
EXECUTION OF DECREE & INTERIM ORDERS

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1. Commissions

Civil Procedure Code, 1908 “*An Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature*”.

Local Commissioners in layman language means an officer of the Court to make local investigation in a case as requested by any party. Generally, the fees of the Local Commissioner is Rs. 25,000. For example an application for appointment of a Local Commissioner is made to the court for investigation in an injunction matter where the Defendants have actually restrained the Plaintiff to enter the property of the Plaintiff.

Order 26 Rules 9: Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Order 26 Rule 10: Procedure of Commissioner

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person – The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. –

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Commissions for scientific investigation, performance of ministerial act and sale of movable property.

Order 26 Rule 15: Expenses of commission

Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Order 26 Rule 16: Powers of Commissioners

Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment:

- a. Examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in, the matter referred to him;
- b. call for and examine documents and other things relevant to the subject of inquiry;
- c. at any reasonable time enter upon or into any land or building mentioned in the order.

Appointment of Commissioner under Section 75 of the CPC

Appointment of Commissioner in terms of part III i.e. matter “Incidental proceedings” of CPC is a provided by section 75 of the CPC. Inasmuch as this article is concerned with the appointment of Commissioner section 75 of CPC being the provision relevant, empowering the court, it would be opposite to refer the provisions.

Section 75 of the CPC Power of the court to issue commissions. Subject to such conditions and limitations as may be prescribed, the court may issue a commission:

- a. to examine any person;
- b. to make a local investigation;
- c. to examine or adjust accounts; or
- d. to make a partition;
- e. to hold la scientific, technical, or expert investigation;
- f. to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- g. to perform any ministerial act.

Some Important Case Laws on Local Commissioner

- *It is not the work of the Court to gather evidence in favour of one party*

In **Padam Sen and another vs. The State of U.P.**, AIR 1961 SC 218, three Judge Bench of the Hon’ble Supreme Court the Court having no inherent power to appoint a Commissioner for any purpose not mentioned in section 75 of the CPC and Order XXVI of the Code. On behalf of the State it is urged that the Court can appoint a Commissioner in the exercise of its inherent powers saved in section 151 of the CPC

for purposes which do not come within the provisions of section 75 of the CPC and Order XXVI of the CPC.

- a. *Advocate Commissioner cannot be used for fact finding purposes and as such*

In **Devadoss vs. A. Durai Singh**, reported in 2002 (3) CTC 748, the Madras High Court has held that the Advocate Commissioner cannot be used for such fact finding purposes and as such, the order passed by the Court below is not sustainable under law. It is always open to the decree holder to examine the concerned persons as witnesses and prove as to how, and in what manner they got the cable connection. Hence the point is answered accordingly.

2. Arrest & Attachment before Judgment

Arrest Before Judgment

Order 38 Rules (1-4)

Rule 1.

Where defendant may be called upon to furnish security for appearance.- Where at any stage of a suit, other than a suit of nature referred to in section 16, clauses (a) to (d), the court is satisfied, by affidavit or otherwise,

- a. that the defendant, with intent, to delay the plaintiff, or to avoid any process of the court or to obstruct or delay the execution of any decree that may be passed against him,
- i. has absconded or left the local limits of the jurisdiction of the court, or
 - ii. is about to abscond or leave the local limits of the jurisdiction of the court, or
 - iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof, or
- b. that the defendant is about to leave India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance: Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim;

and such sum shall be held in deposit by the court until the suit is disposed of or until the further Order of the court.

Scope of the Order

An order of arrest before judgment of defendant is to be passed only:

- where the plaintiff is able to make out a prima facie case;
- and on the court being satisfied with the ingredients regarding possible abscondence or disposal of properties with intent to delay or obstruct execution of the prospective decree.

Nature

The jurisdiction to issue warrant and call for security is vested with the court even with regard to foreigners, just as it is vested with the court in regard to dishonest and fraudulent Indian defendants.

And because the decree against him will have to be transmitted abroad for execution, the court is vested with the jurisdiction to call for security. Where the judgment debtor and garnishee are situated beyond the territorial jurisdiction of the execution court And there is no material to show that the debt payable is within the jurisdiction of the execution court, an order prohibiting garnishees from payment to judgment-debtor is beyond the jurisdiction of court.

A ship touching the temporarily at an Indian port is in the same position as a foreign personnel defendant who is about to leave jurisdiction. If the claim against the ship is reasonably arguable, then to the extent of the reasonably best decree obtainable by the plaintiff, the court can and should obtain security from the ship before releasing her arrest.

Reasonable Probability

Where the defendant is about to leave India, It is enough if the circumstances under which he is about to leave India afford a reasonable probability that any decree that may be passed against him in the suit will thereby be obstructed or delayed in the execution.

Suit Must be Bonafide

In every case when an application is made under this rule, the court must be satisfied that the suit is bona fide.

Appeal

An order passed under O. 38, R. 1, is not appealable in nature though an order under Rule 2 which is to be passed when the defendant is brought before the court and where he fails to furnish security is appealable.

Rule 2.

Security:

1. Where the defendant fails to show such cause the court shall Order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such Order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.
2. Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Liability Under Security Bond

The extent of liability of a surety on a security bond must depend on the terms thereof, and it has been held that it should be strictly construed. On this principle, it has been held that the liability to produce the defendant at any hearing of the suit does not import a liability to produce him at the stage of execution of the decree.

