

EXECUTION OF DECREES

(Order 21 CPC)

S.S. Upadhyay

Former District & Sessions Judge/

Former Addl. Director (Training)

Institute of Judicial Training & Research, UP, Lucknow.

Member, Governing Body,

Chandigarh Judicial Academy, Chandigarh.

Former Legal Advisor to Governor

Raj Bhawan, Uttar Pradesh, Lucknow

Mobile : 9453048988

E-mail : ssupadhyay28@gmail.com

Website: lawhelpline.in

1. **Decrees which are generally executed by courts and their provisions at a glance:** Following are the decrees for whose execution applications are moved by the decree holders:
 - (i) Money decree: Order 21, rules 30, 41,43, 52,56 CPC.
 - (ii) Certificate of decree holder on receiving payment of decretal amount out of court: Order 21, rule 2 CPC and Rule 170 of G.R.Civil
 - (iii) Delivery of possession: Order 21, rule 35 CPC and Section 74 CPC.
 - (iv) Execution and registration of sale deed in favour of decree holder in pursuance of decree for specific performance of contract: Order 21, rule 34 CPC
 - (v) Breach of decree for permanent prohibitory or mandatory injunction: Order 21, rules 32, 37,38,39,40 CPC and Rule 178 of G.R.Civil
 - (vi) Application for restoration of execution application dismissed in default of the decree holder under Order 21, rule 105(2) CPC: Order 21, rule 106 CPC
 - (vii) Application for recalling ex parte order passed against judgment debtor for default under Order 21, rule 105(3) CPC : Order 21, rule 106 CPC
 - (viii) Objections by judgment debtors against decrees: Section 47 CPC

- (ix) Objections by third parties against delivery of possession: Order 21, rules 97 to 103 CPC
- (x) Duty of Munsarim on receiving execution application: Rule 166 of G.R.Civil

- 2.1 Notice to judgment debtor under Order 21, rule 130 CPC:** Order 21, rule 130 CPC, as inserted in Uttar Pradesh, provides that “ Nothing in these rules shall be deemed to prevent the court from issuing and serving on the judgment debtor simultaneously the notices required by Order 21, rule 22, 66 and 107 CPC.”
- 2.2 Notice of execution application to judgment debtor:** Order 21, rule 140 CPC, as inserted in Uttar Pradesh, provides that “ All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or 8 CPC shall apply to all proceedings taken under Order 21 or Section 47 CPC.”
- 2.3 Notice to judgment debtor under Order 21, rule 22 CPC when required:** Order 21, rule 22 CPC, as amended in Uttar Pradesh, provides that “Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment debtor has sustained substantial injury by reason of such omission.”
- 2.4 Process fee in execution of decrees: Rule 106** of the General Rules (Civil) provides that the process fee for issue of processes in execution of decrees shall be paid by the decree holder.
- 2.5 Report of process server in execution cases:** Order 21, rule 25 CPC.

- 2.6 Notice to judgment debtor before issuing process under Order 21, rule 35 CPC for delivery of possession:** Where possession of the decretal property was delivered to the decree holder by issuing process under Order 21, rule 35 CPC without issuing notice of the execution application to the judgment debtor and the judgment debtor had to suffer huge loss as his belongings were removed and appropriated, the Supreme Court granted him a compensation of Rs 2000/- See: Gopalan Vijayan Vs.Kunchanadhan, (1993) Suppl 2 SCC 671
- 2.7 General Rules (Civil):** See Rules 162 to 178 of the General Rules (Civil) which deal with the execution of decrees of various natures:
- 2.8 A judgment debtor normally not entitled to notice of execution application:** A judgment debtor is not entitled to any further opportunity of show cause or notice. See: New Okhla Industries Development Authority, NOIDA, Ghaziabad vs. State of UP, 1995(13) LCD 892.
- 2.9 Mandatory directions of Supreme Court for compliance in suits and execution proceedings:** The Supreme Court, in Para 42 of its judgement in the case noted below, has issued following mandatory directions to the courts dealing with the civil suits and the execution proceedings of decrees:
- 42.1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents upon oath, which are in possession of the parties to disclose and produce documents upon oath, which are in possession of the

parties including declaration pertaining to third-party interest in such properties

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.

42.3. After examination of parties under Order 10 or production of documents under Order 11 or receipt of Commission report, the court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

42.4. Under Order 40 Rule 1 CPC, a Court Receiver can be appointed to monitor the status of the property in question as *custodial legis* for proper adjudication of the matter.

42.5. The court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

42.6. In a money suit, the court must invariably resort to Order 21 Rule 11, ensuring immediate execution of decree for payment of money on oral application.

