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EXECUTION OF DECREES FOR EVICTION & DELIVERY OF VACANT POSSESSION ---
OBJECTIONS AGAINST DELIVERY – DETERMINATION.

EXECUTION OF DECREES FOR EVICTION & DELIVERY OF VACANT POSSESSION --- OBJECTIONS AGAINST DELIVERY --- DETERMINATION

INTRODUCTION:

The term “execution” has not been defined in the Code. In its widest sense, the expression “execution” signifies the enforcement or giving effect to a judgment or order of a Court of justice. Stated simply, “execution” means the process for enforcing or giving effect to the judgment of the Court. In other words, execution is the enforcement of decrees and orders by the process of the Court, so as to enable the decree-holder to realise the fruits of the decree. The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by the judgment, decree or order. (*See: Overseas Aviation Engg. (G.B.) Ltd. In re, (1962) 3 WLR 594*).

In *Ghan Shyam Das v. Anant Kumar Sinha, (1991) 4 SCC 379*, dealing with the provisions of the Code, relating to execution of decrees and orders, the Hon’ble Supreme Court stated:

“So far the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of Order XXI of the Code take care of different situations, providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party in adequate measure and appropriate time, the answer is a regular suit in the civil court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other statutes, and the Judge being entrusted exclusively with administration of justice, is expected to do better.”

In *Satyawati v. Rajinder Singh & Anr., (2013) 9 SCC 491*, the Hon’ble Supreme Court 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.*

There are many ways through which a decree can be executed. One such way is by the delivery of property.

Section 51(1) of the Civil Procedure Code says that the Court has the power to order execution of the decree, on the application of the decree-holder, by delivery of any property specifically decreed. Provisions in Order XXI provide for delivery of property under CPC.

It is said that justice must not only be done but it must appear to have been done. Therefore, granting a decree is not enough, but the Court has to make sure that such a decree should be properly enforced. Keeping in mind these words, when a Court asks for delivery of a property, it must be enforced properly and the decree-holder has the right to move to the Court where the property has not been delivered to him.

RELEVANT PROVISIONS UNDER CPC:

- i. **Order XXI Rule 35 CPC**--Execution of decrees for delivery of immovable property, including removal of persons bound by the decree.
- ii. **Order XXI Rule 36 CPC**--Execution of decrees for delivery of property occupied by tenants or other lawful occupants.
- iii. **Order XXI Rule 97 CPC**--Application for adjudication on resistance or obstruction to possession.
- iv. **Order XXI Rule 98 CPC**--Orders for removal of resistance or obstruction after adjudication.
- v. **Order XXI Rule 99 CPC**--Application by third parties dispossessed by decree-holders for restoration of possession.
- vi. **Order XXI Rule 100 CPC**--Orders to be passed upon complaints of dis-possession.
- vii. **Order XXI Rule 101 CPC**--Determination of questions relating to right, title, or interest in the property within execution proceedings.

DELIVERY OF POSSESSION TO D.HR:

Order XXI Rule 35 CPC states that where the decree is for delivery of any immovable property, possession of such property shall be delivered to the party to whom it has been adjudged, or to the person who has been appointed by that party to receive the delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the land.

And, where a decree is for the joint possession of immovable property, it shall be delivered by affixing a copy of the warrant in some conspicuous place of the property and proclamation by beating of drums, or other customary mode, the substance of the decree at some convenient place.

Lastly, where possession of any building or enclosure is to be delivered and the person in possession who is bound by the decree does not give access to that property, the Court may, through its officers, after giving reasonable warning and facility to any woman not appearing in public due to the customs of the country, to withdraw, remove or open any lock or bolt or by breaking the door or any other act to put the decree-holder in possession of the property.

Order XXI Rule 36 CPC states that where a decree is for delivery of any immovable property that is in the occupancy of a tenant or any other person who is entitled to occupy such property and is not bound by the decree to relinquish such occupancy, the Court shall make an order for delivery by affixing a copy of the warrant in some conspicuous place on the property, and by proclamation to the occupancy by beating of the drums or any other customary mode at some convenient place, the substance of the decree in regard to the property.

Rules 35 and 36 of Order XXI both are related to decree for immovable property but there is a distinction between both. The possession referred to in sub rules (1) and (3) of order XXI, rule 35 is Khas or actual possession, while that referred to sub-rule (2) and 36 is formal or symbolical possession.

This rule describes the mode of obtaining possession- For possession of vacant land the court can order the removal or demolition of the constructions made during the pendency of the suit.

Decree for ejectment against a tenant is binding upon the ***tenant's licensee- I&M Ltd. Vs Pheroze AIR 1953 SC 73,75***. By a decree the judgment debtor and his tenants were directed to deliver vacant possession to the decree holder. Judgment debtor raised construction and inducted tenants Pendente lite. Executing court can order demolition of structure ***B.Gangadhar Vs. B.G.Rajalingam -AIR 1996 SC 780***.

There was a decree for delivery of possession against tenant only. No decree against sub tenant was passed since he was not party to the suit. So, execution case against the sub- tenant was dismissed. This dismissal will not operate as a bar to a subsequent execution petition against the tenant nor an application of removal of obstruction against the sub- tenant – as laid down by the Hon'ble Supreme Court in ***Ameena Vs. Sundaram (1994) 1 SCC 743***.

In the case of **Mumtaz Jehan v. Insha Allah**, AIR 1983 DELHI 65, it was held that under Order XXI Rule 35(1) CPC, actual possession is delivered by removing all persons bound by the decree and under Order XXI Rule 36 CPC, symbolic possession is delivered where the property is in occupancy of the tenants entitled to occupy and not bound by the decree to deliver possession.

In the case of **Ratan Lal Jain v. Uma Shankar Vyas**, AIR 2002 SC 804, it was held that the former is actual or physical delivery of the possession while the latter is delivery of formal or symbolic possession.

In the case of **Shamsuddin v. Abbas Ali**, further cleared the difference between the two. It held that the person in actual possession is not physically dispossessed from the property given to him in execution of the decree. While delivery in Rule 36 remains delivery of formal or symbolic possession so far as the person in actual possession is concerned but as against the person bound by such decree, it amounts to delivery to possession.

HOLDER OF DECREE OF POSSESSION:

This expression includes “holder of a decree for possession” postulates that he has to be a holder of valid decree for possession and will not include a holder of decree which is a nullity.

The law relating to execution for eviction and resistance has been laid down in Order XXI Rules 95, 96; tenant Appendix-E, Form No.39 C.P.C. - AP Amendment.

Limitation: One year (Art.134 of Limitation Act) (**Patnam Khader Khan Vs. Patnam Sardar Khan**) (1996 (5) SCC 48)

Resistance: Order XXI Rule 97, Form No. 40 Appendix E CPC, Sec.74 CPC – 30 days imprisonment

Order XXI Rule 98, Warrant; Form No.41/App.E/CPC, Enquiry

Order XXI, Rules 99, 100 and 101 contains the provisions enabling the executing court to deal with a situation when a decree-holder entitled to possession of the property encounters obstruction from any person.

