Executions

Order 21 of the Code of Civil Procedure deals with the solemn act of execution of the decrees passed by the Courts from grassroots to the top. Ultimately, after the judgment attains finality or where there is no stay in the execution by any Appellate or Revisional Court, it is the Court of original jurisdiction which performs this sacred act of implementation of the execution. It has been often seen that in view of less number of units prescribed for execution of the decree, the executions are not give that much time and importance as required and desired. It is only the execution, which reveals and signifies the importance of the decrees to be passed and the pedestal of the Court and sanctity of the document. As such, the decrees are required to be executed with force, so that the Decree Holder having a document containing declaration of his rights may not feel cheated or helpless having earned no fruits of the lis got settled by him from the Court even after spending decades altogether.

This Order can be divided into six parts. If the Courts deal the executions while considering the applications/objections topic wise, it would be easy for them to adjudicate the matter easily. The main classification is as under:-

(1) Applications for execution and the process to be applied.
(2) Stay of executions.
(3) Mode of executions.
(4) Sale of immovable property and movable property.
(5) Adjudication of the claims and objections.
(6) Resistance and delivery of possession.

Order 21 Rule 1 CPC : **Method of adjustment in money decree -**

Order 21 Rule 1 of the CPC provides for the modes of paying the money decree. First of all, the Court should appropriate the amount towards interest, then towards the costs and thereafter, towards the principal, unless, of course, the deposit is indicated to be towards specified heads by the judgment debtor while making the deposit and intimating the decree holder of his intention. This Order also provides mode for executing the decrees and implementation of even decrees of specific performance, permanent injunction, restitution of conjugal rights and possession etc.

The Hon'ble Supreme Court in case ***Gurpreet Singh Vs. Union of India,*** 2008 (2) RCR (Civil) 207, has observed as under:-

> 26. Thus, in cases of execution of money decrees or award decrees, or rather, decrees other than mortgage decrees, interest ceases to run on the amount deposited, to the extent of the deposit. It is true that if the amount falls short, the decree holder may be entitled to apply the rule of appropriation by appropriating the amount first towards the interest, then towards the costs and then towards the principal amount due under the decree. But the fact remains that to the extent of the deposit, no further interest is payable thereon to the decree holder and there is no question of the decree holder claiming a re-appropriation when it is found that more amounts are due to him and the same is also deposited by the judgment debtor. In other words, the scheme does not contemplate a reopening of the satisfaction to the extent it has occurred by the deposit. No further interest would run on the sum appropriated towards the principal.
>
> 27. As an illustration, we can take the following situation. Suppose, a decree is passed for a sum of Rs.5,000/- by the trial court along with interest and costs and the judgment debtor deposits the same and gives notice to the decree holder either by approaching the executing court under Order XXI Rule 2 of the Code or by making the deposit in the execution taken out by the decree-holder under Order XXI Rule 1 of the Code. The decree holder is not satisfied with the decree of the trial court. He goes up in appeal and the appellate court enhances the decree amount to Rs.10,000/- with interest and costs. The rule in terms of Order XXI Rule 1, as it now stands, in the background of Order XXIV would clearly be, that the further obligation of the judgment debtor is only to deposit the additional amount of Rs. 5,000/- decreed by the appellate court with interest thereon from the date the interest is held due and the costs of the appeal. The decree holder would not be entitled to say that he can get further interest even on the sum of Rs.5,000/- decreed by the trial court and deposited by the judgment debtor even before the enhancement of the amount by the appellate court or that he can re-open the transaction and make a re-appropriation of interest first on Rs.10,000/-, costs and then the principal and claim interest on the whole of the balance sum again. Certainly, at both stages, if there is short-fall in deposit, the decree holder may be entitled to apply the deposit first towards interest,

