES OF DECREES AND THEIR MODE OF EXECUTION

A. GENERAL

Elaborate procedures have been laid down for execution of various types of decrees. By virtue of the very nature of such decrees special intricacies may be involved and specific remedies maybe provided under the law to meet with such situation.

Money decree involves payment of money and the prescribed mode for execution includes notice to the judgement debtor, attachment of his movable and immovable properties and sale thereof. The executing court also has a power to order arrest and imprisonment of judgement debtor in exercise of its jurisdiction within the framework prescribed under the law.

**78 KRISHNA SINGH V/s. MATHURA AHIR, AIR 1982 SC 686.

Provisions for garnishee also constitutes an important aspect of law of execution. Garnishee is a person who owes money to the judgement debtor or is under obligation to deliver any movable property to him. Through the mechanism of the garnishee order the judgement debtor is prevented from realising his debt without discharging his obligation under the decree.

Another important mechanism to execute the decree is precept. Precept is an order or direction by the court which passed the decree to other court which would be competent to execute the decree to attach any property belonging to judgement debtor.

The main object underlying the provision of precept is to ensure interim attachment of the property. It is the first step initiated by the court to facilitate execution. The attachment effected in furtherance of a precept is valid for 2 months and decree will have to be transferred for execution.**79 The procedure for garnishee order requires a notice to garnishee under rule 46 A of order 21. If such notice is not given the whole process becomes futile.

Any amount lying to the credit of the judgement debtor can be attached by following garnishee procedure.**80 Shares, security and other movables belonging to judgement debtor can also be attached and sold in execution of decree by following this procedure. The judgement debtor may also make the part payment of the amount for making payment for the remaining amount.

B. SPECIFIC MOVABLE PROPERTY

When the decree is for any specific movable property, the execution can take place in any of the following made :-

- (a) By seizure and delivery of the property.
- (b) By detention of the judgement debtor.
- (c) By attachment of his property.
- (d) By attachment and detention both.

**79 HINDUSTAN BICYCLE V/s. NATH BANK AIR 1957 AP 209

**80 S. KRISHNA BHATT V/s STATE BANK OF INDIA 1990 BANKING CASES

Money is not covered within the definition of movable property and there is separate procedure for money decree.

Provisions as stated above apply only to specific movable property in possession of the judgement debtor and if it is in possession of third party the procedure prescribed under this provision does not apply.**81

If the court is satisfied that the property to be delivered does not exist in specie for some other reason then in such case the court may also direct the decree holder to disclose the market value of the property,**82 as an alternate to the delivery of the property. In respect of certain movables of importance it is not possible to workout the money value. Even if a decree is silent the executing court can fix the amount if the attempt to recover the property is fruitless. If the property to be delivered is not in the same condition in which decree holder is entitled to get it, then the court can determine compensation to be paid.

C. DOCUMENT AND NEGOTIABLE INSTRUMENTS

If the decree is for execution of a document, the process of execution involves signing of such documents by the judgment debtor. When judgement debtor neglects or refuses to obey or comply with the decree, the court shall after giving opportunity to the decree holder as well as to the judgement debtor, prepare the draft of the document in accordance with the terms of the decree and execute such document. Such document shall have same effect as the execution of the document by the party himself.

If the decree is for endorsement of a negotiable instrument and the judgement debtor neglects or refuses to obey the decree, the court after giving an opportunity shall prepare draft of endorsement and endorse it accordingly. It shall have same effect as endorsement by party or his order to endorse it.**83

**81 SECTION 51-A AND ORDER 21 RULE 31 OF CPC.

**82 A G VENKATNARSINHA V/s. VIJAYALAXMI AIR 1982 MAD.329 DB.

**83 ORDER 21 RULE 34 OF CPC.

D. IMMOVABLE PROPERTY

A court executing a decree has the power to attach the property and sell the property or portion thereof which is sufficient to satisfy the decree.

After such attachment the first step is issuing proclamation of sale. Such a proclamation shall be prepared after notice to both the sides and shall comprise of following details:-

1. Time and place of sale.
2. Details of property or part thereof to be sold.
3. Revenue if any attached to property.
4. Encumbrance to which the property is liable.
5. Amount to be recovered under the decree.
6. Such other particulars which court considers material.

Service of notice is a mandatory requirement and non-compliance will vitiate the entire proceedings.**84

The proclamation shall be affixed on the conspicuous part of the property. It should also be published in the manner directed by court. The purpose of having stage of proclamation is to protect the interest of intending purchasers by giving to them all material information and also to protect interest of judgement debtor by facilitating him to fetch proper market price. The sale of immovable property can not take place without consent of judgement debtor before expiry of 15 days on the date of proclamation.