RESISTANCE TO DELIVERY OF POSSESSION:

A situation may arise where the judgment debtor or any other party may resist or obstruct to deliver the decretal property. The decree-holder, in such a case, can move to the court for enforcement of his decree by removal of such obstruction. The provisions related to resistance or obstruction to delivery of possession has been given from Rule 97 to Rule 103 of Order XXI CPC.

The main hurdles to execute the decree passed by the civil court, is the objection raised by the judgment debtors, strangers or the persons claiming under or through the judgment debtors, during the execution of proceeding. Generally, the objectors have raised their objections under Section 47 and order XXI Rule 97, 99, 101 of the CPC, Sections 47 & 74 and Order XXI Rules 97 to 103, 104 and 105 to 106 of the Civil Procedure Code, 1908.

By virtue of Code of Civil Procedure (Amendment) Act, 1976 Act no. 106 of 1976 w.e.f. from 1st February 1977, Sub section 2 of section 47 was omitted. Section 47 of the CPC states as “Question to be determined by the court executing the decree”. In this section, earlier there are three sub clauses but in terms of amendment made in the code of Civil Procedure by virtue of Civil Code Amendment Act no. 104 of 1976 with effect from 1.2.1977 sub section 2 has been deleted and now there are two sub sections and two explanation in this section as per clause;

1) All questions arising between the parties to the suit in which decree was passed, or their representatives and relating to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and by a separate suit.

2) The question to be determined by the court executing the decree means that a person is legal representatives of the parties to the suit or not.

Explanation -I:

As per this section parties to the suit means that the plaintiff whose suit is dismissed and the defendant against whom the suit is dismissed.

Explanation -II:

(a) For the purpose of this section a purchaser of decree shall be the deemed party to the suit in which the decree is passed.

(b) All questions relating to the delivery of possession of such property to such purchaser or his representatives shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

PROCEDURE TO BE ADOPTED IN DEALING WITH THE APPLICATION UNDER SECTION 47 CPC:

In a judicial pronouncement by their lordship Hon'ble Mr. Justice D.N.Upadhyay in the case of ***Nand Lal Sharma Vs. Raj Kumar Sharma & Ors. reported in 2014 (3) JCR 657***, discussed about Section 47 of the Civil Procedure code.

In the case between ***Rahul S. Shah Vs. Jitendra Kumar Gandhi*** reported in 2021(2) JLJR (SC) 459 Hon'ble Supreme Court held that

“the court exercising jurisdiction u/s 47 or U/O XXI must not issue notice on an application of third party claiming rights in a mechanical manner- the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating of suit if due diligence was exercised by the applicant – the court should allow taking of evidence during the execution proceeding only in the 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- the court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or malafide, resort to rule 98(2), Order XXI as well as grant compensatory costs in accordance with Section 35-A of CPC 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.”

In view of the above judgment of Hon'ble Supreme Court, Hon'ble High Court has been pleased to make the following amendments in the “Civil Court Rules of the High Court of Jharkhand” Rule 115 B. The Court exercising jurisdiction under Section 47 of CPC or under Order XXI of 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 during the trial of the suit. Therefore, it is incumbent to the court dealing with the application u/s 47 CPC must be heard preliminary and upon

finding merit if any then only registered as misc. case and proceed further and if no case made out the application must be disposed of threshold.

The steps to be taken, under Order XXI Rules 35 and 36 of the Code of Civil Procedure, 1908, in the case of the delivery of immovable property are as follows:

(a) **Firstly**, where a decree is for delivery of immovable property if such property, is in the possession of any person bound by the decree, such person may be called upon to vacate the property in order that possession may be delivered to the person to whom it has been adjudged, or his agent; and if he refuses to do so he may be removed from the property in order to effect such delivery of possession. Here the endorsement on the warrant should state that the property was found in the possession of A (naming the person), and that he was one of the persons bound by the decree or held on behalf of one of those persons (naming the persons); that he was required to vacate the property, and that, on his doing so, the person entitled under the decree was put in possession; or that, on his refusal to do so, he was removed from the property, and the person entitled under the decree was put in possession.

(b) **Secondly**, where a decree is for joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming by beat of drum at some convenient place the substance of the decree. Here the endorsement on the warrant should state on what part the property the copy of the process was affixed and at what place the substance of decree was proclaimed.

(c) **Thirdly**, where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the officers of the Court may (after giving reasonable warning and facility to any woman, not appearing in public according to custom, to withdraw) remove or open any lock or bolt or break open any, when the property is in possession of a person who is bound by the decree or who holds possession on behalf of one who is so bound by a decree for joint possession. Obtaining access to deliver possession door or do any other act necessary for putting the decree-holder in possession. Here the endorsement should describe briefly the action taken, as in paragraph (a) above.

(d) **Fourthly**, if the property is in the occupancy of a tenant or other person entitled to occupy it and not bound by the decree to relinquish such occupancy, a copy of the warrant must be affixed in some conspicuous place on the property, and proclamation made as provided in Order XXI Rule 36 of the Code. Here the endorsement should state that a copy of the warrant had been put up (stating where it was affixed) and that the substance of the decree had been proclaimed. Before issuing a warrant for the delivery of immovable property, the Court should ascertain from the decree-holder, or his agent, the name of the person whom he believes to be in possession of such property, to guide it in selecting the particular mode of delivery suitable to the case. When a decree is passed giving possession of agricultural land, the date on which possession is to be delivered should always be specified in the decree, an order passed as to any standing crops that may be on the land. If this has not been done in the decree, it should be done in the order which is sent to the Collector by the Court executing the decree. If however, no date is specified in either the decree or the order, and the land of which possession is to be delivered is in the cultivating possession of the judgment-debtor, the Collector should at once refer to the Civil Court for instructions as to whether or not he is to delay execution of the decree, until any crop which may have been sown by the judgment-debtor and is standing on the land, has been removed. When property is in possession of a person who is not bound by decree.

SCOPE AND APPLICABILITY OF RULES 35 & 36 of ORDER XXI OF CODE OF CIVIL PROCEDURE:

Order XXI Rule 35 makes it clear that warrant of possession can be straightaway sought against the persons occupying immovable property which is subject matter of a decree by the decree-holder provided such persons who are occupying the suit property are the judgment debtors or persons claiming through the former. It means it provides removing any person bound by the decree who refuses to vacate the property.

Order XXI Rule 36 provision is made for delivery of formal or symbolic possession of the property in occupancy of tenant or other person entitled to occupy the same and not bound by the decree that relinquished with occupancy as held by the Hon'ble Supreme court in *N.S.S.Narayana Sarma Vs. M/s Gold Stone Exports Pvt. Ltd., 2002 (1) SCC 662*

ORDER 21 RULE 97, 101 AND SECTION 47 OF CODE OF CIVIL PROCEDURE CODE:

Section 47, Rules 97 and 101 contemplate different situations. Section 47 is the general provision and where as Rules 97 and 101 deals with specific situation. Section 47 deals with execution of all kinds of the decrees whereas Rules 97 and 101 deals only with the execution of decrees of possession.

In case of the resistance of execution proceedings by a stranger by claiming independent interest in the property, this Rule 97 applies. The word “any person” is comprehensive enough to include a part from the judgment- debtor or any one claiming through him even persons claiming independently and who therefore, be total strangers to the decree.