then towards costs and the balance towards the principal. But that is different from saying that in spite of his deposit of the amounts decreed by the trial court, the judgment debtor would still be liable for interest on the whole of the principal amount in case the appellate court enhances the same and awards interest on the enhanced amount. This position regarding execution of money decrees has now become clear in the light of the amendments to Order XXI Rule 1 by Act 104 of 1976. The argument that what is awarded by the appellate court is the amount that should have been awarded by the trial court and so looked at, until the entire principal is paid, the decree holder would be entitled to interest on the amount awarded by the appellate court and therefore he can seek to make a re-appropriation by first crediting the amount deposited by the judgment debtor pursuant to the decree of the trial court towards the cost in both the courts, towards the interest due on the entire amount and only thereafter towards the principal, is not justified on the scheme of Order XXI Rule 1 understood in the context of Order XXIV Rules 1 to 4 of the Code. The principle appears to be that if a part of the principal has been paid along with interest due thereon, as on the date of issuance of notice of deposit, interest on that part of the principal sum will cease to run thereafter. In other words, there is no obligation on the judgment debtor to pay interest on that part of the principal which he has already paid or deposited."

Order 21 Rule 42 CPC

Attachment before judgment in execution:-

Order 21 Rule 42 CPC deals with the attachment before the Court holds an inquiry as to rent or *mesne* profits or any other matter, the property of the judgment debtor could be attached, before the amount due is escertained in the terms of Order 38 Rule 5 CPC.

Order 21 Rule 29 CPC: whether the decree of other Court could be stayed-

The scope of applicability of Order 21 Rule 29 CPC;- Rule 29 refers to cases where the execution of the decree held by the Decree Holder could be stayed. For the applicability of Order 21 Rule 29 CPC, two conditions are to be fulfilled; (1) a proceeding in execution of the decree of that Court started at the instance of the decree holder against the judgment-

debtor and (2) a suit at the instance of the same judgment-debtor against the holder of the decree of that Court.

Transferee Court has no power to stay the execution of the decree pending in its Court because the decree is not passed by that Court. Subsequent sale in spite of stay order held valid.

While elaborating Order 21 Rule 29 of the Civil Procedure code, the Hon'ble Supreme Court in ***Shaukat Hussain @ Ali Akram and others Vs. Smt. Bhuneshwari Devi (dead) by L.Rs. & others,*** 1973 AIR (SC) 528, has observed as under:-

> 4. Mr. Chagla appearing on behalf of the appellants prefaced his arguments by stating that the property attached in execution was a very valuable property worth more than Rs. 20,000/- and had been sold for a paltry sum due under the decree and this circumstance itself was sufficient to show that the sale was liable to be set aside. That contention is clearly not open on the materials on record. A judgment-debtor can ask for setting aside a sale in execution of a decree under section 47 C.P.C. and, in special circumstances which attract the provisions of Order XXI rule 90 he may also apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale provided he further proves to the satisfaction of the court that he has sustained substantial injury by reason of the irregularity or fraud. The application made to the executing court in the present case by the judgment-debtors was not one under Order XXI rule 90 C.P.C. That is conceded by Mr. 16-L172Sup.CI/72 1026 Chagla. Had it been the case that on account of fraud or material irregularity in conducting the sale, the sale required to be set aside, evidence would have been led on the point and there would have been a clear finding as to the substantial injury. The judgments of all the three courts proceed entirely on the basis that the application was one under section 47 C.P.C. and not under Order XXI Rule 90 C.P.C. They do not deal with the question of- material irregularity or fraud in the conduct of the sale, nor do they deal with the injury caused to the judgment-

debtors. The only question which was agitated before the courts was whether the sale was illegal in view of the fact that the execution proceedings had taken place during the existence of a stay issued by a competent court. It was also common ground that the stay issued by the Munsif was an Order passed under Order XXI Rule 29 C.P.C. The first two courts held that the stay was in existence when the execution proceedings ended in the sale while the High Court held that factually it was so because the sale took place on 6-8-1963, the stay, if any, having ceased to operate after 5-8-1963. The High Court further pointed out that the stay under Order XXI Rule 29 issued by the court of the Munsif Gaya was null and void as it was passed by a court without competence and, therefore, in law there was no legal stay of execution and the sale which took place in due course after attachment and proclamation of sale, was a valid one.