42.7. In suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while

adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

42.9. The court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

42.10. The court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to sub-rule (2) of Rule 98 of order 21 as well as grant compensatory costs in accordance with Section 35-A.

42.11. Under Section 60 CPC the term "...in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

42.12. The executing court may dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

42.13. The executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the police station concerned to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the court, the same must be dealt with stringently in accordance with law.

42.14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the court personnel/staff executing

the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the executing courts.

43. We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable. See: *Rahul S. Shah Vs. Jinendra Kumar Gandhi and others* (2021) 6 SCC 481 (Three-Judge Bench)

- 3.1 Decree holder can apply any of the modes prescribed in law for execution of decree:** one mode of execution is applied, it is well settled principle that when the law prescribes more than one mode of execution, it is for the decree- holder to choose which of them he will pursue. See: *Anandilal vs. Ram Narain*, AIR 1984 SC 1383.
- 3.2 Executing Court not to alter the mode of execution directed by court passing the decree :** Interpreting the provisions of Sec. 47 CPC and Or. 21, r. 30 CPC in relation to the execution of money decree, it has been held by the Supreme Court that if the mode of recovery of the decretal amount was prescribed by the court passing the decree then alteration of the manner of recovery of the decretal amount by the executing court is illegal. See: *Radhey Shyam Gupta vs. Punjab National Bank*, AIR 2009 SC 930.

4. **Factors to be taken into account by the executing court:** An executing court should not consider any factors, facts or reports other than those taken into account by court passing judgment and decree and which formed part of the record. See: *Satyawati Vs. Rajinder Singh & Another*, (2013) 9 SCC 491.
- 5.1 **Scope of Section 47 CPC:** Question of tenancy cannot be decided by the executing court. See: *TCI Finance Ltd vs. Calcutta Medical Centre Ltd.*, 2006 (1) ARC 32 (SC)
- 5.2 **Executing Court cannot question validity of decree on objection u/s 47 CPC that the decree was passed without territorial jurisdiction:** Executing Court cannot question validity of decree on objection u/s 47 CPC that the decree was passed without territorial jurisdiction. A distinction must be made between a jurisdiction with regard to the subject-matter of the suit and that of the territorial and pecuniary jurisdiction. Whereas in the case falling within the former category, the judgement would be a nullity, in the latter it would not be. See:
- (i) *Sneh Lat Goel Vs. Pushp Lata Goel*, AIR 2019 SC 824.
- (ii) *Mantoo Sarkar Vs. Oriental Insurance Company Limited*, (2009) 2 SCC 244 (paras 19 & 20)
- 5.3 **Jurisdiction and question of decree being nullity can be decided by executing court u/s 47 CPC:** Objection as to jurisdiction of trial court decreeing the suit and question of decree being nullity can be examined by the executing court u/s 47 CPC. See: *Smt. Sharda Sahu vs. ADJ Lucknow*, 2005(2)AWC1769(LB)

- 5.4 Objection as to title raised by third party beyond the scope of Section 47 CPC:** Objection was never taken in the written statement nor raised in suit or appeal. Objection relating to investigation of title of a third party to the decretal property is beyond the scope of Section 47 CPC. See : Jagbir Singh Vs VI Addl. District & Sessions Judge, Bijnor, 1997 (30) ALR 358 (All.)
- 5.5 Executing court cannot go behind the decree:** Executing court cannot go behind the decree. It must take the decree according to its trainer and cannot entertain any objection that the decree was incorrect in law or on facts. Until the decree is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. See:
- (i) Sneh Lat Goel Vs. Pushp Lata Goel, AIR 2019 SC 824.
 - (ii) Mantoo Sarkar Vs. Oriental Insurance Company Limited, (2009) 2 SCC 244 (paras 19 & 20)
 - (iii) Vashudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman, AIR 1970 SC 1475.
- 5.6 Executing court can take cognizance of decree being nullity for want of jurisdiction:** In case of decree being nullity for want of jurisdiction and if the same is patent on the face of the decree, then executing court may take cognizance of the nullity. Else normal rule will prevail that the executing court cannot go behind the decree. See: Rafique Bibi (Dead) by LRs vs. Sayed Walliuddeen (Dead) by LRs, (2004) 1 SCC 287
- 5.7 A decree suffering from illegality or irregularity of procedure cannot be termed as in executable:** A decree suffering from illegality or irregularity of procedure cannot be termed as in executable decree by the executing court. The remedy of a person aggrieved by such a decree is to have it set

aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. See:

(i) (1993) 2 SCC 458

(ii). Vasudeo Dhanji Bhai Modi vs. Raja Bhai Abdul Rehman, (1970) 1 SCC 670.