RESISTANCE TO EXECUTION/ RESISTANCE TO DELIVERY OF POSSESSION TO DECREE- HOLDER OR PURCHASER:

Section 74 and Rules 97 to 103 of Order XXI of the Code of Civil Procedure deals with this provision.

Sec.74 of CPC - Resistance to execution:

Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

Rule 97 of CPC- Resistance or obstruction to possession of immovable property:

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

Under this rule, the decree holder as well as any person may complaining to the court about the resistance and obstruction in obtaining possession. When a person unreasonably and in the instance of judgment debtor resisted the delivery of possession in such case the decree holder may complain to the court executing the decree and on adjudication of the matter complained the court, and the court executing the decree order for removal of the obstruction or may pass any such order as deem think fit and proper.

In the case of **Brahmadeo Choudhary Vs Rishikesh Prasad Jaiswal AIR 1997 SC 856**, the Hon'ble Supreme court held that the objection of the objector can be considered by the executing court against the possession warrant and the court can stay the execution proceeding till the objection petition is decided by the executing court. In this case also, the question came up before the court that whether the objector can claim adjudication of his right until he is actually dispossessed. The Hon'ble Supreme Court held that the claim could be adjudicated prior to actually dispossessed under Rule 97 of Order XXI CPC. The same view was relied by the Hon'ble Supreme Court in the case of **Silver line Forum Vs. Rajiv Trust AIR 1998 SC 1756**, also **Rajesh Vs Sreenath AIR 1998 SC 1827**.

In the case of **Tanzeem -E- Sufia Vs. Bibi Haliman, AIR SC 3083**, the Hon'ble Supreme Court held that even if the objector filed a suit for declaration of right, title of part premises for which decree sought to be executed. The executing court shall have power to decide the objection under Order XXI Rule 97 CPC.

WHO CAN FILE APPLICATION?

Where a holder of a decree for possession of immovable property or the purchaser of any property sold in execution of decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

Order XXI Rule 97 CPC clearly provides that where execution of decree is resisted or obstructed by any person the decree holder may make an application to the court complaining of such resistance or obstruction. Where upon the court shall proceed to adjudicate upon the application in accordance with the provisions contained in the code. Application by the judgment debtor under Rule 97 C.P.C is not permissible.

Rule 97 (1) of Order XXI deals with the situation where the decree holder is resisted or obstructed from obtaining the possession of the decree schedule property.

A plain reading Rule 97 shows that it is only the decree holder or an auction purchaser of any such property who can make application in case of possession is resisted or obstructed and not by objector before his dispossession. Under Order XXI Rule 97 CPC Application moved by the decree holders who complains about the resistance or obstruction offered by any person to the decree holder in this attempt at obtaining possession of the property and who wants such possession of the property and who wants such obstruction or resistance to be removed which otherwise is a impediment in his way, a lis on hand and such obstructionist or resisting party on the other, to whom summons has been issued by the court.

EXPRESSION ANY PERSON IN RULE 97:

It has widening the scope of power so as to enable to executing court to adjudicate the claim. It includes all the persons resisting delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or any other persons claiming right on their own, including a stranger.

Where any third party wants to raise an objection to the effect that decree cannot be executed against him, he is entitled to file an application under Order XXI Rule 97 CPC which would have to be decided on its own merits by the executing court in accordance with law.

A transferee of right will be entitled to file an application without separate assignment of decree.

A claim for share in the suit property can be decided by the executing court alone as laid down by the Hon'ble Supreme Court in **Prasanta Benerji Vs. Pushpa Ashok Chandani JT 2000 (7) SC 502**.

Even a stranger can offer resistance claiming independent title as held by Hon'ble High Court in **Padigi Padmavath Vs. Kamala Nagarjau, 2004 (1) ALT 413**.

In case where there was excess deliver of movables and judgment debtor sought for redeliver of such movables, claim came under Section 47 of CPC and hence, pendency of execution petition is not necessary as held in **Gopala Krishnaha Kamath Vs. Bhasker Rao 1988 (2) KLT 352**.

WHO CAN RESIST OR OBSTRUCT?

The following persons can resist or obstruct the execution of decree of possession:

1. It is comprehensive enough apart from judgment debtor any person claiming through him.
2. Persons claiming the title independently and therefore they are strangers to the decree can also resist for possession and mere possession would not be sufficient.
3. A tenant even prior to the date of the decree in title suit is entitled to resist. The application filed by the tenant (not a party to the eviction proceedings) after filing the execution petition is maintainable under Order XXI Rule 97 C.P.C even before his possession.
4. A lessee of judgment debtor is also included with the meaning of Section 47 but a sub tenant is not entitled to obstruct but, where he is in possession of the property for long 30 Years to the knowledge and consent of the predecessor of the decree holder can the execution. Plea of adverse possession if proved is a substantial ground for raising under Rule 97 C.P.C.

WHO CANNOT RESIST OR OBSTRUCT?

A Judgment Debtor or his persons cannot resist or obstruct of delivery of possession. The petitioner is claiming his possession through the judgment debtor and since it has not acquired any right of suit premises independent of right of judgment debtor and thus obstruction which was made by the petitioner in execution of the said decree

*“Objection by the wife of deceased tenant can be impleaded in the eviction petition and can proceed with the proceedings as held in **Auto Cade Vs. Ranjita Roy 2010 Ind law Cal 297**”*

A third party to a suit for partition, who has no interest, who has no interest in the property covered in the suit, cannot resist in execution of decree on the basis of final decree is not in consonance with the plaint prepared by the commissioner appointed during the final decree proceeding as held in **M.Padma Vs. M.Seshagiri Rao 2003 (4) ALT 683**.

In the absence of title over the property in favor of the claimant, no application under this rule is maintainable as held in **Ittiachan Vs M.I.Tomy AIR 2002 KER 5**.

A compromise decree between the original tenant and co owner to surrender the possession of third party/would be nullity and the third party is competent to resist the delivery of possession as held in between **Ram Chandra Verma Vs. Shri Jagat Singh Singhi AIR 1996 SC 1809.**

RESISTANCE OR OBSTRUCTION:

Once the resistance is offered by so called stranger to the decree which comes to be noted by a executing court as well as by a decree holder, the option available to the DHR against such an obstructionists is only remedy under Rule 97 CPC and he cannot get over such obstruction and insist on the re issuance of warrant of possession under Rule 97 CP.C, the decree holder cannot by pass Rule 97 C.P.C and insist upon re issuance of warrant of possession under Rule 35 C.P.C with police aid as laid down in **Mahinder Singh Vs. Pratima Kumari Mohapatra (2001) 2 ORISSA LR 695.**

RULE 98 OF CPC - ORDERS AFTER ADJUDICATION:

(1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2);

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) Pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment- debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

RULE 99 OF CPC - DISPOSSESSION BY DECREE-HOLDER OR PURCHASER:

(1) Where any person other than the judgment-debtor is dispossessed of im-movable property by the holder of a decree for 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. This rule applies where the person other than the judgment debtor is dispossessed by the decree holder or the purchaser he can claim for his dispossession and established his in-dependent right, title.