The scope of Rules 26 to 29 of Order 21 CPC:-

"6. Order 21, Civil Procedure Code deals generally with the execution of decree and orders. That order is divided into several topics, each topic containing a number of rules. The first four topics cover rules 1 to 25 and the fifth topic, namely, stay of execution comprises 4 rules, namely, Rules 26 to 29. A perusal of these rules will show that the first three rules i.e. Rules 26 to 28 deal with the powers and duties of a Court to which a decree has been sent for execution. Under Rule 26, that Court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the Court of first instance or the appellate Court. It will be seen, therefore, that under Rule 26 the transferee Court has a limited power to stay execution before it. Moreover, under sub rule (2) if any property is seized by it in the course of execution, it may even order the restitution of the property pending the result of the application made by the judgment-debtor to the Court of the first instance or to the appellate Court. Rule 27 says that any such restitution made under sub-rule (2) of Rule 26 will not prevent the property of the

judgment-debtor from being retaken in execution of the decree sent for execution. Rule 28 provides that any order of the Court by which the decree was passed, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution. And then we have Rule 29 which deals with a different situation. The rule is as follows:

> "Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed the Court may, on such terms as to security or otherwise, as it thinks fit stay execution of the decree until the pending suit has been decided."

It is obvious from a mere perusal of the rule that there should be simultaneously two proceedings in one Court. One is the proceeding in execution at the instance of the decree-holder against the judgment-debtor and the other a suit at the instance of the judgment-debtor against the decree holder. That is a condition under which the Court in which the suit is pending may stay the execution before it, if that was the only condition, Mr. Chagla would be right in his contention, because admittedly there was a proceeding in execution by the decree-holder against the judgment-debtor in the Court of Munsif 1st Gaya and there was also a suit at the instance of the judgment-debtor against the decree-holder in that Court. But there is a snag in that rule. It is not enough that there is a suit pending by the judgment-debtor, it is further necessary that the suit must be against the holder of a decree of such Court. The words "such Court" are important "Such Court" means in the context of that rule the Court in which the suit is pending. In other words, the suit must be one not only pending in that Court but also one against the holder of a decree of that Court. That appears to be the plain meaning of the rule."

Order 21 Rule 35 (3) and Rule 97 CPC

These two Rule provides a right to the Decree Holder to complain against a person, who creates resistance in the execution of the decree.

Order 21 Rule 41 CPC- Arrest and detention:-

In case of money decree, as per Order 21 Rule 41 CPC, where the decree cannot be executed otherwise by way of attachment or sale of the property, the Court could make an order for the attendance and examination

of such Judgment Debtor, or officer or any other person and for the production of any books or documents. If the decree remained unsatisfied for 30 days or otherwise the Judgment Debtor disobeys the decree, the Court may direct the person disobeying the order to be detained in the civil prison for a term not exceeding three months.

Section 47 of CPC

All the questions relating to execution, discharge and satisfaction of the decree are to be decided by the Executing Court and even the decision of the complicated questions is also not prohibited.

Section 47 of the Civil Procedure Code provides for disposal of all the questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Even the Code bars the powers to decide as the person raising objection is a Judgment Debtor or his representative and such question would also relate to execution, discharge or satisfaction of a decree.

In case ***Jugalkishore Saraf Vs. M/s Raw Cotton Co. Ltd.,*** 1955 AIR (SC) 376, the Hon'ble Apex Court has observed as under:-

> "There could be no -objection to decide questions involving investigation of complicated facts or difficult questions of law in execution proceedings, as section 47 of the Code of Civil Procedure authorises the Court executing the decree to decide all questions arising therein and relating to execution of the decree and subs-s- (2) further authorises the executing Court to treat a proceeding under the section as a suit thus obviating the necessity of filing a separate suit for the determination of the same. The line of decisions of the High Court of Bombay beginning with 11 Bom 506 and ending with AIR 1946 Bom 272 importing the equitable principle above enunciated therefore appears to me to be more in consonance with law and equity than the strict and narrow 'interpretation put on the words "where a decree..... is transferred by assignment in writing" by the High Courts of Madras and Calcutta in the decisions above noted."

Order 21 Rule 16 CPC:-

The assignment and transfer of the decree made, when assignment is complete. It was observed by the Hon'ble Supreme Court in ***Jugalkishore's*** case (supra), as under:-

"54. Is there any warrant for importing this equitable principle while construing the statutory 'Provision enacted in Order 21, rule 16 of the Code of Civil Procedure? The Code of Civil Procedure does not prescribe any mode in which an assignment in writing has got to be executed in order to effectuate a transfer of a decree. The only other statutory provision in regard to assignments in writing is to be found in Chapter VIII of the Transfer of Property Act which relates to transfers of actionable claims and an actionable claim has been defined in section 3 of the Act as

> "a claim to any debt..... or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief....."