Nor does the undertaking to produce in one court extend to producing the defendant in any other court to which the case might be transferred.

Where the defendant gave an undertaking not to alienate a property, which happens to be a mortgaged property, the act of mortgagee to sell the property cannot lead to breach of undertaking by the defendant.

Where a suit dismissed for default of appearance is again restored, an order passed under, O. 38, R. 3, becomes thereby renewed.

Rule 3.

Procedure on application by surety to be discharged:

1. A surety for the appearance of a defendant may at any time apply to the court in which he became such surety to be discharged from his obligation.
2. On such application being made, the court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.
3. On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Rule 4.

Procedure where defendant fails to furnish security or find fresh security.-Where the defendant fails to comply with any Order under rule 2 or rule 3, the court may commit him to the civil

prison until the decision of the Suit or, where a decree is passed against the defendant, until the decree has been satisfied: Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees: Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment Before Judgment

Order 38 Rules (5-12)

Rule 5.

Where defendant may be called upon to furnish security for production of property:

1. Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:
 - a. is about to dispose of the whole or any part of his property, or
 - b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
2. The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
3. The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
4. If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

Object of the Rule 5

The main object of an attachment before judgment is to enable the plaintiff to realize the amount of decree, if one is eventually passed, from the defendant's property.

The object is to prevent a decree from becoming in fructuous.

The order that is contemplated by this rule is not an unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished.

Order 38, rule 5 is not to be used as a lever for the plaintiff to coerce the defendant to come to terms.

Scope of Rule 5

An order under O. 38, R. 5 can be issued only if circumstances exist as are stated therein to the satisfaction of the court.

The affidavit in support of the contentions should not be vague and it must be properly verified.

A mere allegation that the defendant is selling off his properties is not sufficient. Particulars must be stated.

An order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the party against whom the power is exercised.

Where the property sought to be attached is transferred before filing of the suit, the claim by creditor that transfer was hit by s 53 of the Transfer of Property Act 1882 cannot be rejected on the ground that the transferee were not made parties to the suit.

The provision for attachment is not applicable where the property has already been disposed of. The purchaser of the property has a right to object order of attachment as he was not a party to the suit and had become the owner of the property before the filing of the suit.

Court Must be Satisfied

Before exercising jurisdiction under rule 5 and passing orders for the attachment of properties before judgment, the court must satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger that the defendant is doing all things with dishonest intention of defeating or delaying the possible decree.

The court must not only be satisfied on the material, but also state the so in the order.

The plaintiff should state precisely the grounds on which the belief or apprehension can be entertained, that the defendant is likely to dispose of, or remove the property.

That has to be some prima facie material on the basis of which the court could satisfy that the condition requisite for making an order of attachment before judgment exist.

The circumstances that a company is in financial strain or that the debtor may be unable to pay the debt do not warrant attachment before judgment.

Notice to Defendant

The order of attachment should be passed after notice to defendant.

Property

The expression 'property' includes the property of every description whether movable or immobile. The expression 'his property' refers to property of the defendant. However, it cannot be the joint property of plaintiff and the defendant.

Effect

An attachment before judgment cannot be an attachment in execution of a decree. It can only become an attachment in execution of a decree after the decree has been passed and after an application to execute such a decree has been made.

Conditional Attachment

The court has ample power to direct conditional attachment. No prior notice is necessary in such case. It is, however, open to the defendant and his right to show cause against attachment has not been affected.

Property Situated Outside Jurisdiction

Where the property sought to be attached is outside the local limits of the jurisdiction of the court, the proper course to follow is to transmit the order for attachment to the court in whose jurisdiction the property is situated.

Rule 6.

Attachment where cause not shown or security not furnished:

1. Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may Order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.
2. Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

Property Specified

The property specified is, the property specified by the plaintiff as required by R. 5, sub-R. (2). Such property may be within or without the jurisdiction of the court.

If the party against whom the order is passed has never been called to furnish security or show cause, the question of making an order under R. 6 for 'failure' to comply with such direction does not arise. If such an order is passed, it is void.

Wrongful Attachment

If the defendant does not obtain an order setting aside the attachment, he will not afterwards be entitled to maintain a suit in tort on the ground that the attachment was wrongfully procured.

If the attachment was effected by an injunction in restraint of alienation of the defendant will not be entitled to damages for wrongful attachment, unless he proves that he lost a chance of a profitable sale, and evidence of loss credit is insufficient.

Rule 7.

Mode of making attachment: Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Surender Singh Bajaj v M/S. Kitty Steels Limited: ‘Order 38 Rule 7, CPC provides that the attachment under Order 38 Rule 5 shall be made in the manner provided in the attachment of property in execution decree’.

Rule 8.

Adjudication of claim to property attached before judgment: Where any claim is preferred to property attached before judgment, such claim shall be adjudicated upon in the manner hereinbefore provided for the adjudication of claims to property attached in execution of a decree for the payment of money.

Rule 9.

An order for attachment will be withdrawn if the defendant furnishes security or the suit is dismissed.

Rule 10.