- 5.8 Plea of fraud in obtaining decree not to be decided by executing court but by filing a separate suit:** Section 47, Order 9, rule 13 CPC- In execution of ex parte decree, wife of defendant- tenant had filed written statement and vakalatnama in the suit. Now alleging that she never filed written statement and vakalatnama and fraud was played in this respect. Such objection was rightly rejected by the executing court. This plea cannot be entertained in execution proceedings. – Separate suit is the remedy. See: Smt. Nirmala Debi Srivastava vs. District Judge, Kanpur Nagar, 1998(2) ARC 568 (All)
- 5.9 Non- impleadment of transferee or assignee will not render the decree void ab initio u/s 47 CPC:** Powers of court u/s 47 CPC are quite different and much narrower than the power of appeal, revision or review. Non-impleadment of transferee or assignee will not make the decree *void ab initio* so as to invoke application of Section 47 CPC. See: Dhurandhar Prasad Singh vs. Jai Prakash University, AIR 2001 SC 2552.
- 6. Order of lower authority merges into that of the superior authority:** A judicial order passed by the trial court merges in the order passed by the appellate or revisional court. It cannot be said that an appellate or revisional decision in which the decision of the trial court has merged is still a case arising out of the original suit. After merger, the decision arising out of the

original suit vanishes. See: Jaswant Singh Vs. Smt. Kusum Lata Devi, 2012 (116) RD 383 (All)(LB).

- 7.1 Stay of execution proceedings by the executing court:** Order 21, rules 26 to 29 CPC and Order 41, rule 5 (2) CPC
- 7.2 Appeal, revision, writ not to be treated as stay order unless there is an order staying execution proceedings:** Order 21, rule 41 (5) CPC
- 7.3 Stay order passed by superior court becomes effective from the date of communication to the lower court:** Explanation to Order 41, rule 5 CPC.
- 7.4 Stay order passed by superior court becomes operative from the time when it is actually communicated to the lower court:** A stay order passed by a superior court becomes operative and takes effect from the time when it is actually communicated to the court below. Following an earlier Full Bench Decision of the Allahabad High Court reported in AIR 1927 All 401 (Full Bench) and 1960 ALJ 542 (All), it has been held that a stay order is effective w.e.f. the date of its communication to the court passing the stay order. The stay order passed by the higher court does not have the effect of ousting jurisdiction already possessed by the subordinate court over the case pending before it. Any proceeding taken in the subordinate court in ignorance of the stay order cannot therefore be said to be null and void. See:
- (i) Smt. Ram Sri vs. Dhanpat, 1980 A.Cr.R. 327 (All)
 - (ii) Ram Raj vs. State of UP, AIR 1963 All 588 (DB)(LB)
- 8.1 Court can u/s 151 CPC direct defendant to provide security before proceeding with suit:** Court may on application of plaintiff or on its own

motion using inherent powers of court under Section 151 CPC, under circumstances warranting the same, direct the defendant to provide security before further progress of the suit. See: *Rahul S. Shah Vs. Jinendra Kumar Gandhi*, (2021) 6 SCC 418 (Three-Judge Bench)

- 8.2 Duty of executing court in case of dispute regarding payment of decretal amount made out of court u/o. 21, r. 2 CPC:** If the receipts showing payment of decretal amount (amount of maintenance) out of court are filed by the judgment debtor but disputed by the decree holder, it becomes obligatory on executing court to go into the question and decide the facts as to whether payment had actually been made or not. Executing court cannot reject the application of the judgment debtor on the ground that the payments were not certified u/o. 21, r. 2 CPC. See: *Dr. Subhash Chandra Jain vs. Special Judge (E.C. Act), Farrukhabad*, AIR 2009 (NOC) 899 (All)
- 8.3 Court has no power to order payment of decretal amount into installments:** Where R.C. was issued for recovery of money and the High Court directed for payment into installments, it has been held by the Division Bench that the High Court has got no power under Article 226 of the Constitution to order payment by installments. It can be done only by the bank or the financial institution granting loan and not by the court. Re-scheduling of loan by court is not permissible. See: *Mohan Swaroop vs. Tehsildar, Pilibhit*, 2002 (47) ALR 191 (DB)
- 9.1 Section 5 Limitation Act not applicable to deposit of decretal amount :** Section 5 of the Limitation Act, 1963 for condonation of delay is applicable to appeal an application. It does not apply to depositing decretal amount and

condoning delay in deposit. See: Smt. Kusum Devi Vs. Ramji Verma, AIR 2016 (NOC) 393 (All).