A judgment debt or decree is not an actionable claim for no action is necessary to realise it. It has already been the subject of an action and is secured by the decree. A decree to be passed in future also does not come as such within the definition of an actionable claim and an assignment or transfer thereof need not be effected in the manner prescribed by section 130 of the Transfer of Property Act. If therefore the assignment or transfer of a decree to be passed in the future does not require to be effectuated in the manner prescribed in the statute there would be no objection to the 1415 operation of the equitable principle above enunciated and the contract to assign evidenced by the assignment in writing becoming a complete equitable assignment of the decree when passed.

The assignment in writing of the decree to be passed would thus result in a contract to assign which contract to assign would become a complete equitable assignment on the decree being Passed and would fulfill the requirements of Order XXI, rule 16 in so far as the assignment or the transfer of -the decree would in that event be effectuated by an assignment in writing which became a complete equitable assignment of the decree when passed. There is nothing in the provisions of the Civil Procedure Code or any other law which prevents the operation of this equitable principle and in working out the rights and liabilities of the transferee of a decree on the one hand and the decree-holder and the judgment debtor on the other, there is no warrant for reading the words "where a decree..... is transferred by assignment in writing" in the strict and narrow sense,, in which

they have been read by the High Court of Madras in 17 Mad LJ 391 and the High Court of Calcutta in AIR 1924 Cal 661 and AIR 1932 Cal 439.

It is significant to observe that the High Court of Calcutta in AIR 1939 Cal 715 applied this equitable principle and held that the plaintiff in whose favour the defendant had executed a mortgage bond assigning by way of security the decree that would be passed in a suit instituted by him against a third party for recovery of money due on unpaid bills for work done was entitled to a declaration that he was the assignee of the decree passed in favour of the defendants and was as such entitled to realise the decretal debt either amicably or by execution. If the plaintiff was thus declared to be the assignee of the decree subsequently passed in favour of the defendant and entitled to realise the decretal amount by execution could apply for execution of the decree and avail himself of the provisions of Order 21, Rule 16 as the assignee of the decree-which was passed subsequent to the date of the assignment in writing in his favour."

Order 21 Rule 99 CPC

Rule 99 of Order 21 provides an objector, other than the Judgment Debtor, to raise objection claiming any right in the property from which he is directed to be dispossessed. Rule 99 of Order 21 reads as under:-

"99. Dispossession by decree holder or purchaser

(1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

The other question to be noticed is that normally the Courts frame the issues while deciding the lis between the parties, but the law does not provide that in each case, the issues are required to be framed. Where the objections raised by the third party are superfluous, then the Court can refuse to entertain the same and such objections could summarily be tried.

Where objections have some merits, then the Court could decide those objections after seeking reply and evidence of the parties.

Rules 105 and 106 of Order 21 CPC, govern the procedure for adjudication of the objection:-

These Rules read as under:-

"105. Hearing of application

(1) The court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the court may make an Order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the court may hear the application ex parte and pass such Order as it thinks fit.

Explanation : An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

106. Setting aside orders passed ex parte, etc.

(1) The applicant, against whom an Order is made under sub-rule (2) of rule 105 or the opposite party against whom an Order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the court to set aside the order, and if he satisfies the court that there was sufficient cause for his non-appearance when the application was called on for hearing, the court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No Order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order."

Restoration of the objections:-

Rule 106 of this Order indicates that if the objector fails to appear, then the application could be dismissed and on showing the sufficient cause, the Court could restore the said objection petition and decide the same on merits.

Order 21 Rule 92 (2):- The conditions when the sale could be set aside after auction-

Order 21 Rule 92 (2) provides that if the deposit is made within 30 days from the date of sale and an application is filed, then the Court would have no discretion but to set aside the sale and if the amount is not deposited within 30 days, but within 60 days, then it will be within the discretion of the Court, whether or not to grant the application. However, the application could be filed within 60 days. Rule 92 (2) of Order 21 CPC reads as under:-

> "(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make an Order setting aside the sale:
> PROVIDED that no Order shall be made unless notice of the application has been given to all persons affected thereby:"

Order 21 Rule 89 CPC

Primary condition precedent to set aside the sale of a mortgaged property is to pay the mortgage money in addition to depositing of 5 percent of the purchase money in the Court.