Attachment before judgment not to affect rights of strangers, nor bar decree holder from applying for sale: Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Rule 11A.**Provisions applicable to attachment:**

1. The provisions of this Code applicable to an attachment made in execution of a decree shall, so far as may be, apply to an attachment made before judgment which continues after the judgment by virtue of the provisions of rule 11.
2. An attachment made before judgment in a suit which is dismissed for default shall not become revived merely by reason of the fact that the Order for the dismissal of the suit for default has been set aside and the suit has been restored.

3. Injunctions

Interim or interlocutory orders are those orders passed by a court during pendency of a suit or proceeding which do not determine the substantive rights and liabilities of parties with respect to subject matter of the suit or proceeding. Latin maxim "*Actus curiae neminem gravabit*" which means "*an act of the court shall prejudice no one*" explains the rationale behind granting such orders. This principle can be found in Section 94(e) of the Civil Procedure Code (hereinafter referred to as the code) which says that 'In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Interim orders are necessary to deal with and protect rights of the parties in the interval between the commencement of the proceedings and final adjudication. They prevent abuse of process during the pendency of proceedings. Such interim orders may be summarized as follows:

1. Commissions: Order 26
2. Arrest before judgment: Order 38
3. Attachment before judgment: Order 38
4. Temporary injunctions: Order 39
5. Interlocutory orders: Order 39
6. Receiver: Order 40
7. Security for costs: Order 25
8. Payment in court: Order 24

It is a well settled principle of law that interim relief can always be granted in the aid of and as ancillary to the main relief available to the party on final determination of his right in a suit or any other proceeding. Therefore, the court undoubtedly possesses the power to grant interim relief during the pendency of the suit.

The law of injunction in India has its origin in the Equity Jurisprudence of England from which we have inherited the present administration of law. From the aforesaid historical background,

it is manifest that the origin of the power to grant injunction is from equity, hence the exercise of the discretion by the Courts is to be governed mainly by equitable considerations. Injunction is stated in Order 39, Rule 1-5.

An injunction is a judicial process whereby a party is required to do, or to refrain from doing, any particular act. It is a remedy in the form of an order of the court addressed to a particular person that either prohibits him from doing or continuing to do a particular act (prohibitory injunction); or orders him to carry out a certain act (mandatory injunction).

Kinds of Injunctions

a. Perpetual Injunction: Permanent Injunctions on the other hand, maybe granted, at the discretion of the court by the decree of the court after hearing the case .It remains in force for all time to come.(S. 37(2))

Granting Perpetual Injunction:

- By Section 38 perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.
- Where the defendant is a trustee of the property for the plaintiff.
- Where there is no standard for ascertaining the actual damage caused, or likely to be caused, to the plaintiff, by invasion of his rights.
- Where the invasion of the plaintiff's right is such that compensation in money would not afford adequate relief.
- Where injunction is necessary to prevent multiplicity of judicial proceedings.

b. Temporary Injunction: Temporary Injunctions are those which remain in force until specified time or until further orders. Such injunctions can be granted at any stage of the suit and are governed by Order 39 of the Code of Civil Procedure, 1908 rather than by Specific Relief Act, 1963.(S 37(1))

It may be granted at any stage of the suit. It remains in force till disposal of the suit or until it is revoked and ad interim temporary injunction remains in force till disposal of the petition for temporary injunction or until it is revoked.

Granting Temporary Injunction

- To restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent multiplicity of judicial cases.
- To restraint any person from insulting or prosecuting any proceeding in a court not subordinate to that from which injunction is sought.

- To restraint any person from applying for prosecuting any legislative body.
- To restraint any person from instituting or any proceeding in a criminal matter.
- To prevent breach of a contract, the performance of which would not specifically enforced.
- To prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.
- To prevent a continuing breach in which the plaintiff acquiesced.
- When equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust.
- When conduct of plaintiff or his agent is such to disentitle him to the assistance of the court.

Order 39

Rule 1:

Temporary injunction can be granted when:

1. any property in dispute in a suit is in danger of being wasted , damaged or altered by any party to the suit , or wrongfully sold in execution of a decree; or
2. the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors;
3. the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff relating to any property in dispute in the suit .

State of Orissa vs. Madan Gopal, an injunction is a judicial process whereby a party is required to do or to refrain from doing any particular act. Temporary injunction is mode of granting preventive relief by the court at its discretion. A temporary injunction is also known as interim injunction.

In **Agricultural Produce Market Committee Case**, the Hon'ble Apex Court has held that "a temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction."

Rule 2:

According to the Rule 2 of CPC, temporary injunction may be granted where the defendant is about to commit a breach of contract, or other injury of any kind. Where the court is of the opinion that the interest of justice so requires, it may grant temporary injunction. Where the court is of the opinion that the very object of granting temporary injunction would be defeated by delay, it can grant an interim injunction in favour of the applicant. Chartered High Courts also have inherent power under their general equity jurisdiction to grant an injunction restraining a party from proceeding with a suit pending in another court.

To grant the order of temporary injunction is purely a discretionary power of the court. This discretion is to be exercised according to the established judicial principles and judicially. The following principles are laid down for consideration by the court while granting temporary injunction:

- *Prima facie* case
- Balance of convenience
- Irreparable injury.