The court has discretion to adjourn the sale further but if the sale is adjourned for more than 30 days a fresh proclamation is required to be issued. The judgement debtor has a right to prevent the property from being sold by paying the amount till such time the property is knocked down. Decree holder can not bid without express permission of the court. It is not obligatory on part of the court to put the entire property of judgement debtor to sell. If part of the property is sufficient, only that much should be sold.**85

****84** DESH BANDHU V/s ANAND 1994 1 SCC 131.

****85** JAMILABIBI V/s. STATE BANK OF TRAVANARU 1ST 1991 BC 284.

It is quiet likely that a third party may raise objection to the attachment of property. In such case court has to proceed for adjudication of the claim. If the property is already sold then no such claim can be entertained. The court may also not entertain such claim if it finds that the claim or objection was designed to unnecessarily delay the proceedings.

XI

ARREST AND DETENTION OF JUDGEMENT DEBTOR

In the execution application the decree holder can insist that the decree be executed by arrest and detention of the judgement debtor. If such a prayer is made in execution application, the court will instead of issuing a warrant, issue a notice calling upon the judgement debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to civil prison. Such a notice will not be necessary if the court is satisfied by affidavit or otherwise that such notice will result in delay in the execution proceeding or the judgement debtor is likely to abscond or leave local limits of the court.

If the notice is not complied warrant for arrest will be issued. Such warrant may direct that unless the specified amount is paid the person should be brought before the court. The order for arrest and detention should not be passed in mechanical manner.

Mere failure to pay does not justify arrest and detention of judgement debtor. In words of justice Krishna Iyer. **86

"The provision needs to establish not mere omission to pay but an attitude of refusal on demand and dishonest disowning of the obligation under the decree. Here the consideration of debtor's other pressing needs and strained circumstances will play prominently. We would by this construction save law with justice..""

****86 JOLLY GEORGE V/s. BANK OF COCHIN, AIR 1980, SC 470.**

Justice Krishna Iyer has expressed great sympathy for the judgement debtor in distress and has remarked that in this land of Daridranarayan it is no crime and to recover debts by procedure by putting one in prison is violative of Article 21 unless there is proof of minimum fairness of willful failure to pay inspite of sufficient means.

The decision if applied in its true spirit virtually makes the provision for arrest a dead letter. The application for arrest will generally be objected on such grounds and execution of decree will get delayed further.

Another important provision connected with arrest is for payment of subsistence allowance. No judgement debtor shall be arrested in execution of decree unless and until the decree holder pays into court such sum as the Judge thinks sufficient for subsistence of judgement debtor from time of his arrest until he is brought before the court. When such person is committed to Civil prison the court will fix his monthly subsistence allowance and such amount will have to be paid by the decree holder in advance. The amount can be recovered as cost of execution. If the judgement debtor appears before the court then the application for arrest for imprisonment will be heard and appropriate orders will be passed.**87 Whenever the court is convinced that the object of the judgement debtor is to defeat or delay the execution of the decree with malafide intention then such powers to send judgement debtor to civil prison should be exercised. Similarly if the judgement debtor undertook to deposit the decreetal amount with interest and cost, the default will justify the arrest and imprisonment.**88

A woman can not be arrested and detained in civil prison in execution of decree for payment of money. Even in decree for restitution of conjugal rights a woman can not be arrested.

**87 RULE 39 ORDER 21 OF CPC.

**88 JAGDISHCHANDRA V/s. PUNJAB NATIONAL BANK AND OTHERS. 1ST VOL. 1993 BC 175.

XII

ATTACHMENT OF PROPERTY IN EXECUTION

The Civil Procedure Code makes elaborate provisions for attachment of property in execution. The court is vested with power to order execution of decree by attachment or sale or sale without attachment of the property situated within its local jurisdiction. Sale of property without attachment is not void and attachment is not a condition precedent for sale.**89 The general rule is that all-saleable property whether movable or immovable belonging to judgement debtor can be attached. Section 60 of the CPC lays down the list of properties, which can not be attached. Thus wearing apparel, utensil, tool of artisans, houses of agriculturists, wages, salaries, pensions and gratuities, right of maintenance etc. can not be attached except and to the extent permitted under section 60. The mode in which various properties may be attached are as given below:-

<u>TYPE OF PROPERTY</u>	<u>MODE OF ATTACHMENT</u>
1. Movable property in possession of judgement debtor	by actual Seizure and sale if the property is subject to speedy and natural decay. **90
2. Movable property not in possession of judgement debtor	by order prohibiting person in possession from giving it to judgement debtor.
3. Negotiable instrument	by actual seizure and bringing it to court.
4. Debt not secured by a negotiable Instrument	By an order-prohibiting creditor from recovery of the debt and debtor from paying the debt with a directive to deposit the amount in court.