RULE 100 OF CPC - ORDER TO BE PASSED UPON APPLICATION COMPLAINING OF DISPOSSESSION:

Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination,

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

RULE 101 OF CPC - QUESTIONS TO BE DETERMINED:

All questions (including questions relating to right, title or interest in the prop-erty) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

In the case of **N.S.S. Sharma Vs. M/S Goldstone Exports (p) Ltd. And others reported in AIR 2002 SC 251**-the Hon'ble Supreme Court been held that *Resistance or obstruction to possession made in execution – All relevant issues arising in the matter on an application under Order XXI Rule 97 or Rule 99 shall be determined by the executing court and not by separate suit.*

In a case of **Vol Builders Pvt. Ltd.& Anr. Vs. Janab Salim Saheb & Anr reported in AIR 2009 JHARKHAND 84, 2009** Where in the Hon'ble High Court been held that *where two separate suits were filed – one by objector for declaration of right, title and interest, over the suit property on the basis of agreement for sale- Another suit was filed for injunction in respect of suit property- Suit on the basis of Agreement was dismissed – Appeal against is subjudice - Knowing about the pendency of the two suits, court below cannot proceed to embark upon a separate inquiry on it own on the issue raised (Order XXI Rules 97, 98, 101, 103 and 104 explained)*

Also in the case of **Sushil Kumar Sureka Vs. Santosh Kumar Singh reported in 2009(3) JCR 740** it has been held that *the objection under Order XXI rules 98, 99, 100, and 101- objection were repeatedly rejected up to High Court- Suit filed by the father of the objector is pending- A case of gross abuse of process of law- order impugned set aside with a nominal cost of Rs.2500/-.*

QUESTIONS FALL FOR DETERMINATION :-

1. No enquiry in the absence of prima facie case :-

The court is not obliged to determine the question of obstruction merely because the objector raised it. Technical objections, such as want of jurisdiction to execute the decree etc are not maintainable.

2. Questions to be determined by in case of objection under Rule 99 of the code:-

An application filed under Rule 99 of Order XXI of the code is equated to a suit and as such all questions arising between the parties to the proceeding, shall be determined by the court dealing with the applications and not in a separate suit.

DISTINCTION BETWEEN RULE 97 AND RULE 99 OF ORDER XXI OF THE CODE:

When once resistance was offered by the objector, the proper procedure which was required to be followed by the decree-holder, was the one contemplated under Order XXI Rule 97 of CPC. Where as if the objector is removed by Nazir, the remedy of objector is to invoke Rule 99 CPC and seek for restoration of possession. After dispossession the remedy of objector is under Rule 99 of the code.

APPLICABILITY OF RULE 101 IN CASE OF OBJECTION UNDER RULE 99 OF THE CPC:-

A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 of the Code and if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree as laid down by the Hon'ble Supreme Court in **Silver line Forum Ltd Vs. Rajiv Trust AIR 1995 SC 1754**.

RULE 102 OF CPC - RULES NOT APPLICABLE TO TRANSFEREE PENDENT LITE:

Nothing in Rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation:- In this rule, "transfer" includes a transfer by operation of law. This rule is recognizes the doctrine of lis pendens as embodied in Section 52 of the Transfer of Property Act, 1882

In the case of **Usha Sinha Vs. Dina Ram and others reported in (2007) 7 SCC 144** the Hon'ble Apex court elaborately discussed this rule- Object and scope of order 21 rule 102 restated- It based on justice equity and good conscience – A transferee from a judgment debtor is presumed to be aware of the proceeding before a court of law- Held if, unfair inequitable or undeserved protection is afforded to a transferee pendent-lite, a decree- holder will never be able to realise the fruits of the decree – Transfer of Property Act 1882 S. 52.

DOCTRINE OF LIS PENDENSE-

A person purchasing the property from the judgment debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of decree – Held resistance at the instance of transferee of a judgment debtor during pendency of the proceeding cannot be said to be resistance or obstruction by a person in his own right and, therefore is not entitled to get his claim adjudicated.

RULE 103 OF CPC - ORDERS TO BE TREATED AS DECREES:

Where any application has been adjudicated upon under Rule 98 or Rule 100 the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

In the case of **Jogindera Kaur @ Jogender Kaur Vs. Kali Prasad @16 Kalu Prasad , 2003 (9) SCC 464, 200**, the Hon'ble Supreme Court held that the order passed under Rules 97, 99, 98, 100 and 101- Adjudication and determination under- to be treated as decree under Order 21 Rule 103- as such first appeal and also second appeal shall lie. Therefore, it is clear that when an order is being passed after adjudication of the claim of third parties filed under Order XXI Rules 97, 99 that order is appealable. But when the court in threshold rejected the application, in such case the said order is not a decree within the meaning of Rule 98 and 100 of Order XXI CPC as such no appeal shall lie.

In a judgment reported in CCR (Current Criminal Law Reports) **2002(1) SC 483** the Hon'ble Supreme court held that Application filed under Order XXI Rule 97 or 99 dismissed at the threshold on the ground of maintainability without making any inquiry into right, title or interest such an order cannot be said to have passed under Rule 98 Order XXI as decree.

RULE 104 OF CPC - ORDER UNDER RULE 101 OR RULE 103 TO BE SUBJECT TO THE RESULT OR PENDING SUIT:

Every order made under Rule 101 or Rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such

order is made, if in such suit the party against whom the order under Rule 101 or Rule 103 is made has sought to establish a right which he claims to the present possession of the property.

RULE 105 OF CPC - HEARING OF APPLICATION:

(1) The Court, before whom 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.

Owing to the applicability of the provisions of Section 141 to execution proceedings, Order IX does not apply to execution proceedings. The result has been that the courts have found it difficult to decide the circumstances in which an application for execution can be dismissed for non-appearance or if a court has dismissed an application for non appearance where the court in the absence of any specific provisions relating to restoration of the execution proceeding, can restore such application. Rules 105 and 106 are inserted to deal in such cases.

RULE 106 OF CPC SETTING ASIDE ORDER PASSED EX-PARTE, ETC.,:

(1) The applicant, against whom an order is made under sub-rule

(2) 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:

i. 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 or such terms as to costs, or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

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

iii. 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 applicant had knowledge of the Order.

Rules 105 and 106 of Order XXI structured like Order IX of the Code of Civil Procedure. When we conjointly read both the provisions, there are similarities in the provisions.

RESTORATION OF EXECUTION CASE:-

When an execution petition is dismissed for default, a restoration application under Section 151 CPC is maintainable.

EXECUTION OF DECREE WITH POLICE ASSISTANCE :-

Order XXI Rule 97 CPC:- In the case of **Rahul S.Shah Vs. Jitendra Kumar Gandhi reported in 2012) JLJR (SC) 459**, Hon'ble Supreme Court made directions- the executing court must dispose of the Execution proceeding within six months from the date of filing, which may be extended only by recording reasons in writing for such delay-executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned police station to provide police assistance to such officials who are working towards execution of 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

By Applying the law laid down by the Hon'ble Apex Court and rules made by the Hon'ble High court, now it is required to issue writ of delivery of possession of immovable property with police assistance, directing the concerned police station to provide adequate police force at the time of effecting writ of Delivery of Possession, in appropriate cases.