While elaborating Rule 89 of Order 21 CPC, the Hon'ble Supreme Court in case ***Tribhovandas Purshottamdas Thakkar Vs. Ratilal Motilal Patel and others,*** 1968 AIR (SC) 372, has held as under:-

> 5. It was urged, however, that the mortgagee having agreed to, abandon the execution proceeding and to wait for six months for receiving payment of the mortgage dues from the trustees, abandonment of the execution proceeding was in law equivalent to, payment to the decree-holder of the amount specified in the proclamation of sale for the recovery of which the sale was ordered. This in

our Judgment is a futile argument. By abandoning the execution proceeding the claim of the creditor is not extinguished: he is entitled to commence fresh proceedings for sale of the property. Rule 89 of Order 21 is intended to confer a right upon the judgment- debtor, even after the property is sold, to satisfy the claim of the decree-holder and to compensate the auction purchaser by paying him 5% of the purchase-money. The provision, is not intended to defeat the claim of the auction purchaser, unless the decree is simultaneously satisfied. When the judgment creditor agrees to extend the time for payment of the amount for a specified period and in the meanwhile agrees to receive interest accruing due on the amount of the decree, the condition requiring the judgment debtor to deposit in Court for payment to the decree holder the amount specified in the proclamation of sale for the recovery of which the sale was ordered. cannot be deemed to be complied with.

6. Our attention was invited to several decisions in which it was held, that if the judgment-debtor instead of depositing in Court the amount specified in the proclamation of sale for recovery of which the property is sold, satisfies the claim of the decree-holder under the decree, the requirements of Order 21 Rule 89 are complied with: **Subbayya v. Venkata Subba Reddi, AIR 1935 Mad 1050; Muthuvenkatapathy Reddy v. Kuppu Reddi, AIR 1940 Mad 427; ILR (1940) Mad 699 (FB); Laxmansing Baliramsing v. Laxminarayan Deosthan Kapshi, ILR (1947) Nag 802; Rabindra Nath V. Harendra Kumar, AIR 1956 Cal 462; M.H.Shivaji Rao V. Niranjanaiah, AIR 1962 Mys 36.** These cases proceed upon interpretation of the expression 'less any amount which may since the date of such proclamation of sale, have been received" occurring in clause (b) of Rule 89. It is unnecessary to venture an opinion whether these cases were correctly decided. It is sufficient to observe that an order setting aside a court sale, in execution of a mortgage decree cannot be obtained, under

> Order 21 Rule 89 of the Code of Civil Procedure by merely depositing 5 % of the purchase- money for payment to the auction purchaser and persuading the decree-holder to abandon the execution proceedings."

The essentials for setting aside the sale have also been elaborately discussed by the Hob'ble Apex Court in case ***Dadi Jagannadham Vs. Jammulu Ramulu,*** 2001(4) RCR (Civil) 267, wherein it has been held as under:-

> "18. Having given our careful consideration to the question, we are of the opinion that there is no anomaly and that there are no different periods of limitation for making deposits and/or filing an application for setting aside the sale. It is by virtue of Order 21 Rule 89 CPC that an application for setting aside a sale and a deposit can be made. Order 21 Rule 89 CPC does not prescribe any period within which the application is to be made or deposit is to be made. All that Order 21 Rule 92 (2) provides is that if the deposit is made within 30 days from the date of sale and an application is filed then the Court would have no discretion but to set aside the sale. That doesnot mean that if the deposit is made after 30 days the Court could not entertain the application. If the deposit is made beyond the period of 30 days, but within the period 60 days, then it will be within the discretion of the Court whether or not to grant the application. Thus an application can be made within the period prescribed under Article 127, Limitation Act. As an application can be made within 60 days and, as stated above, no period for making a deposit is prescribed under Order 21 Rule 91 (2) the deposit can also be made within 60 days. In our view, therefore, the view expressed in P.K. Unni's case that Order 21 Rule 92(2) CPC prescribes a period of limitation for making a deposit is not correct."