**89 KRISHNALAL V/s. BHAGWAN 1973 GLR 820.

**90 TIKKA V/S. STATE OF UP AIR 1961 SC 803

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|---|--|
| 5. Share in a company | by on order prohibiting the holder from transferring it or receiving dividend. |
| 6. Share or interest in movable property | by notice to the judgement debtor prohibiting him from transferring or charging it. |
| 7. Salary or allowance of employee | by an order that amount shall be withheld from such salary or allowances. |
| 8. Partnership property | by making an order |
| | ⇒ Attaching the interest share of the partner and partnership |
| | ⇒ Appointing a receiver of the share |
| | ⇒ Directing production of accounts. |
| | ⇒ Ordering sale of such interest. |
| 9. Property in custody of other court or officer | by notice requesting that such property may be held subject to order of the court |
| 10. Decree for payment of money or Sale in enforcement of a mortgage or a charge. | By an order of such court. |
| 11. Agricultural produce | By affixing copy of warrant on the land and on the house where judgement debtor resides. |
| 12. Immovable property | By an order prohibiting judgement debtor from charging or transferring it.**91 |

**91 SATYANARAYAN V/S. RAMANARAYAN 1993 4SCC 414

Attachment has been described as seizing another's property and involves the act or process of taking, apprehending or seizing the property and bringing the same in custody of the court. It is mainly used to seize the debtor's property in order to secure the claim of the creditor.**92 The orders of attachment if promptly passed may effectively prevent the judgement debtor from transferring his property and expedite the compliance of decree including payment of money.

XIII

OBJECTION AND CLAIMS

After issue of orders for attachment/proclamation, the court adjudicates upon the claims to or objections in respect of attachment of property in execution of decree. Such objections are raised by judgement debtors or third parties on the ground that property is not liable to attachment. Before ordering sale of the property or otherwise proceeding with execution the court has to first proceed to adjudicate upon the claim or objections in accordance with the provisions contained under Civil Procedure Code.**93 Such claim or objection however can not be entertained if property attached has been already sold or where the court considers that the claim or objection will unnecessarily delay the proceedings. All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relating to adjudication of claim or objection shall be dealt with by the court dealing with the claim and not by separate suit. The court upon determination of the questions referred to above:-

- (i) Allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit, or
- (ii) Disallow the claim or objection.
- (iii) Continue the attachment subject to any mortgage, charge or other interest in favour of any person, or
- (iv) Pass such order, as in the circumstances of the case it deems fit.

**92 BLACK'S LAW DICTIONARY 6TH EDITION AT PG.126.

**93 ORDER 21, RULE 58 CIVIL PROCEDURE CODE.

If there are several properties and several judgement debtors the execution court has the discretion to decide against which and whose properties the execution may be first initiated.

If the judgement debtor's possession is disputed and there is subsequent dispossession after decree for possession is complied with, a suit to obtain such possession can be initiated.**96

The guarantors raise objections for initiating action first against principal debtor, his properties and securities provided by him. The Kerala High Court has held that against a guarantor execution by arrest and detention in the prison cannot be ordered unless the court is satisfied that he has the means to pay at least some substantial portion of the decretal debt. The proceedings in such case may be stayed.**97

If a company, under process of liquidation starts proceedings of execution is not entitled to seek protection of section 446 of Companies Act, to debar other persons, from defending their property.**98

XIV

EXECUTION SALES

The sale in Execution proceedings may be of

1. Movable Property
2. Immovable Property

**96 GEORGE ANTOBY V/S. KERALA STATE FIN. CORP. IC (1991) BC 9

**97 UMA SHANKAR V/S. SARABJEET 1996 SC 1005, 1000

**98 VELAYUDHAN V/S. STATE BANK OF INDIA, AIR 1989, KAR.38.

If the sale is of agricultural produce it should be conducted on or near the place where such crop is grown or at threshing floor etc. The sale may be postponed if fair price is not offered or if market is held in that area till next market sale. In case of negotiable instruments the sale can be made through a broker. Any irregularity in publishing or conducting the sale does not vitiate the validity of sale. If the movable property is in custody of the court it may be physically delivered to the purchaser. If it is with a third party the delivery shall be made by directing person in possession not to give the same to judgement debtor or anyone else except the purchaser.**99

If the movables sold are shares of a limited company the purchaser is not entitled as a matter of right to have his name entered in the register of company and he is subject to the provisions of articles of association applicable to all transferees and hence sale have to transfer the shares in his name.