DENIAL OF TITLE BY THE JUDGMENT DEBTOR IN HIMSELF, IF PERMISSIBLE:

If an application under Rule 97 C.P.C, the judgment debtor can raise the question of his title to the property which should be gone into and should be decided by the executing court, otherwise the court acted with material irregularity.

OBSTRUCTIONIST'S RIGHT TO OPPOSE:

As per Rule 97 CPC when the third party, not bound by the decree, approaches the court to protect his independent right and title and interest before he is actually dispossessed from immovable property. In the absence of the right over the property in favor of the claimant, no application under this rule is maintainable. It will be open to an obstructionist to raise a contention of illegality of decree not liable to be executed even in spite of the fact that he cannot establish his independent right of possession as held in **Mani Nariman Vs. S.Dauwala AIR 1991 Bom 328.**

POLICE AID:

After an obstruction was offered by a third party, the decree holder, moved an application under Order XXI Rule 35 C.P.C for police assistance to remove the obstruction. No police aid can be granted until the objection is decided under Order XXI Rule 97 C.P.C.

ABSENCE OF POSSESSION CLAUSE IN AGREEMENT OF SALE:

In the absence specific direction as to possession clause in the agreement of sale, it has to be read into the decree as laid down in **Y.Subba Rao Vs. Azi Zunnisa Begum, (1985) 2 APLJ 149.**

NECESSITY OF APPLICATION:

The court can grant relief to the decree holder though he had not made an application under Rule 97 C.P.C and decide whether the obstruction caused was at the

instance of Judgment debtor as laid down in **R.S.Maddin Setty, Vs. A.R.A Basith (1970) 1 Mys LJ 419**

NOTICE AND HEARING :

Application under Rule 97 C.P.C cannot be ordered without notice and it is mandatory that adjudication be made in such application after giving notice and hearing the parties who are other than as laid down in **Dairapu Satyanarayana and others Vs. Omni Appala Naidu 2004 (4) ALT 418.**

FRESH APPLICATION:

The failure to take steps under Rule 97 the execution petition was closed, there is no bar to decree holder applying under Rule 97 a fresh order of delivery of possession on obstruction can be raised as laid down in **L.Rama Murthy VS L.Kondamma AIR 1983 AP 135.**

If a holder of decree for possession applies for delivery of possession, but is resisted or obstructed in obtaining possession, it is not obligatory on him to proceed under this court, he make either apply again for execution of the decree under Rule 35 and Rule 36 or make a fresh applications for delivery under Rule 95 or institute a regular suit for possession as laid down in **Mukund Babu Jadav Vs. Tanu Sakhu Pawar AIR 1933 BOM 457 (FB).**

When first application is disposed not on merits, a second application is not barred. A second warrant of possession can be issued after obstruction, provided the obstruction offered is without substance or whose claim is on the face of it is unacceptable and cannot be said to be in good faith. But, if the resistance or obstruction needs investigation, the decree holder must proceed under Rule 97 C.P.C.

ADJUDICATION UNDER SUB RULE 2:

As provided under Sub Rule (2) of was substituted by Amendment Act 1976, on an application under Order XXI Rule 97 CPC being made, the court shall proceed to adjudicate upon application in accordance with the provisions which are contained in

Rule 97 or Rule 99 C.P.C and the right , title and interest of the parties there to shall be determined by the court conclusively as if it was decree subject to right of appeal and not a matter to agitated by separate suit. As laid down in **Sasmita pattanaik VS. Sunanda Pattainaik 2010 (1) CIT 28.**

Adjudication need not necessarily a full fledged adjudication, no detailed inquiry by collection of evidence is required.

Executing Court obliged to determine under Rule 101 must posses two adjuncts they are;

1. Such questions should have legally arisen between the parties,
2. Such questions must be relevant for consideration and determination between the parties, similarly third party, who questions the validity of a transfer made by decree holder to an assignee, cannot claim that question, regarding the validity should be decided during execution proceedings.

All questions in regard to the title were to be determined by executing court as a civil court once an objection petition had been filed by the petitioner and same should be dismissed summarily. The court is bound to see whether the resistor or obstruct-or was a person bound by a decree and he refused to vacate the property. Adjudication under this rule is *Sina qua non* to a finality of adjudication of right, title or interest in the immovable property under execution. If there are clear boundaries as to identify the property, it prevails over the survey number and hence the executing court, cannot direct the surveyor to hold the inquiry into the same are not maintainable.

NO ENQUIRY IN THE ABSENCE OF PRIMA FACIE CASE:

If obstruction is not bonafide, the objection petition is liable to be rejected, if the obstructionist does not project the obstruction without any just cause, his claim could not be entertained and executing court is not obliged to make an inquiry into the claim of the objector as provided under Rules 97 to 101 CPC.

VALIDITY OF WARRANT OF DELIVERY:

Warrant of possession cannot be issued, unless and otherwise adjudication into Rule 97 is decided on merits. Though the decree holder makes an application under Order XXI Rule 35 for delivery of possession, in the light of obstruction by a third party, the court has not decide the objection first and then only pass appropriate orders.

In case a compromise decree providing symbolic delivery granted to decree holder, it could not be executed by requiring the obstructor who was a stranger to the decree to handover vacant possession as laid down in **Roshanlal Vs. Avinash AIR 2003 Bom 31**.

RIGHT OF SUIT:

After amendment Act 104 of 1976, the resultant position that any order passed under Order XXI Rule 97 C.P.C shall be determined by the court dealing with such application and separate suit is barred. Where a decree holder fails to file an application under Rule 97 C.P.C when obstruction is raised he is barred from filing of suit later on as laid down in **Kumar Krishna Nanda Vs. Babu Lal Shah (1987) 2 CCC 499 (Patna)**.

No separate suit is to be filed for the purpose of determining the questions relating to the right, title, and interest in the property arising in a proceeding under Rule 97.

A third party has no locus standi to seek investigation into its claim under Rule 97, such a third party can protect his possession during the execution of decree only by an independent civil suit by claiming temporary injunction there in on the right to possession independent of the judgment debtor as held in **Mohammad Shareef Vs. Bashir Ammed AIR 1983 MP 44**.

MAINTAINABILITY OF RULE 97 PETITION AFTER SUIT:-

Suit, after initiation of the proceeding under Rule 97 of the code is not maintainable as held in **Prasanth Banerji Vs. Pushpa Ashoke Chandani AIR 2000 SC**

3567. When the suit is instituted seeking relief, then an application under Rule 97 CPC is not maintainable as two different proceedings cannot be initiated for the same relief.

PAYMENT OF COURT FEE ON RULE 97 PETITION:

An appeal, filed under Order XXI Rule 97 of the amended code is just as Rule 58 (4), declares that the order made has the same force as if it were a decree. By this, it does not follow that the application made under the said provision is a suit and should be valued as such as held in **B.Biksha Reddy Vs. G.Venuka Bai, 1982 (2) An.W.R. 181.**

LIMITATION:

Each occasion of obstruction gives a cause of action for filing of an application to remove obstruction. The period of limitation is 30 days is prescribed as per Article 167 of Limitation Act from the date of resistance or obstruction.