Other conditions where sale could be set aside

Order 21 Rule 90 CPC- deals with the situations when the sale could be set aside:-

Mere to establish irregularity or fraud is not sufficient to set aside the sale. The applicant must establish that material irregularity or fraud has resulted in substantial injury to the applicant. There is no specific

provision under Order 21 Rule 67 CPC that sale must be advertised in the local newspaper. Therefore, irregularity cannot be given weight in the absence of any such order made by the Court.

The Hon'ble Apex Court in case ***Saheb Khan Vs. Mohd. Yusufuddin and others,*** 2006 AIC (SC) 1871, has further observed as under:-

> "13. Therefore, before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale.
>
> 14. A charge of fraud or material irregularity under Order 21 Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with the orders of Order 21 Rule 67(1) read with Order 21 Rule 54(2). No doubt, the Trial Court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. Theprovisions of Order 21 Rule 67 clearly provide if the sale is tobe advertised in the local newspaper, there must be specific directionof Court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order 21 Rule 67(1) "as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2)." Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:
>
> "(2). The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situated (and,

where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village)."

Order 21 Rule 58 CPC- Attachment of mortgaged property:-

Attachment before judgment- Suit under Order 21 Rule 58 CPC to release the property from attachment. If the property is under attachment in another money suit and the mortgagee is not in actual or constructive possession of the property on that date, then the objection by such objector under Order 21 Rule 58 CPC to such attachment is not maintainable.

While further elaborating Order 21 Rule 58 CPC, the Hon'ble Supreme Court in case ***Kabidi Venku Sah Vs. Sayed Abdul Hai and another,*** 1984 AIR (SC) 117, has observed as under:-

"7. The matter is quite simple but has unfortunately dragged on for nearly 15 years on account of a wrong and ill advised step taken by the appellant. The learned Principal Civil Judge erred in observing that what was attached before judgment on 24.09.1964 is not the equity of redemption alone but the entire property. He has rightly held that in the claim petition the question of the mortgage of 1948, the mortgage decree, the Court auction sale and delivery of possession of the property to the appellant pursuant to that sale cannot be contended to be collusive and observed that the first respondent could, if at all, challenge them only in a separate suit. That being so, undoubtedly the mortgage of 1948 in favour of the appellant was there and what remained with the mortgagor was only the equity of redemption until it was brought to an end by the sale in execution of the mortgage decree confirmed by the court on 28.08.1968. Therefore, there could be no doubt whatsoever that on 24.09.1964 when the property was attached before judgment long after the mortgage dated 31.07.1948 and two years, before the suit and the mortgage was filed in 1966, the mortgagor had the equity of redemption and that what could have been attached in law on 24.09.1964 was the equity of redemption alone and not the entire interest in the property. There should have been no difficulty for the learned Judge of the High Court holding that the appellant could not have been in possession of the property, actual or constructive, for he was only a simple mortgagee who had nothing to do with possession and he got delivery of the property through the court as a decree holder – court auction purchaser on 28.04.1968 as noticed by the learned Judge in his judgment. The appellant had no doubt an interest in the property as mortgagee, but he could not have been in

possession of the property as he was only a simple mortgagee. The appellant was a secured creditor as he had a mortgage in his favour, and any attachment effected after the date of the mortgage and during its subsistence can be only subject to that mortgage. He had no interest in the equity of redemption on the date of the attachment and could not therefore have had any objection to that right of the mortgagor being attached by the first respondent. Therefore, he was not a person who could in law file any claim petition under Order 21 Rule 58 objecting to the attachment of the equity of redemption. We may notice here what Order 21 Rule 58(1) says and it is this:

"Where any claims preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained."

8. The attaching creditor can bring the property to sale only subject to the mortgage so long as it is subsisting. That is to say he could bring only the mortgagor's equity of redemption to sale if it had not already been extinguished by its sale in execution of any decree obtained on that mortgage. But, if the equity of redemption has already been sold after the date of the attachment the attaching, decree holder could proceed only against the balance, if any, of the sale price left after satisfying the mortgagee decree-holder's claim under the decree. The mortgagee's right is thus not affected, at all. Therefore, it is we had observed earlier that the appellant had taken a wrong and ill advised step in coming forward with the claim petiton which has resulted in the matter dragging on for over 14 years from 15.01.1969. The appellant could not object to the attachment of the equity of redemption. The appeal fails and is dismissed, but under the circumstances of the case without costs."