Moneys payable under a life Insurance Policy of judgement debtor are entirely exempted from attachment and sale by virtue of provisions of section 60(1) (kb) of Civil Procedure Code and the position does not change whether the money is received during his lifetime or after the death.**100

In respect of immovable property the execution sale may be made by any court other than a small causes court.

Where there is an order for sale of immovable property and the judgement debtor can satisfy the court that there is reason to believe that the amount of decree maybe raised by mortgage or lease or private sale of such property or any part thereof or of any other immovable property of the judgement debtor, the court may postpone such sale on such terms and for such period as it thinks proper to enable him to raise the amount. The court in such case will grant certificate authorising judgement debtor to carryout such transaction.**101

**99 ORDER 21, RULE 79 CIVIL PROCEDURE CODE.

**100 FEDERAL BANK LTD. V/S. SMT. INDIRA DEVI AND OTHERS AIR 1986 BOM. 101.

**101 ORDER 21, RULE 83 OF CIVIL PROCEDURE CODE.

The provision aforesaid is in form of one more opportunity for the judgement debtor to manage his own affairs and raise the best possible price and pay off the decretal amount. On the other hand it has an inbuilt potential for further delaying the matter and hence the power to impose the conditions needs to be exercised very judiciously. No sale should be postponed and no certificate should be granted unless the whole amount due on decree can be raised by such mortgage, lease or sale.

In every sale of immovable property the person declared to be the purchaser, has to deposit 25% of amount of purchase money in the court and in default of such payment property will forthwith be resold. The full payment has to be made by the purchaser within 15 days of sale of such property.**102

If default is made in making payment as aforesaid the deposit may after defraying expenses of sale be forfeited and property shall be resold and defaulting purchaser shall forfeit all claim to property. Fresh proclamation of sale is required to be issued. If the property to be sold is share of undivided immovable property bid by co-owner will have preference.

From the viewpoint of delay in execution this is one more stage where the proceedings be delayed on account of non-payment of remaining amount by the purchaser. It is pertinent to note that the 25% amount is forfeited to the Government and does not go to the decree holder.

Where immovable property has been sold in execution of decree any person claiming interest in the property sold at the time of sale or at the time of making application may apply to have the sale set aside on his depositing in the court, 5% of the amount of purchase money and for payment to decree holder amount specified in proclamation of sale less the amount which is already paid to the judgement debtor.

**102 ORDER 21, RULE 85 OF CIVIL PROCEDURE CODE

Where immovable property has been sold in execution of decree, the decree holder, or the purchaser, or other person entitled to share in distribution of assets, or whose interests are affected by the sale, may apply to court to set aside the sale on ground of material irregularity or fraud in publishing or conducting it. The sale cannot be set aside unless the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

The purchaser may also apply to court to set aside the sale on the ground that the judgement debtor has no saleable interest in the property.**103

Where no application is made under the aforesaid provision sale shall become absolute and certificate will be issued to purchaser. If the property is in possession of judgement debtor or tenant, the court may pass orders to remove a person who refuses to vacate.

Thus there are several rounds of contest at each stage for execution proceedings. Unless the judgement creditor (decree holder) is really vigilant and prompt and court also strictly refuses to interfere on technical grounds, the time involved in execution proceedings may be substantially long. If the purchaser is dead, then sale certificate maybe given in the name of his legal heir.

The Supreme Court has held that where objections are filed by decree holder on ground of inadequacy of price, and value of property is undisputed, the auction-purchaser maybe directed to pay higher price though he is in possession of property.**104 However, when no objection is taken by the concerned party at the stage of issuing proclamation of sale and even after receipt of notice no objections were raised, estoppel applies against disputing the sale on inadequacy of price at a later stage.**105

**103 ORDER 21 RULE 94 OF CIVIL PROCEDURE CODE.

**104 STATE BANK OF INDIA V/S. AJIT JAIN AND OTHERS I (1995), BANKING CASES PAGE 446 (SC)

**105 SREEDHARAN V/s. UNION BANK OF INDIA I(1993) BC 479.

XV**SETTING ASIDE THE SALE**

A sale before it becomes absolute, can be set aside on the following grounds:-

- (i) Upon application by a party having interest in property upon deposit of 5% of amount in the court and payment to decree holders of amount mentioned in proclamation.
- (ii) On the ground of fraud or irregularity.
- (iii) Where any property is sold in execution of decree pending final disposal of any claim to or objection to attachment of property, sale may be set aside upon decision in such matter.