The time spent in revision proceedings as ill advice of counsel after its rejection can be condoned under Article 14 of Limitation Act 1963 as held by Hon'ble Apex Court in **Ghasi Ram vs. Chait Ram Saint 1998 SC 2476.**

Section 5 of Limitation Act has no application to Order XXI, time cannot be extended for an application under Rule 97 where as Section 5 of Limitation Act is applicable in preferring appeal over the orders in Rule 97 CPC.

APPEAL OR REVISION:

An order passed under Rule 97 is appealable as per Rule 103 of Code and is not amenable of revision. Where a person has no right to obstruct cannot maintain appeal. Revision cannot be entertained by the Hon'ble High Court as there is clear prohibition under Section 115 (2) of the code when an appeal is provided under Rule 103.

RULE 98 ORDERS AFTER ADJUDICATION:

1) Upon the determination of the questions in Rule 101, the court shall, in accordance with such determination and subject to the provisos of Sub Rule (2).

a) Make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

b) Pass such other orders as, in the circumstances of the case it may deem fit.

2) Where upon such determination, the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment debtor or by some other persons at his instigation or on his behalf, or by an transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into the possession of the property and where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to 60 days.

Mistaken delivery of property – Remedy :-

If the court delivered possession of the property mistakenly assuming the jurisdiction, it can rectify the own mistake by ordering re- delivery under this rule i.e. under Rule 99 of the code as laid down by the Hon'ble High Court of Madras in **Vaithilingam Chettiar Vs. S.N.Laxman Nadar AIR 1965 Mad 331**.

EFFECT OF ORDER 21 RULE 58 ON THIS RULE:-

A claimant whose application under Order XXI Rule 58 of the code is dismissed on merits, cannot apply under this rule as laid down by the Hon'ble High Court of Patna in **Rasananda Rath Vs. Ratha Sahu AIR 1935 Pat 122**.

Procedure Of Execution Under AP Building (Rent, Eviction and Control) Act 1960 Act repealed (but for the purpose of pending cases discussed)

In 2019 SCC online AP 272 between **Mara Venkata Lingam Vs. State of AP represented by its Prl. Secretary, Law department and others** where in held by the Hon'ble Supreme Court held that

“A.P. Residential and Non-residential Premises Tenancy Act, 2017, Sections 1 (3), 30 and 40 A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960, Section 10 Jurisdiction of civil court Principal Junior Civil Judge, Tenali, by referring Section 40 of the Act returned the plaint on the observation that jurisdiction of Civil Courts is barred As of now admittedly the RENT Courts are not constituted in terms of Section 30 of the Act The exercise is under way It can be said that till the ESTABLISHMENT of the RENT Courts terms of Section 30 of the Act has taken place the Civil Courts, which are vested with the jurisdiction to entertain the civil suits can also entertain the suits filed by the lessees seeking injunction and other relevant reliefs Writ Petition is accordingly disposed of Learned Principal Junior Civil Judge, Tenali, directed to entertain the suit.”

WHAT ORDERS OF RENT CONTROLLER ARE EXECUTABLE IN NATURE:

Section 15 of the Act the following orders are executable:

1. Order of Eviction under Section 10 of the Rent Control Act
2. Recovery of possession by the land lord for repairs, alterations or additions or for reconstruction under Section 12 of the Act.
3. Recovery of possession by the land lord for repairs, alterations or additions or for reconstruction of the buildings in respect of which government shall be deemed to be the tenant under Section 13 of the Act.
4. Orders against the land lord not to interfere with the amenities enjoyed by the tenant under Section 14 of the Act.

The order passed in execution is not subject to the appeal. Only revision will lie to the Hon'ble High Court under Section 22 of the Act.²⁵

WHETHER SECTION 47 AND SECTION 151 CAN BE APPLIED TO THE PROCEEDINGS UNDER SECTION 15 OF THE ACT :

If any fraud is played in the proceeding under Section 15 of the Act it is felt that Section 47 and Section 151 CPC may be applied even in rent control proceedings in spite of the fact that Section 15 of the Rent controller Act provides comprehensive powers of execution and so the order obtained by fraud can be recalled by the rent controller.

Claims made or obstructions caused - Powers of Rent controller under Rule 23 (7):-

Differences between Claims under Order XXI Rule 58 and Rule 23 (7) of the Rent Control Act 1961

There is a significant difference in the enquiry in a claim petition filed under Order XXI Rule 58 and Rule 23(7) of Rent Control Rules or an enquiry under rule 101 of Order XXI of the code of Civil Procedure, if the execution before the Rent Controller is resisted and obstructed by any party other than the person against whom the order of eviction is passed, the rent controller summary enquiry will be conducted by him but will not decide the rights, title and interest of the person causing obstruction to the execution. Whereas enquiry under Rule 58 or Rule 101 of Order XXI of CPC is akin to the regular trial and executing court will decide the right, title and interest of the person who makes claim or causes obstruction; therefore the jurisdiction under Rule 23 (7) of Rent Controller is very limited.

Controller can restore the possession to the claimant who was wrongfully dispossessed:

The scope Under Rule 23(7) of the rules of rent control is wide to include the power with the rent controller not only to disallow the execution if the claimant is entitled to the property but can also restore the possession to the claimant as laid down by the Hon'ble High Court in **M.A.Salam Vs. S.Siddamma 2007 (2) ALT 101**.

The person making claim or causes obstruction must be in possession of the premises:

A person who is not in a possession of the premises in question cannot maintain a petition under Rule 23 (7) of Rent control rules on the ground that the landlord ought to have made him a party to the eviction petition.

What are the orders executable Under the AP Tenancy Act 1956.

The Special officer or the Hon'ble District Judge will pass the following orders:

1. For resumption of possession of the land for personal cultivation of the land lord under Section 12 of the Act
2. Orders for eviction, on termination of lease under Section 13 of the Act.

Procedure that can be followed while ORDERING DELIVERY OF VACANT POSSESSION:

- i. A suit for declaration of title and for recovery of possession was decreed. Execution Petition has been filed for delivery of immovable property i.e., open land under Order XXI Rule 35 C.P.C., The Executing Court ordered delivery of property. When the Bailiff proceeded to execute delivery warrant, he found that there are structures like residential houses made by Judgment Debtors in the suit land. Then the Bailiff returned delivery warrant un-executed duly reporting to the Executing Court about existence of such structures. The executing Court ordered him to execute the delivery warrant entrusted to him, duly directing him to demolish such construction of structures and hand over vacant possession of suit land to decree holder, even though the plaintiff has not sought for the relief of mandatory injunction in the suit and in that situation, the decree under execution cannot be treated to be as an un-executable decree and it is of no consequence as to whether such structures are in existence or not in suit land which were constructed either prior or after filing of the suit, as per the language used in Order XXI Rules 35, 97 and 101 C.P.C.,
- ii. The Executing Court can pass orders directing its Bailiff to execute the delivery warrant duly demolishing structures, if any, made by the Judgment Debtors and to deliver vacant possession of suit land, on the application made by Decree holder under Order XXI Rule 97 C.P.C., requesting the Executing Court to give such specific directions to its Bailiff to demolish the structures made by Judgment Debtors in suit land and handed over its vacant possession to Decree holder.