- 9.2 Section 5 of Limitation Act not to apply to execution of decree u/o 21, rule 90 CPC:** Section 5 of Limitation Act does not apply to execution of decree under Order 21, rule 90 CPC. See: Aarifaben Vs. Mukul Thakorebhai Amin, (2020) 5 SCC 449
- 9.3 Thirty days period prescribed u/o 21, rule 106(3) CPC for moving restoration application of execution application dismissed in default mandatory:** Application u/s 5 of the Limitation Act, 1963 is not maintainable in execution proceedings under Order 21 CPC. Section 151 CPC cannot be invoked in such matter. Hardship or injustice cannot be a ground for extending period of limitation. If the execution application was dismissed in default, application for its restoration must be filed under Order 21, rule 106(3) CPC within 30 days from the date of order and not thereafter from the date of knowledge. See: Damodaran Pillai vs. South Indian Bank Ltd., 2005(34)AIC 83(SC)
- 9.4 Section 5 of Limitation Act not applicable to r execution proceeding sunder Order 21 CPC and restoration of execution application:** Limitation period for restoration of execution application dismissed in default under Order 21, rule 105 CPC is 30 days under Order 21, rule 106 (3) CPC from the date of dismissal and 30 days from the date of knowledge of the ex parte order. See: Damodaran Pillai vs. South Indian Bank Ltd., 2005(4) AWC 3160(SC)

9.5 No limitation for filing objection u/s 47 CPC : No limitation is prescribed for filing objection u/s 47 CPC. See: Arun Lal v. Union of India, AIR 2011 SC 506.

9.6 Limitation period for moving applications under Order 21 CPC for execution of different types of decrees as provided by the Limitation Act, 1963 :

- (i) Permanent prohibitory injunction: No limitation period: Article 136.
- (ii) Permanent mandatory injunction: 03 years from the date of the decree or where a date is fixed for performance, such date: Article 135.
- (iii) For possession of immovable property in execution of decree: 30 days from the date of resistance or obstruction: Article 129.
- (iv) For execution of all other decrees or orders: 12 years: Article 136.
- (v) Application for restoration of execution application dismissed in default of the decree holder or for an order to set aside ex parte order passed against the judgment debtor: 30 days: Order 21, rule 106 CPC.

9.7 Period covered under stay order can be excluded in computing limitation period: In the case of execution of a decree, the period that elapsed for non-execution of the decree due to operation of temporary injunction restraining execution of the decree has to be excluded under Section 136 of the Limitation Act, 1963. See: Vareed Jacob vs. Sosamma Geevarghese, (2004) 6 SCC 378.

9.7 Delayed execution of decree for possession deprecated by the Supreme

Court : Where unreasonable delay had taken place in executing a decree for possession u/o 21, rule 35 CPC, explaining the provisions of Order 21, Order 26, rule 9 CPC and Section 47 of the CPC, the Hon'ble Supreme Court has held that there should not be unreasonable delay in execution of a decree because the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain. See: Satyawati Vs. Rajinder Singh & Another, (2013) 9 SCC 491.

10.1 Separate suit not necessary by third party resisting execution of eviction

decree: Separate injunction suit by third party claiming independent rights in decretal property is not maintainable. Such claims by third party can be decided in the execution proceedings itself in view of the provisions of Section 47 CPC and Order 21, rules 97, 101 CPC. See:

- (i) Raghunath Prasad vs. Jangjeet Singh, AIR 2008 (NOC) 49 (All).
- (ii) AIR 1998 SC 1754
- (iii) AIR 2001 SC 2552
- (iv) 2003 AIR SCW 6458

10.2 Separate suit not necessary by resister or obstrucater against delivery of

possession in decree for specific performance of contract: In case of ex parte decree of specific performance of contract where delivery of possession is given to the decree holder, objection by third party purchaser claiming to be in possession of the vacant land under the registered sale deed is maintainable under Order 21, rule 99 CPC and not by filing a separate suit. Delivery of possession to the decree holder by the executing court amounts to dispossession or legal ouster of the objector /third party

purchaser within the meaning of Order 21, rule 99 CPC. See: Ashan Devi vs. Phulwasi Devi, AIR 2004 SC 511.

10.3 Order 21, rule 104 applies to that suit which was pending on the date of commencement of proceedings under Order 21, rule 35 and rules 101 to 103 CPC and not to that suit which was filed later on: Order 21, rule 104 CPC provides that the orders passed under Order 21, rules 101 to 103 CPC are subject to the result of any pending suit. But the said provision is applicable only as regards the suit that is pending on the date of the commencement of proceeding in which the orders were made under Order 21, rules 101 to 103 CPC. The rule 104 of Order 21 CPC does not cover those suits which are filed later on only because the order under rules 101 and 103 of Order 21 CPC were passed during the pendency of such suit. See: Vaniyankandy Bhaskaran vs. Mooliyil Padinhjare Candy Sheela, AIR 2009 SC 250.