Where inadequacy of price is due to factors other than material irregularities or fraud, it is not a valid ground for setting aside the sale.**106 The court is also not empowered to confirm the sale till the period of limitation for objections has expired. If sale is confirmed before that period, very material right of party is taken away and it is left without any remedy if such party wants to challenge the sale.**107 Where there are several judgement debtors having undivided interest in property sold, the order passed by the court setting aside sale with respect to his interest ensures for benefit of other judgement debtors. The court also has inherent power under section 104 to set aside a sale. The provisions in Civil Procedure Code to set aside and/or dispute the validity of sale thus appears to be too liberal and in most cases results in disadvantage to the decree holder.**108

**106 VIDYA BHAN PRAKASH V/s. SECOND ADDL. DIST. JUDGE AIR 1988 ALL.204.

**107 BAGHLA BRICKETTE INDUSTRIES V/S. PUNJAB FIN. CORPN. AIR 1986, P & H 50.

**108 ORDER 21, RULE 99 CIVIL PROCEDURE CODE.

The claims raised by third parties who are strangers to the suit upto stage of execution, such as claim from tenants or others claiming interest in the property also delays the proceedings subsequently. Where any person other than decree holder is dispossessed in execution, he is entitled to make application in the court which will be decided by court.

XVI

RESISTANCE TO SALE

Where the holder of a decree for possession of immovable property or purchaser of any such property sold in execution of decree is resisted or obstructed by any person in obtaining possession of property, he may make an application complaining of such resistance or obstruction and the court shall proceed to adjudicate upon the application in accordance with the provisions of the Act.**109 The expression "resistance" or "obstruction" refers to some overt act on part of person who is in possession of property. The person in possession can not file application under this rule but can defend his conduct when application is moved against him. The right to move such application is conferred on decree holder or judgement purchaser.

As per Full Bench judgement of Madhya pradesh High Court a third party has no locus standie to seek investigation of claim made under this rule.**110

Where such a complaint is made court should issue a notice to obstructer and inquire into his claim and not summarily evict him by sheer force. As per learned editors of Mulla's Civil Procedure Code there is one important change after 1976. After this change the decree holder can resort to separate suit, yet if he chooses to proceed under rule 97, he can not subsequently bring a suit.**111

**109 ORDER 21 RULE 97 CIVIL PROCEDURE CODE.

**110 USHA JAIN V/S. MANMOHAN BAJAJ.

**111 MULLA, CIVIL PROCEDURE CODE, 12TH EDITION PG.804.

XVII**SPECIAL MACHINERY PROVIDED BY GOVERNMENT****TO RECOVER DUES UNDER STATE****SPONSORED SCHEMES**

After nationalisation the banks have shifted their focus to purpose oriented lending from security oriented lending. Hence the credit is extended to various small borrowers/agriculturists etc. As the cost of litigation and time involved is high, special machinery has been provided for recovery of dues of banks under Gujarat Public Moneys (Recovery of Dues) Act, 1979.

The amount lent under "State Sponsored Scheme" can be recovered under this Act. The words state sponsored scheme means a scheme adopted by the State Government or an officer authorised by it in this behalf for development of agriculture or industry and notified as such by the State Government or the authorised officer by notification in official gazette. Such laws have been passed by various State legislatures**112

The Act provides for a summary and speedy procedure to recover the amount involved. If any person is a party to a loan or advance by way of financial assistance given by the State Government or Bank and makes any default in payment of the loan or advance or any installment thereof and fails to make payment or comply with obligation then the officer of the bank or Government may send to the collector a certificate in the prescribed form mentioning the sum due and requesting him to recover such amount as arrears of land revenue. The collector after due inquiry can proceed to recover the amount stated therein as arrears of land revenue. The amount recovered shall be paid to the bank or institution concerned.

**112 SECTION 2(1), GUJARAT PUBLIC MONEYS RECOVERY ACT.

The jurisdiction of Civil Courts in the matter is barred and no suit for recovery of any such dues as aforesaid shall lie in a Civil Court against any person and no injunction shall be granted in respect of action taken.**113

Due opportunity is provided to the borrower to make payment of the amount before initiating drastic recovery action against them.

****113 SECTION 3 OF GUJARAT PUBLIC MONEYS RECOVERY ACT.**

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