- iii. Even if the Judgment Debtors have contended that without a prayer and decree for mandatory injunction, the trial Court/Executing Court cannot give directions to its Bailiff to remove structures on the premises that they exist even at the time of filing of the suit and if plaintiff Decree holder fails to ask for decree for mandatory injunction by way of filing separate suit, the Executing Court cannot order delivery of vacant possession of suit land and such contention of Judgment debtors is liable to be rejected by Executing Court, in view of specific language used in Order XXI Rules 35(3) 97 & 101 C.P.C.
- iv. The court can execute the decree without tortuous remedy by way of filing a separate suit for mandatory injunction or possession thereof by the plaintiff – Decree holder so as to avoid delay in execution or frustration and thereby defeat decree. Hence, the Judgment Debtors have no right or word to say or to contend that the decree under execution is only for recovery of schedule land is an un-executable decree. But the Executing Court is certainly empowered to pass specific directions to its Bailiff to execute the delivery warrant after demolishing the structures, if any, existing on schedule land and hand over vacant possession of the schedule land.
- v. Even, if, for any reason, the Judgment Debtors do not co-operate in removing the movables from the existing structures, the Bailiff is authorized to make an ‘inventory’ of those movables in the presence of 2 respectable panchas i.e., Panchayat Secretary and Village Servant and keep all those movables in the custody of such Panchayath Secretary, to be delivered to the Decree holder as per the provisions of Rule 35 of Order XXI C.P.C.
- vi. Further, Sub-rule (3) of Rule 35 of Order XXI C.P.C., clearly authorizes the Executing Court through its officers i.e., Bailiffs to deliver the possession of suit land to which decree passed and if the person in possession by that time, namely Judgment Debtor, being bound by the decree under execution, do not afford free access, the Court through its officers i.e., Bailiffs, may, after giving reasonable warning to the person in possession, and facilitate 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 open any door or do any other act necessary for putting the Decree holder in possession of the suit land.

- vii. The intendment of the Parliament in introducing the important provision under Order XXI Rule 35 (3) C.P.C., which authorizes Executing Court to pass all the incidental, ancillary or necessary orders for the purpose of enforcement of the decree under execution for the relief of delivery of the possession of the suit land and those inherent powers also include the power to remove any obstructions of construction or superstructure made PENDENTI LITE i.e., either prior to or after filing of the suit, and such type of orders passed by the Executing Court in execution of decree for delivery of possession of suit land, cannot be treated to be orders not passed without having jurisdiction.
- viii. In these situations, it is also not necessary that the tenant or any person is in possession inducted by the Judgment Debtor by way of lease or the induction of that person and that person should be made as party to the suit, when the construction was made pending the suit and that person or tenant was inducted into possession without there being obtaining any leave of the Court.
- ix. It is settled law that even a tenant who claims title, right or interest in the property through Judgment Debtor or under colour of interest through Judgment Debtor, the tenant is also bound by the decree, like Judgment Debtor and that the tenant need not be treated to be econominee and there is no need to implead him as a party defendant to the suit nor it be an impediment to remove obstruction put up by that person to deliver possession to the Decree holder, by the Bailiff while executing delivery warrant in a decree under execution passed only for declaration of title or recovery of possession.
- x. These are two principles kept in mind by the Executing Court, while passing ancillary, incidental or necessary orders for the effective enforcement of decree under execution of delivery of possession of suit land, by following the mandatory provisions of Order XXI Rules 35 (3) and 101 C.P.C., by exercising these inherent powers, so as to enable the Decree holder to get the decree fruits without there being any delay in execution.
- xi. From a reading of above parameters, it is well known and understand even not only to a law maker but also at best a prudent man, that the intendment of Parliament in introducing the provisions of Order XXI Rules 35 (3), 97 and 101 C.P.C., so as to enable the decree holder to get the decree fruits, without there

being impleadment of tenant as a party to the suit, which means it is not necessary to implead tenant as a party-defendant to the suit, even if Judgment debtor inducted him as his tenant into possession of suit land pending suit i.e., PENDENTI LITE (prior to filing of the suit or after filing of the suit).

- xii. In that situation, the Executing Court is perfectly right in exercising its jurisdiction while passing ancillary, incidental or inherent powers in ordering delivery of possession of property in execution of decree and thus the Executing Court is having ample power to direct its Bailiff to execute the delivery warrant in a suit for only declaration of title and for recovery of possession of land, even though there exist structures after its due demolition and hand over the possession of suit land to the decree holder i.e., by demolishing the structures made by Judgment debtor even during the pendency of suit and such an action of the Executing Court in passing such an order exercising its inherent power, cannot be treated to be as an Order passed without having jurisdiction.
- xiii. Likewise, there is no need to implead the tenant as a party/ defendant to the suit when the construction was made pending suit and if tenant is inducted into possession of the same without 'leave' of the Court.
- xiv. It means, the execution of decree need not be stalled in that exigency of inducting Judgment debtor's tenant in possession and another exigency of filing any separate suit for mandatory injunction.
- xv. Thus, there is no impediment or there is no hard and fast rule to say that the tenant in possession must be impleaded as a party defendant to the suit and the tenant need not be econominee to the suit and there is no bar for removal of structure put up by them to deliver possession to the decree holder who gets decree for declaration of title or possession only, without there being the relief of mandatory injunction.
- xvi. The above said parameters have been rightly held by Apex Court while dealing with the above subject matter in

B.GANGADHAR Vs. B.G.RAJALINGAM

(AIR 1996 SUPREME COURT 780)

in the following lines :

“.. .. in view of Order XXI, Rule 35(3) the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. Thus where in a suit for declaration of title and vacant possession of land, the decree was passed by the trial Court directing handing over vacant possession of land by demolishing the shops constructed by the Judgment debtor during pendency of suit, the said direction in execution of decree was not without jurisdiction”.

“ It is also not necessary that the tenant should be made party to the suit when the construction was made pending suit and the tenants were inducted into possession without „ leave “ of the Court. It is settled law that the tenant who claims title, right or interest in the property through the judgment debtor or under the colour of interest through him, he is bound by the decree and that, therefore, the tenant need not be impleaded as a party defendant to the suit nor it be an impediment to remove obstruction put up by them to deliver possession to the decree ”.

xvii. The Hon’ble High Court of Judicature, Andhra Pradesh at Hyderabad has also discussed the above parameters while dealing with the similar subject matter in

DONGALA VENKAIAH AND ANOTHER

Vs.

DONGALA RAJI REDDY

(2007 (5) ALD 716),

held as follows :

“ Execution of decree under Order XXI Rules 35, 97 and 101 C.P.C in a suit for declaration of title and recovery of possession is decreed and Structures like residential houses made by Judgment debtors/Defendants in suit land the Trial Court of ordered execution directing Bailiff to demolish construction and hand-over vacant possession of land to decree holder is Not without jurisdiction, Merely because plaintiff has not sought for relief of mandatory injunction, it cannot be said that decree is inexecutable and it is of no consequence whether structures existing on suit land were constructed prior to or after filing of suit ”.