11.1 Who may resist delivery of possession under Order 21, rule 97 to 103 CPC?: All persons claiming any right in the decretal property can resist the delivery of possession even though they are not bound by the decree. Such persons may include tenants or other persons claiming right on their own including a stranger. See: Shreenath vs. Rajesh, (1998) 4 SCC 543.

11.2 A transferee pendente lite has no right to resist delivery of possession under Order 21, rules 97 to 101 CPC: The right of an innocent and genuine occupant as an obstructor is recognized under Order 21, rule 97 CPC. But such a right cannot be converted into a tool in the hands of high handed and self seeking persons/judgment debtors in order to defeat the rights of the parties and to render the decrees and orders of the Court nothing more than pieces of paper. Order 21, rule 97 CPC is intended to protect a

person who is genuinely in possession of the property claiming independent rights. That is why under Order 21, rule 101 CPC, the Court is required to go into all allegations of title, right and interest as if it is a suit by itself. But the most important feature to be borne in mind is rule 102 which is squarely applicable to the facts of the present case. The provisions relating to the resistance or obstruction to possession of immovable property will not apply to obstruction by a person to whom the judgment debtor had transferred the property pendente lite. See:

- (i) Munusamy vs Vengadachalam, AIR 1998 SC 1754
- (ii) (2010) 2 SCC 114

11.3 Unjust claim or resistance against delivery of possession should be rejected by executing court: Order 21, rule 98(2) CPC would not apply even if a person resists or obstructs delivery of possession at the instigation of the judgment debtor but shows that he has otherwise a just cause. If the resistance or obstruction is found to be unjust and unwarranted, then the same would be removed by the executing court. See: Brahmdeo Chaudhary vs. Rishikesh Jaiswal, (1997) 3 SCC 694.

11.4 An order passed under Order 21, rules 97 to 103 CPC operates as res judicata only if it is passed on the merits: An order passed under Order 21, rules 97 to 103 CPC operates as res judicata only if it is passed on the merits. See:

- (i) Noorduddin vs. K.L. Anand, (1995) 1 SCC 242.
- (ii) Jai Prakash vs. Khinaraj, AIR 1991 Rajasthan 136.

11.5 Res judicata and Section 47 CPC : Where appeal filed by the judgment debtor against an order rejecting objection u/s 47 CPC was dismissed, it has

been held by the Allahabad High Court that subsequent application u/s 47 CPC is barred by the principles of res judicata See: AIR 1975 All 229.

11.6 Order not appealed against to operate as res judicata: Where an application for setting aside sale by executing court is dismissed and no appeal is filed against, another application for setting aside the sale will be barred by the principles of res judicata. See : AIR 1987 SC 1443

11.7 Order deciding objection against execution shall operate as res judicata against similar objection raised second time: A matter directly and substantially in issue in execution proceedings if heard and finally decided, such a decision will operate as res judicata at a subsequent stage of the same execution proceedings. See:

(i) (1982) 2 SCC 109

(ii) 1981 ALJ (NOC) 118.

11.8 Defence available in suit but not raised will amount to constructive res judicata: A defence available in suit but not raised in the suit shall be deemed to have been raised and decided in the suit itself. Such an objection is not open to be agitated u/s 47 CPC at the time of execution of the decree. See: Jagbir Singh vs. VI ADJ, Bijnor, 1997 (30) ALR 358.

11.9 Constructive res judicata and Section 47 CPC_: A defence which has not been raised, which could have been raised, shall be deemed to have been raised and decided by reason of principles of constructive res-judicata. The same cannot remain open to be agitated at the time of execution. A defence in the suit cannot be a ground of application under Section 47 inasmuch as it would have the effect of reversing the decree. Such question cannot be gone into by the executing court on the established principle that the executing court cannot go behind the decree. Such question is no more open to be

decided in execution proceeding. See : Jagbir Singh Vs VI Addl. District & Sessions Judge, Bijnor, 1997 (30) ALR 358 (All.)