Prima facie case

The expression “*prima facie*” means at the first sight or on the first appearance or on the face of it, or so far as it can be judged from the first disclosure. *Prima facie* case means that evidence brought on record would reasonably allow the conclusion that the plaintiff seeks. The *prima facie* case would mean that a case which has proceeded upon sufficient proof to that stage where it would support finding if evidence to contrary is disregarded. The Supreme Court in **Marin Burn Ltd. v. R.N. Banerjee** held that ‘A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a *prima facie* case had been made out, the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and as to whether that was the only conclusion which could be arrived at on that evidence.’

In **Gujarat Electricity Board, Gandhinagar v. Mahesh Kumar and Co. Ahmedabad** wherein it was held that “*Prima facie* case” means that the Court should be satisfied that there is a serious question to be tried at the hearing, and there is a probability of Plaintiff obtaining the relief at the conclusion of the trial on the basis of the material placed before the Court. “*Prima facie* case” is a substantial question raised bona fide which needs investigation and a decision on merits. The Court, at the initial stage, cannot insist upon a full proof case warranting an eventual decree. If a fair question is raised for determination, it should be taken that a *prima facie* case is established. The real thing to be seen is that the Plaintiff’s claim is not frivolous or vexatious.”

Uttara Bank vs. Macneill & Kilburn Ltd.: The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a *prima facie* case in his favour of him. It is to be understood that relief of temporary injunction cannot be sought for some right which would arise in future. Similarly, an injunction cannot be obtained to restrain a party from filing a suit. In **Seema Arshad Zaheer Case**, the Hon’ble Supreme Court has indicated the salient features of *prima facie* case as under: “The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a *prima facie* case as pleaded, necessitating protection of the plaintiff’s rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff’s rights is compared with or weighed against the need for protection of the defendant’s rights or likely infringement of the defendant’s rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant

such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands." However, in the **Best Sellers Retail India (P) Ltd. case**, the Hon'ble Supreme Court observed that *prima facie* case alone is not sufficient to grant injunction and held that: "Yet, the settled principle of law is that even where *prima facie* case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable."

Balance of convenience

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of "balance of convenience" in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs. The inconvenience caused to the plaintiff would be granted than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called "balance of convenience", it is really the "balance of inconvenience", and it is for the plaintiffs to show that the inconvenience caused to them would be granted than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. In granting a temporary injunction the Court should consider,

- I. The plaintiff makes out a *prima facie* case;
- II. That the plaintiff will suffer irreparable loss if the injunction prayed for is not granted; and
- III. The balance of convenience lies in favour of the plaintiff.

Case: **MT. AymumNessa v. md. Obaidul haque**, temporary injunction should be refused in the absence of the above mentioned three principles. In the case of **Orissa State Commercial Transport Corporation Ltd. v. Satyanarayan Singh**, observed: 'Balance of convenience' means the comparative mischief or inconvenience to the parties. The inconvenience to the plaintiff, if temporary injunction is refused, would be balanced and compared with that to the defendant if it is granted. If the scale of inconvenience leans to the side of the plaintiff, then interlocutory injunction alone should be granted.

In **Antaryami Dalabehera v. Bishnu Charan Dalabehera**, as this point, it was held that balance of convenience, which means, comparative mischief for inconvenience to the parties. The inconvenience to the petitioner if temporary Injunction is refused would be balanced and compared with that of the opposite party, if it is granted.

In **Bikash Chandra Deb v. Vijaya Minerals Pvt. Ltd.**: the Hon'ble Calcutta High Court observed that issue of balance of convenience, it is to be noted that the Court shall lean in favour of introduction of the concept of balance of convenience, but does not mean and imply

that the balance would be on one side and not in favour of the other. There must be proper balance between the parties and the balance cannot be a one-sided affair.

Irreparable injury

In **Dalpat Kumar & Anr. v. Prahlad Singh & Ors.**, the Supreme Court explained the scope of aforesaid material circumstances, but observed as under: “The phrases ‘*prima facie* case’, ‘balance of convenience’ and ‘irreparable loss’ are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man’s ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts rest eloquent and speak for themselves. It is well-nigh impossible to find from facts *prima facie* case and balance of convenience.”

In the case of **Orissa State Commercial Transport Corporation Ltd. v. Satya Narayan Singh**, the court observed: ‘Irreparable injury’ means such injury which cannot be adequately remedied by damages. The remedy by damages would be inadequate if the compensation ultimately payable to the plaintiff in case of success in the suit would not place him in the position in which he was before injunction was refused.

S.No.	Temporary Injunction	Perpetual Injunction
1.	For a specified time and may be granted at any point during the suit.	By the decree of the court, by the examination merits of the case.
2.	Order 39 (Rules 1 to 5) of CPC governs temporary injunctions.	Sections 38 to 42 of SRA governs perpetual Injunctions.
3.	Is non-conclusive and short run.	Is Final, Conclusive and Long Run.
4.	May only focus on the Plaintiff’s side.	Focuses on the Plaintiff as well as the Defendant.
5.	May be revoked by the court.	Is non-revocable by the court, though appealable.