<u>Order 21 Rule 35 (2) CPC:-</u> Attachment of share of coparcenary property and limitation to take possession of such property-

Decree against father and four sons. Execution against Joint Family property- Auction purchaser purchased at the auction sale was the share of four sons' with joint family property. Sons' original share was 4/5th reduced to 2/3rd on the date of auction sale, after the birth of another son- 1/6th share also allotted in partition suit to auction purchaser, but he was entitled only to four sons' share that is 2/3rd share in the property.

Alienation by coparceners of undivided interest – Alienee is not entitled to possession of interest purchased by him till a partition has made that being so, it is arguable that the coparceners can never be in adverse possession of the properties as against him as possession can be adverse against a person only when he is entitled to possession.

In case ***M.V.S. Manikayala Rao Vs. M. Narasimhaswami and others,*** 1966 AIR (SC) 470, the Hon'ble Supreme Court has held as under:-

> "5. As earlier stated the High Court held that Article 144 applied. The application of this article seems to us to present great difficulties to some of which we like to refer. That article deals with a suit for possession of immovable property or any interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff. This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period when a specific allotment was made in his favour": ***Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh, 1954 SCR 177 at P.188.*** It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras Full Bench case of ***Vyapuri v. Sonamma Boi Ammani, ILR 39 Mad 811.***
>
> 6. In the case in hand the learned Judges of the High Court thought that the applicability of Article 144 to a suit like thepresent one was supported by the decision of theJudicial Committee in ***Sudarsan Das v. Ram Kirpal Das, 77 Ind App 42.*** We feel considerable doubt that the case furnishes any assistance. It held that Article 144 extends the conception of adverse possession to include an interest in immovable property as well as the property itself. In that case, a purchaser of an undivided share in a property which was

not coparcenary property, had obtained possession of that share and he was held to have acquired title to it by adverse possession. That was not a case of a person who was not entitled to possession. We are not now concerned with adverse possession of an interest in property.

Order 21 Rule 35 (3) CPC :- Extent of force to be used to take possession-

This Rule provides that even if the possession of some premises is not delivered, then the Court, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break any door or do any other act necessary for putting the Decree-Holder in possession.

Order 21 Rule 17, Order 34 Rule 4, Rules 14 and 15:- Recovery of maintenance by sale of the property over which charge was created-

Execution for maintenance after the charge has been created by the Court on many lots of the properties. Even if the purchase of one lot is found to be made by the decree-holder prior to the execution, then the recovery of maintenance could be effected from the other properties over which, the charge has been created.

In case ***Janapareddy Latchan Naidu Vs. Janapareddy Sanyasamma,*** 1963 AIR (SC) 1556, the Hon'ble Apex Court has observed as under:-

> "6. The argument involves a fallacy because it assumes that a charge created by a decree on a number of properties disappears when the charge-holder in execution of the charge decree purchases one lot of properties. An executory charge-decree for maintenance becomes executable again and again as future sums become due. The executability of the decree keeps the charge alive on the remaining properties originally charged till the future amount cease. In other words the charge subsists as long as the decree subsists. By the execution the charge is not transferred in its entirety to the properties purchased by the charge-holder. Nor is the charge divided between those properties and those which still remain with the judgment debtor. The whole of the charge continues over all the properties jointly and severally. Nor is any priority established between the properties purchased by the charge-holder and those that remain. It is not permissible to seek an analogy from the case of a

mortgage. A charge is different from a mortgage. A mortgage is a transfer of an interest in property while a charge is merely a right to receive payment out of some specified property. The former is described a jus in rem and the latter as only a jus ad rem. In the case of a simple mortgage there is a personal liability express or implied but in the case of charge there is not such personal liability and the decree, if it seeks to charge the judgment debtor personally, has to do so in addition to the charge. This being the distinction it appears to us that the appellant's contention that the consequences of a mortgagee acquiring a share of the mortgagor in a portion of the mortgaged property obtain in the case of a charge is ill founded. The charge can be enforced against all the properties or severally."

Date:

Justice A.N. Jindal
Punjab and Haryana High Court
Chandigarh.