11.10 Pre-conditions for applying principle of constructive res judicata: In order to apply principles of constructive res judicata to execution proceedings, it must be shown that the party affected has had clear notice of the nature of the claim made against him or has had an opportunity of contesting the claim. See: AIR 1981 All 235 (Full Bench)

11.11 Dismissal of execution application for non-prosecution not to operate as constructive res judicata: Where the execution application was dismissed for non-prosecution for want of prosecution, it has been held by the Supreme Court that the decision will not operate as constructive res judicata. See: AIR 1969 SC 971

11.12 Constructive res judicata applies to execution proceedings also: Principles of constructive res judicata apply to the execution proceedings under Order 21 CPC as well. Where the first application u/s 47 CPC of the objector was already dismissed by the Executing Court and a second application u/s 47 CPC was again moved by him, relying on the law declared by the Hon'ble Supreme Court in Maqbool Alam Vs. Ahodaija, AIR 1966 SC 1194, it has been held by the Hon'ble Allahabad High Court that the principles of res judicata apply also to execution proceedings. See :

- (i) AIR 1953 SC 65(72).
- (ii) Smt. Vijai Devi Vs. Ram Swarup, AIR 1975 All 229.
- (iii) Tilak Dhari Singh Vs Addl. District Judge, Jaunpur, 1981 ALJ (NOC) 118 (All)

11.13 Subsequent objection barred by constructive res judicata if not filed earlier on show cause notice: Where the judgment debtor did not file any objection against the show cause notice issued under Order 21, rule 22 CPC and subsequently raised objection when the warrant of attachment was issued by the executing court under Order 21, rule 23 CPC, it has been held that the principle of constructive res judicata as provided by the Explanations IV and VII CPC will apply and the objections raised by the judgment debtor subsequently would be barred. See: *Barkat Ali vs. Badri Narain* (2008) 4 SCC 615

12.1 Legal representative of deceased decree holder can continue execution proceeding: Interpreting the provisions of Section 50 CPC, Order 21, rule 15 and Order 22, rule 12 CPC, it has been held in the cases noted below that in the event of death of the decree holder, legal representative of the deceased decree holder can seek permission of the executing court to continue the proceedings in the pending execution case. See:

- (i) AIR 1973 SC 2110
- (ii) *Rifakat Ali vs. Shyam Sunder*, 2004 (55) ALR 398 (All).
- (iii) *Manmohan vs. Kailash Nath*, AIR 1957 (All) 647 (All-D.B.)
- (iv) *B.S. Venkatachallapathy vs. Sri C.J. Pandurang Setty* 2000 AIHC 3577 (Karnataka)

12.2 Deciding dispute as to who is legal representative to the deceased decree holder: If the question as to who is the Legal Representative of the deceased decree holder has finally been decided by the Court, such a decision is a decree and will operate as res judicata. See: AIR 1974 All 229 (Full Bench)

13. Relief claimed in plaint but not discussed in judgment and not granted in writing must be deemed to have been declined: Relief claimed in plaint but not discussed in judgment and not granted in writing must be deemed to have been declined. If a decree is silent as regards any relief claimed by the plaintiff in the plaint, Explanation V to Section 11 CPC declares that such relief must be treated as refused. See: *Yashwant Sinha Vs. CBI*, (2020) 2 SCC 338 (Three-Judge Bench).

14.1 Executing court has power to decide all objections raised by third party against delivery of possession under Order 21, rules 35 and rules 97 to 103 CPC: Where an immovable property was sold in execution of decree and the person in possession obstructed the attempt to dispossess him, it has been held by the Supreme Court that the executing court can consider all questions raised by the person offering obstruction against execution of the decree and can pass appropriate orders under Order 21, rule 103 CPC. See:

- (i) *NSS Narayana Sharma Vs. M/s Goldstone Experts (P.) Ltd.*, 2002 (46) ALR 360 (SC).
- (ii) *Anwarbi Vs. Pramod D.A. Joshi*, 2000 (10) SCC 405.

14.2 Deciding objection under Order 21, rule 97 to 101 CPC mandatory before delivery of possession to the decree holder: Where in execution of a decree for specific performance of sale deed of the property, the objector who was not a party to the decree, filed an application on the ground that he could not be dispossessed, the order of the executing court overruling the objecting holding that since he was not dispossessed, his application under Order 21, rule 97 CPC was not maintainable, was illegal. Dispossession of the objector from the property in execution is not a condition for declining to entertain the application under Order 21, rule 97 CPC. An adjudication by

the executing court is required to be conducted under Order 21, rule 98 CPC before removal of the obstruction caused by the objector and a finding is required to be recorded in that behalf. See:

- (i) Babulal vs. Raj Kumar, AIR 1996 SC 2050.
- (ii) Niyamat Ali Molla vs. Sonagaon Housing Co-operative Society Ltd., AIR 2008 SC 225.
- (iii) Silverline Forum Pvt. Ltd. vs. Rajiv Trust, (1998) 3SCC 723.