4. Interlocutory Orders

Interlocutory orders are orders passed by a court during the pendency of a suit. They relate to matters of procedure as they arise during the trial of the suit or in the course of execution proceedings. They are passed to assist the parties in the prosecution of their case, or for the purpose of protecting the subject matter of the suit or for ensuring the determination of the merits of the case. They only settle intervening matters relating to the cause. Such orders are made to secure some end and purpose necessary and essential to the progress of the case and generally collateral to the issues to be settled by the court in the final judgment. They, however, do not determine the substantive rights of the parties in respect to subject matter of the suit. These orders are also of different natures, such as:

- **Interim Sale:** Interim sale of any movable property may be ordered, if it is subject to natural decay, such as vegetable, etc.
- Detention, Preservation, Inspection, etc. of subject matter of the suit.

Rules 6 to 10 of Order 39 provide for making certain interlocutory orders. The court has power to order sale of any movable property, which is the subject-matter of the suit or attached before judgment in such suit, which is subject to speedy and natural decay or for any just and sufficient cause desirable to be sold at once." It can also order for detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein. And for that purpose it can authorise any person to enter upon or into any land or building in the possession of any other party to such suit or authorise any samples to be taken or observation to be made or experiment to be tried for the purpose of obtaining full information." However, before making such orders the court shall give notice to the opposite party except where it appears that the object of making such orders would be defeated by the delay. Where the suit land is liable to payment of revenue to government or a tenure liable to sale and the party in possession of such land or tenure neglects to pay revenue or rent, any other party to the suit claiming an interest in such land or tenure may, on payment of the revenue or rent due, be put in immediate possession of the property. The court may award in the decree the amount so paid with interest thereon against the defaulter. Where the subject-matter of a suit is money or some other thing capable of delivery and a party to a suit admits that he holds such money or thing as a trustee for another party or that it belongs or is due to that party, the court may order it to be deposited in court or delivered to that party with or without security.

Order 39 Rules 6-10

Rule 6.

Power to Order interim sale: The court may, on the application of any party to a suit, Order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Explanation:

Order 39, Rule 6, C. P. C., enables the Court, on an application of any party to a suit, to appoint a person to sell moveable properties which is subject to decay and which is the subject-matter of the suit.

The provision of CPC for sale by way of interlocutory order of any property which is the subject matter of the suit or attached before judgment, is permissible only when they are subject of speedy and natural decay and otherwise, when for any just and sufficient cause the court, the

court finds it desirable to send them at once. The power given to the court under Order 39, Rule 6 alone is available before adjudication and decree which may be executed in accordance with the provisions of Order 21. The inherent power of the Court under Section 151 is not available at all.

Rule 7.

Detention, preservation, inspection, etc., of subject matter of suit:

1. The court may, on the application of any party to a suit and on such terms as it thinks fit
 - a. make an Order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein;
 - b. for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and
 - c. for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
2. The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule.

Explanation:

Order 39, Rule 7 inter alia provides that the Court on the application of any party to a suit has the power to authorise any person to enter upon any property which is the subject-matter of the suit and in the possession of the other party and pass such feasible orders as are necessary for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein.

The court cannot appoint a commissioner under this rule, to enter on the lands of a stranger to the suit and prepare an inventory of property which is not the subject matter of the suit. Account books and documents which are not the subject matter of the suit and are purely evidentiary in character are not 'property which is subject matter of the suit', and no order for their search can be made under this rule.

Provision for inspection in R. 7 has been enacted mostly for the purpose of keeping on record the existing condition of the property so that if the same is subjected later on to any change, deterioration or mischief by any of the parties or by any other agency or reason, that can be known by the Court if and when required.

Order 39, R. 7 of the CPC empowers the Court to make an order for detention, preservation and inspection of any property which is the subject matter of the suit or as to which any question may arise in the suit. The plea that power under R 7 can be exercised only in respect of the subject matter of the suit is not correct. Thus, where in a suit for injunction, prima facie finding of possession was recorded in favour of the plaintiff, he shall be deemed to be in possession of

all movables in the suit property. The defendant cannot plead that his belongings are lying in the suit property and seek order of the Court for preservation of those belongings. In the **Institution of Engineers (India) v. Bishnu Pada Bag**, a division bench held that a commission cannot be appointed for the purpose of collecting evidence in a suit and O 39, r 7 cannot be taken recourse to for such purpose.

Ascertaining the conditions of the demised premises by local inspection falls within the purview of O. 39, R. 7 and not under O. 26, R. 9. However, a fixation of rent and ascertainment of the quantum of goods which have become damaged fall outside the purview of O. 39, R. 7 as well as, O. 26, R. 9.

Rule 8.

Application for such orders to be after notice:

1. An application by the plaintiff for an order under rule 6 or rule 7 may be made at any time after institution of the suit.
2. An application by the defendant for a like order may be made at any time after appearance.
3. Before making an order under rule 6 or rule 7 on an application made for the purpose, the court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party.

Explanation:

Any order that a Court can pass under Order 39, Rule 7 is generally governed by Order 39, Rule 8, which appears to be a supplement to the earlier rule. However, before making such orders the court shall give notice to the opposite party except where it appears that the object of making such orders would be defeated by the delay.

Order 39, Rule 7 enables a litigant to apply for the appointment of a Commissioner or for such other interlocutory orders in case the subject-matter of the suit has to be preserved and inspected and for the due safeguarding of his vested rights. Order 39, Rule 8 on the other hand is supplementary to Order 39, Rule 7 in that it enables the plaintiff or the defendant to the action to ask for the appointment of a Commissioner or for an interlocutory order even after the institution of the suit. But once the suit has been instituted, Order 39, Rule 8 prescribes that such an order has to be made generally after notice.