“ Suit filed for recovery of possession of land and having filed written statement, defendants did not let in evidence and if suit decreed and EP for execution of decree filed Defendants instead of filing appeal, filed suit for cancellation of said decree and Defendants” suit was dismissed and when Bailiff could not execute warrant for delivery of possession of suit land on account of existence of residential houses, Decree holder filed E.A. under Order XXI Rule 97 of C.P.C. requesting Court to give directions to bailiff to demolish constructions made by defendants (Judgment debtors) in suit land and such directions were issued accordingly overruling Judgment debtors objections and CRP, Contention that without a prayer and decree for mandatory injunction, trial Court cannot direct bailiff to remove structures/ residential houses and as the structures/residential buildings were already in existence even at time of institution of suit and plaintiff failed to ask for a decree for mandatory injunction, executing Court cannot order delivery of vacant possession ”. “ Rejecting contention that if such constructions were made only during the pendency of the suit then the plaintiff can execute the decree without tortuous remedy of separate suit seeking mandatory injunction or possession, the Court held.”

xviii. The Hon’ble Madras High Court has also discussed about the parameters as mentioned above while dealing with the subject matter in

KANNU GOUNDER Vs. NATESA GOUNDER

(AIR 2005 MADRAS 31)

and held in the following lines :

“ under Order XXI Rule 35 C.P.C., the decree holder is entitled to get vacant possession of the schedule property after removal of any constructions or structures put up during the pendency of the suit in a suit for decree of delivery of vacant possession while executing the decree under execution”.

IN THE CASE OF DURAISAMI MUNDALIAR Vs. RAMASAMI CHETTIAR, 1979 TLNJ 9

“ The salutary principle which has got to be kept in mind is that where a Court directs by a decree or order that vacant possession of land should be given, and decree could be made effective by directing its own officer to remove the superstructure on it (Emphasis applied) and to deliver vacant possession of the

property to the decree holder”. “ it may not be necessary to have any specific power in that behalf, and such a power is exercised in every case in which vacant possession is ordered. The power to remove the superstructure on the land is an incidental power: necessary and ancillary to the power to deliver possession of the property”.

“The exercise of incidental, ancillary or inherent power inconsequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the Judgment-debtor or a person interested or claiming right through the Judgment-debtor has taken law in his hands and made any constructions on the property pending suit, the decree-13 holder is not bound by an such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession, it is not necessary to file a separate suit when the construction was pending suit without permission of the Court. Otherwise, the decree becomes in- executable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings”.

“ It is needless to point out that the construction put up by the defendant/Judgment/debtor whether before or after filing of the suit, is liable to be removed, if there is a prayer for possession. When there is a decree for delivery of vacant possession which would mean and include, delivery after removing all the structures or anything in the suit property and therefore, the plaintiff/decreed holder is entitled to take delivery of possession after removal of any manner of construction or structures in the suit property and therefor. ”

xix. The Hon'ble High Court of Judicature, Andhra Pradesh at Hyderabad, while dealing with the above decision followed the decision rendered by Hon'ble Madras High Court decision and the above 2 decisions are emanated by following the above cited decision of Hon'ble Apex Court and thus these 3 decisions are very much useful for any Executing Court while dealing with the subject matter of the suit for decree for declaration of title and for recovery/delivery of possession of suit land.

Basing upon the verdict and holdings in the above cited 3 decisions, the Executing Courts are at liberty to exercise its inherent powers while ordering the very delivery of possession of suit land, without there being insisting upon the very filing of

separate suit for mandatory injunction so also without there being insisting upon the very impleadment of tenants of Judgment debtors as parties to the suit in the event of Judgment debtors have inducted those tenants in the suit land, with a view to avoid multiplicity of proceedings, without there being any sort of creating situation to the plaintiff in driving again another round of litigation by way of filing separate suit for mandatory injunction and obtain decree in such suit. The Code of Civil Procedure expressly prohibits such a situation with a view to avoid that delay in eviction treating it 'as abuse of the process of the court' and also preventing the Judgment Debtors from procrastinating the executing proceedings for delivery of possession of suit land by way of introducing malafide pleadings by raising dispute with regard to description or identity or schedule land or dispute with regard to boundaries thereof.

The above mentioned parameters which have been already dealt with by Hon'ble Apex Court and also Hon'ble High Court of Judicature, Andhra Pradesh at Hyderabad and also by Hon'ble Madras High Court, are guiding principles to the Executing Courts while dealing with the delivery of property and finally one should have to bear in mind that if there is any kind of hurdle caused by the Judgment Debtors when the Bailiff of Executing Court intends to execute the delivery warrant, the said Bailiff is authorized with a power to remove or demolish any structures appearing in suit land or any tenant inducted in it by Judgment Debtors, the Bailiff is supposed to hand over vacant possession of schedule land to the Decree holder by following the provisions of Order XXI Rules 35(3), 97 & 101 C.P.C., by removing Judgment debtor or his tenant so as to enable the Decree holder to get the decree fruits for declaration of his title and for recovery of possession of the suit land, without there being relief of mandatory injunction.

If the Execution petition is filed for costs also, steps to be taken in the same E.P itself or another E.P can be filed for realization of the costs. If the E.P is filed for costs also, E.P cannot be closed further steps should be ordered for recovery of amount.

EP STEPS IN DELIVERY OF POSSESSION OF IMMOVABLE PROPERTY UNDER ORDER XXI RULE 35 CPC:

- Deliver the schedule property in terms of decree by -----

- Delivery warrant returned unexecuted with the report of the Amin that the J.Dr. and his men obstructed the Amin for execution of warrant. For steps, call on -----

- OR

- Delivery warrant returned unexecuted stating that the door was locked. For steps, call on -----

- Petition filed for Police aid/break open and allowed. Issue fresh delivery warrant with police aid. Call on -----

- Delivery effected on -----, Delivery recorded. EP is closed.

CONCLUSION:

I conclude that Order XXI of CPC is an independent Code in itself and not only provide procedure to be followed by the decree-holder to get the fruits of the decree, at the same time it provides an opportunity to the judgment-debtor or the third party to raise the grievances or objection in the execution proceeding itself. Recourse to independent proceedings by filing a separate suit is clearly prohibited. Therefore, objections If any, are raised by the judgment-debtor or the third party in execution proceedings, the same are required to be adjudicated by executing court following the same procedure as if it were a suit and the orders by the executing court having the force of a decree. Considering the importance of the topic of execution of decree, it is necessary for all the Judicial Officers to pay special attention to the execution proceedings and for that purpose one has to go into the depth of the topic and have clear notions about all relevant provisions.

Submitted with due respects

Smt. N.SREE LAKSHMI,
 PRINCIPAL CIVIL JUDGE [JUNIOR DIVISION]-CUM-
 JUDICIAL MAGISTRATE OF FIRST CLASS,
 RAJAMAHENDRAVARM.