14.3 Executing court must first decide objections of the third party obstructionist and issue process under Order 21, rule 35 CPC for delivery of possession:

Executing court must first adjudicate upon the right and objections of the stranger obstructionist on merit under Order 21, rule 97(2) read with rules 101 and 98 CPC instead of insisting upon first handing over possession and then moving of applications. See:

- (i) Brahmdev Chaudhary vs. Rishikesh Prasad Jaiswal, (1997) 3 SCC 694.
- (ii). Harilal Yadav vs. Ghanshyam Shukla & Others, 2006(1) ARC 198 (All).

14.4 Executing court can order demolition and removal of construction put up by the judgment debtor either before or after institution of the suit:

Executing court can order demolition and removal of construction put up by the judgment debtor either before or after institution of the suit in order to deliver possession of the decretal property to the decree holder. If the suit was decreed for delivery of possession only, the decree holder need not ask for mandatory injunction for demolition and removal of the construction put up by the judgment debtor on the decretal property. See:

- (i) Bandi Prasada Rao vs. P. Hari Kesavulu, AIR 2007 AP 125
- (ii) Dongala Venkaiah vs. Dongala Raji Reddy, AIR 2007 AP 344
- (iii) Ramrup Rai vs. Gheodhari Kuer, AIR 1980 Patna 197

14.5 Identity of property for delivery of possession under Order 21, rule 35

CPC: If the decree holder satisfactorily establishes identity of the property for which the decree was passed, the decree must be executed and the decree holder put in possession of the property. See: Shafigur Rehman Khan Vs Mohd Jahan Begum, (1982) 2 SCC 456

14.6 Identity of decretal property to be taken from decree or plaint:

Where the question of the suit property was already settled in the suit proceedings, order of the revisional court directing the execution court to first consider the objection as to the identity of the suit property before issuing delivery warrant under Order 21, rule 35 CPC was wholly erroneous. It was held by the Hon'ble Supreme Court that court of law should be careful enough to see through such diabolic plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. See: Ravinder Kaur Vs Ashok Kumar, AIR 2004 SC 904

14.7 Identity of immovable property how established?:

Identity of an immovable property can be established as provided in Order 7, rule 3 CPC or Order 20, rule 9 CPC or by issuing survey commission under Order 26, rule 9 CPC.

14.8 Police assistance for delivery of possession under Order 21, rule 35

CPC: Process under Order 21, rule 35 CPC can be immediately issued by the executing court for delivery of possession of the decretal property to the

decree holder and police assistance can also be provided to the bailiff (Amin). But when a third party resists the delivery of possession by saying that he is in possession of the decretal property through the judgment debtor, then possession cannot be delivered to the decree holder with the assistance of the police force without first deciding the claim of such third party. Remedy of the decree holder in such a situation against such third party obstructionist is by way of Order 21, rule 97 (1) CPC. See: Brahmdeo Chaudhary Vs Rishikesh Prasad, (1997) 3 SCC 694

- 15.1 Interest not to be awarded during execution proceeding if it was not awarded in decree:** If interest was not awarded in the decree, the executing court cannot add interest during execution of the decree u/s 34 CPC. Execution court cannot step out of the decree and award interest which was not part of the decree. See: Punjab State vs. Harvinder Singh, 2008(71) ALR 150(SC)
- 15.2 Certificate of payment of decretal amount out of court mandatory under Order 21, rules 2, 3 CPC:** Uncertified adjustment of decree out of the court cannot be entertained by the executing court Order 21, rules 2 and 3 CPC . There is no anti-thesis between the provisions of Section 47 and Order 21, rule 2 CPC. See: Sultana Begum vs. Prem Chand Jain, (1997) 1 SCC 373.
- 15.3 Treasury Officer is not garnishee in proceedings of money decree:** Treasury officer is not a garnishee in the proceedings of execution of money decree. Interpreting the provisions of Order 21, rules 51(c), 58, 46-A, 46-G CPC, it has been held by the Lucknow Bench of the Allahabad High Court that the Treasury Officer or the Chief Treasury Officer does not owe any debt to the judgment debtor and he is not a debtor. See: Chief Treasury

Officer, Lucknow vs. Pradeep Pharma, Etawah, 2005(2) AWC 1616 (All) (LB)

Note: In this case, executing court was executing a money decree against the Director of the Ayurvedic & Unani Services and the executing court (Civil Judge Senior Division, Lucknow) had attached the amount allocated to the Director, Ayurvedic & Unani Services, U.P. through grant No. 33 in major Head A/C 2210 (Medical and Health Services- Non Plan) by prohibiting the Chief Treasury Officer /Treasury Officer, Lucknow from making payments to the Director. Executing court issued notice to the CTO directing him to make available the attached amount to the court. The CTO wrote back to the court expressing his inability to comply in the absence of a Bill signed by the DDO for withdrawing the said amount from the said A/C. Then on revision being filed, the High Court (Lucknow Bench) quashed the executing court's order by holding as above.