The permissive form of the power given to Courts in Order 39, Rule 8 (1) and (2), C. P. C. is significant. It is made optional because the Legislature wanted to clothe Courts with jurisdiction, but it expects that it should not be lightly used and abused. There may be compelling circumstances which prompt the Court in a given case to use the power without notice to the other side. This can be done as justice should not only be done but seem to be done and in cases where the right is coupled with a duty.

Rule 9.

When party may be put in immediate possession of land the subject matter of suit: Where land paying revenue to government, or a tenure liable to sale, is the subject matter of a suit, of the party in possession of such land or tenure neglects to pay the government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

Explanation:

Where the suit land is liable to payment of revenue to government and the party in possession of such land neglects to pay revenue, any other party to the suit claiming an interest in such land may, on payment of the revenue, be put in immediate possession of the property. The court may award in the decrees the amount so paid with interest thereon against the defaulter.

Rule 10.

Deposit of money, etc., in court: Where the subject matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other things as a trustee for another party, or that it belongs or is due to another party, the court may Order the same to be deposited in court or delivered to such last named party, with or without security, subject to the further direction of the court.

Explanation:

Where a party to a suit admits that he holds money as a trustee for another party, the court may order him to deposit such amount in court. The provisions of this rule are attracted when the subject matter of the suit is money or something capable of delivery. The requirement is that it should be admitted by a party that the money or the thing which is the subject matter of the suit is held by it as a trustee for another party or it belongs to or is due to another party. Unless these two conditions are satisfied, no order in terms of O. 39, R. 10 can be passed.

Revision of Interlocutory orders

The 1999 amendment to the CPC added a proviso to Section 115 which reads:

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

In **Tek Singh vs. Shashi Verma**, the interlocutory application filed under Order 39 Rule 1 CPC was dismissed by Trial Court holding that the relief asked for could not be granted as it would amount to decreeing the Suit itself. The Appellate Court dismissed the appeal and in the revision petition filed under Section 115 CPC, the High Court set aside the concurrent findings of fact and allowed it. The Supreme court set aside the ruling of the appellate court observing that “every legal canon has been thrown to the winds by the impugned judgment” and restored the judgment of the Courts below.

Therefore the position of law is well settled and hence, revision petitions can lie against an interlocutory order with the sole purpose to correct jurisdictional errors only. Therefore an order granting or refusing to grant amendment of pleadings is not revisable under Section 115 of the Code of Civil Procedure, particularly after its amendment in the year 2002.

Appeals against interlocutory orders

Generally speaking, no appeal lies against an interlocutory order, but certain interlocutory orders can still be challenged in appeal against decree on the ground that such orders are of such character as would alter the decision of the court on merits and hence, can be challenged.

Section 105 reads as:-

“Save as otherwise expressly provided no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.”

While the first part of the sub-section states that no appeal would lie against any order unless they fall into any of the provisions contained in Section 104 and Order 43, R. 1 the second part states that objections can be raised against the interlocutory order in the memorandum of appeal filed against the decree in the suit in which the interlocutory order was made, if the error, defect or irregularity in making the same affects the decision of the case on the merits.

The error, defect or irregularity within the meaning of Section 105, therefore, must mean an error, defect or irregularity in procedure in law and not in a matter of fact.

5. Receiver

In civil litigation, a receiver plays an important role in assisting the court. The Receiver is considered to be an officer of the court who helps the court to protect and preserve the subject matter of suit till the time the court decides the matter. Sometimes, the court thinks, it is in the

best interest of both the parties to appoint a receiver who will be responsible for the management of the subject matter. The subject matter is generally a movable or immovable property.

The Receiver is liable to take care of the property just as a prudent man will take care of his own personal property. He should follow the directions of the court or else his property can be attached by the court to recover the amount which is due to him.

Receiver Under the Civil Procedure Code

Under order 40 of CPC, The Receiver is an independent and impartial person who is appointed by the court to administer/manage, that is, to protect and preserve a disputed property involved in a suit.

For example, in a dispute between A and B for an immovable property, if the court thinks that it is in the best interest of both the parties that possession should be taken from B and given to an independent person, the court may appoint a receiver who can manage the property till the time the suit is being decided. Such a receiver appointed by the court would be responsible for the maintenance of the property. He can collect the income accruing like rent or any other profits and utilize it to maintain the property. After deducting the expenses incurred in maintenance from the income received from the property, the receiver will have to submit the remaining income, if any, in the court.

He is not representative of either of the parties in the action, is uniformly regarded as an officer of the court working in the interest of neither plaintiff nor defendant but for the common benefit of all the parties.

Purpose of the Appointment of a Receiver

When a party in possession of the disputed property exhausts the property or causes irreparable damages to it, the whole object of the suit gets defeated because the subject matter ceases to exist or its value gets affected. Therefore, when the court is of the opinion that the property in dispute must not go to either of the parties, *pendente lite*, the court appoints a receiver who is entrusted with the protection and preservation of such property. It is a form of interim protection which the court provides to the parties who makes the application till the time the court adjudicates the matter.

Role of Receiver

The Receiver is regarded as an *officer of the court* and is the extended arm and hand of the court. He is entrusted with the responsibility to receive disputed property or money given by the court and manage such property or money till the time a decree is passed or the parties have compromised or any other period as the court deems fit. The property or fund entrusted to the receiver is considered to be *custodia legis* i.e. in the custody of the law. The Receiver has no power other than those entrusted to him by the court while appointing him.

Who can appoint a receiver?

According to the civil procedure code, the court before which the proceedings are pending can appoint a receiver if it appears just and convenient to the court to appoint such receiver [section 51(d)]. It is within the discretionary power of the court to appoint the receiver. For example, in a suit, the trial court can appoint a receiver. Whereas, in appeal, the appellate court can appoint a receiver.

However, the discretion is not absolute, arbitrary or unregulated. The expression “just and convenient” does not mean the appointment is based on the whims and wishes of the judge on any grounds which stand against equity.

How does the court decide whether to appoint a receiver or not?

Court has to keep the following principles in mind before appointing a receiver:

1. Appointment of a receiver is a discretionary power.
2. It is a protective relief to the plaintiff. The object is to protect and preserve the disputed property till the time the suit is pending in the court.
3. A receiver should not be appointed unless the plaintiff shows prima facie that he has a strong case against the defendant and it is more than likely that he will succeed in the suit.
4. Appointment of a receiver is one of the hardest remedies as it deprives the defendant of his right to possession before the final decree. Therefore, the
5. court should not resort to it merely on the ground that it will do no harm. There should be strong apprehension that there is a danger to the property or the plaintiff will be in worse of a situation if the appointment of a receiver is delayed.
6. The court should appoint a receiver only when there is a possibility of wrong or injury. Also, if it is shown that the subject matter is not in the possession of any of the parties and it is in the common interest of both the parties to appoint a receiver for the protection and preservation of the property.
7. The court should look at the conduct of the party who makes the application for appointment of a receiver. The party should come to the court with clean hands and their conduct should be such that they are not disentitled to this equitable relief.

The above principles were introduced by the Madras Court in the case of **T. Krishnaswamy Chetty vs C. Thangavelu Chetty And Ors.**, [AIR 1955 Mad 430]. These principles are now well established in the Indian jurisprudence.

Who can apply for the appointment of the receiver?

Generally, a plaintiff files the application for appointment of a receiver but defendants can also file such application. A third party is not allowed to file the application but if he is interested

in the protection and preservation of the property, he can also make an application after taking permission from the court.

Who can be appointed as a receiver?

A person who is independent, impartial and totally disinterested should be appointed as a receiver. Such a person should not have any stake in the disputed property. Generally, parties to the suit are not appointed as receiver by the court. But in extraordinary circumstances, a party to suit can be appointed as receiver.

When can a receiver be appointed?

The court can appoint receiver whenever the court is of the opinion that either party should not hold the property in dispute. The court can appoint a receiver before or after a decree and can remove any person from the possession or custody of the property and commit the same property in the custody or management of the receiver.

Under the code itself, the receiver can be appointed to prevent the ends of justice being defeated. [section 94(d)]. Similarly, for the execution of a decree, the court has the power to appoint a receiver. [section 51(d)].

There are provisions in special acts which provides for the appointment of a receiver by the court. For example, section 84 of the Companies Act, 2013 provides for the appointment of a receiver. Similarly, section 69A of the Transfer of Property Act, 1882 also provides for the appointment.

Process of Appointment of a Receiver

The process of appointment of a receiver is provided by the courts in their respective court rules. The high court has the power to make rules for the superintendence and control of the subordinate courts.

For instance, in chapter XIX of the Delhi High Court (Original Side) rules, 1967, the following process is provided:

1. Application for appointment shall be made in writing and shall be supported by affidavit.
2. Receiver other than the official receiver has to give security.
3. The security is to be given to the satisfaction of the registrar.
4. He has to provide personal bonds with the number of surety required by the registrar. The personal bond will be double the amount of annual rental value of the property or the total value of the property which the receiver is going to administer.
5. Within a week of appointment, the receiver will have to submit a report providing the details regarding the property such as inventory of property or books of account etc.

6. The registrar will give directions on where to invest the money received by the receiver from the property. Generally, such money is submitted in scheduled banks or government bonds.

Powers of the Receiver

Under order 40 rule 1(d) powers of the receiver are provided as following:

1. Collection of rents and profits arising out of the property.
2. Application and disposal of such rents and profits.
3. Execution of documents as the owner himself.
4. To institute and defend the suit.
5. Such powers as the court may deem fit.

Also, there are indirect powers which a receiver enjoys being the hand of the court. For example, If a person obstructs or interferes with the receiver's right to possession, it will amount to obstruction in a court proceeding and such a person can be made liable for contempt of court. Similarly, property in the hands of the receiver cannot be attached without the leave of the court.

The court has the discretionary power to not confer all the rights on the receiver. Even if the court has given all the powers to him, he should take the advice of the court in all important decisions related to the property to protect himself.

Without the permission of the court, the receiver cannot:

- Grant lease on the property.
- Bring suits except for suit for rent. A suit will be dismissed if not permitted by the court.