15.4 Set off in money decree: During the execution proceedings of a money decree under Order 21, rule 30 CPC, if the representative of the judgment debtor had paid the amount to the full satisfaction of the decree in the suit, the judgment debtor is entitled to the claim of set off in the execution of the decree. See: K. Bathi Reddy vs. Chenchu Reddy, 2001(4) CCC 454 (A.P.)

16. An order issuing show cause notice to the judgment debtor under Order 21, rule 22 CPC is only appealable: Interpreting the provisions of Section 47 CPC, Order 21, rules 22, 23, 24 and Order 43 CPC, it has been held by the Supreme Court that an order issuing show cause notice to the judgment debtor under Order 21, rule 22 CPC is only appealable. See: Barkat Ali vs. Badri Narain (2008) 4 SCC 615

17. Execution case can be compromised by parties: Execution case can be compromised by parties. See:

- (i) N.K. Rajgarhia vs. M/S Mahavir Plantation Ltd., 2006 (1) ARC 354(SC)
- (ii) State of Bihar vs. Subodh Gopal Bose, AIR 1968 SC 281
- (iii) Smt. Kalloo vs. Dhakadevi, AIR 1982 SC 813
- (iv) M. Kamakhya Data Ram vs. Janaki Prasad Rastogi, 1949 ALJ 545 (All)(LB) (DB)
- (v) Motilal Banker Vs Maharaj Kumar, AIR 1968 SC 1087

18. Amendment in execution: application – executing court has power to allow amendment in the execution application. But by such amendment, description of decretal property and boundaries cannot be changed. Change of situation and shape of property by lapse of time is also an obstruction which can be removed by executing court. See: Sheo Kumar Sharma vs. 1st ADJ Nanital, 1998(33) ALR 221(All)

19. Fresh vakalatnama of counsel for D.H. in execution case: An application for execution filed in the court under Order 21, rule 11(2) CPC without vakalatnama of the counsel for the D.H. can be entertained with the subsequent filing of vakalatnama of the counsel. The Supreme Court, expressing concern in regard to the manner in which defective vakalatnamas are routinely filed in courts, has clarified the necessity of filing fresh vakalatnamas at different stages of proceedings like original suits, appeals, revisions, executions and misc. proceedings and also the manner of filing the vakalatnamas as quoted thus “Vakalatnama, a species of power of Attorney, is an important document, which enables and authorizes the pleader appearing for a litigant to do several acts as an agent, which are binding on

the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of the authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled, attested, accepted with care and caution. Obtaining the signature of the litigant on blank vakalatnamas and filling them subsequently should be avoided. The Supreme Court took judicial notice of the following defects routinely found in vakalatnamas filed in courts:

- (1) Failure to mention the name/s designation or authority of the person executing the vakalatnama and leaving the relevant column blank.
- (2) Failure to disclose the name, designation or authority of the person executing the vakalatnama on behalf of the grantor (where the vakalatnama is signed on behalf of a company, society or body) either by affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the vakalatnama).
- (3) Failure on the part of the pleader in whose favour the vakalatnama is executed to sign it in token of its acceptance.
- (4) Failure to identify the person executing the vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the vakalatnama.
- (5) Failure to mention the address of the pleader for purpose of service (particularly in cases of outstation counsel).
- (6) Where the vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the vakalatnama without any endorsement/statement that the signature is for self and as guardian of his minor children. Similarly, where a firm an it is partner, or a company and it's Director, or a Trust and it's trustee, or an organization and it's office bearer

execute a vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorized to sign on behalf of the corporate body/firm/society/organization.

- (7) Where the vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an attorney holder and failure to annex a copy of the power of attorney.
- (8) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets as many a times it is not possible to know who have signed the vakalatnama where the signature are illegible scrawls.
- (9) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. It is not uncommon in some areas for mofussil lawyer to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court and engage a pleader for appearance in a High Court and execute a vakalatnama in favour of such pleader.
- (10) The abovenoted routine defects are found as registries/offices do not verify the vakalatnamas with due care and caution they deserve, such failure many a time leads to avoidable complications at later stages. The need to issue appropriate instructions to the registries/offices to properly check and verify the vakalatnamas filed requires emphasis.
- (11) Filing a fresh vakalatnama with the memorandum of appeal etc. will always be convenient to facilitate the processing of the appeal by the office. See :
 - (i) Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh, 2006(1) ARC 1 (SC) (Three-Judge Bench)
 - (ii) Ram Kishan Vs. State of U.P., 2008 (61) ACC 838 (All)
 - (iii) Satyanarayana vs. Venkatasubbaih, AIR 1957 AP 172 (Full Bench)