Duties of the Receiver

Under order 40 rule (3), duties of a receiver are provided as follows:

1. Furnish security to account for what he will receive from the property as income.
2. Submit accounts (half yearly) for such period or form as directed by the court. The account basically includes the income received and expenses incurred for the protection and preservation of the property.
3. Pay the amount due to the court.
4. Take responsibility for any reduction in the value of the property because of the receiver's wilful negligence.
5. Discharge the duties personally and should not delegate or assign any of the rights entrusted to him by the court.

The receiver has to fulfil all the duties and responsibilities entrusted to him by the court. Otherwise, the court can take action against him and make him personally liable for any loss which might occur due to his negligence or wilful failure to protect and preserve the property.

Liabilities of the Receiver

According to Order 40 rule (4), When a receiver fails:

1. To submit the reports as specified by the court or,
2. To pay the amount due from him as directed by the court or,
3. Causes loss to the property due to gross negligence.
4. Any other duty which court directed him to do,

The court may order the attachment of property of the receiver to recover the loss caused due to his wilful default or negligence.

The court, after recovering all the losses from the proceeds received after selling receiver's property, will pay the balance (if any) to the receiver.

The receiver is bound in keeping down the expenses and taking care of the property in his possession as a prudent man would observe in connection with his own property under similar circumstances.

Will a receiver be entitled to remuneration?

Receivers are entitled to remuneration as fixed by the court for the services rendered by them. Also, a receiver has to be provided for the loss or expenses incurred by him for maintaining the property.

Under order 40 rule (2), the court can fix the remuneration to be paid to the receiver for the services provided by him. The court can pass a general or specific order regarding the same.

For example, The Delhi high court has provided in Delhi High Court (original side) rules, 1967, the for remuneration of the receiver as follows:

Rents recovered, outstanding recovered, the value realised on the sale of movable and immovable properties calculated on anyone estate:

- a) On First Rs. 10,000 : 5 %
- b) Above Rs. 10,000 up to Rs. 20,000 : 3 %
- c) Above Rs. 20,000 up to Rs. 50,000 : 2 %
- d) Above Rs. 50,000 up to Rs. 1,00,000 : 1 %
- e) Above Rs. 1,00,000 : ½ %

Similarly, for taking custody of money, 1 %, for taking custody of Government securities of stocks, shares, 1 % of the estimated value. If no remuneration is specified for any work, such remuneration can be granted, as the court may think reasonable, on the application of the receiver.

Collector be appointed as a Receiver

According to (Order 40 rule 5), a collector can be appointed as a receiver if the revenue generated from the property is received by the government, the court can appoint a collector as a receiver with his consent if the court thinks that management of such property by collector will promote the interests of those who are concerned.

End Note:

The receiver plays an important role whenever the court requires the receiver to manage the subject matter in a suit to protect and preserve it till the time, the court decrees the suit.

The receiver is an officer of the courts and the subject matter managed by him is considered to be in custody of the law. The court appoints a receiver when the court is of the opinion that neither of the party should manage the property till the time the matter is decided. Any person can become a receiver provided they fulfil the requirements set by the court.

A receiver should be of impartial, independent and indifferent character who has no stake in the subject matter and can manage the property just as a prudent man will do with his own property. Court have vested certain powers and responsibilities on the receiver which he should use to manage the property in the best way possible.

The receiver should be careful while making an important decision related to the subject matter as he is personally liable for any damage to it. He can seek the permission of the court before making such decisions to be safe.

6. Security for Costs

Order 12

Rule 1.

When security for costs may be required from plaintiff:

1. At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant:

Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiff are, residing out of India and that such plaintiff does not possess or that no one of such

plaintiffs possesses any sufficient immovable property with India other than the property in suit.

2. Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1).

Explanation:

At any stage of a suit, the court may either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred, and likely to be incurred by any defendant: provided that such an order shall be made in all cases in which it appears to the court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit. [Order XXV, Rule (1)].

Whoever leaves **India** under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1). [Order XXV, Rule 1 (2)].

Rule 2.

Effect of failure to furnish security:

1. In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.
2. Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.
3. The dismissal shall not be set aside unless notice of such application has been served on the defendant.

Explanation:

Where the security for the payment of costs, when ordered, is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw there from.

Where a suit is dismissed for failure to furnish security for costs, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. But the dismissal shall not be set aside unless notice of such application has been served on the defendant. (Order XXV, Rule 2).

7. Execution of Decree

Execution is the last stage of any civil litigation. There are three stages in litigation:

1. Institution of litigation.
2. Adjudication of litigation.
3. Implementation of litigation.

Implementation of litigation is also known as execution. A decree will come into existence where the civil litigation has been instituted with the presentment of the plaint. The decree means operation or conclusiveness of judgment. Implementation of a decree will be done only when parties have filed an application in that regard. A decree or order will be executed by the court as facilitative and not an obligation. If a party is not approaching the court, then the court has no obligation to implement it *suo motu*. A decree will be executed by the court which has passed the judgment. In exceptional circumstances, the judgment will be implemented by another court which is having competency in that regard.

Execution is the medium by which a decree-holder compels the judgment-debtor to carry out the mandate of the decree or order as the case may be. It enables the decree-holder to recover the fruits of the judgment. The execution is complete when the judgment-creditor or decree-holder gets money or other thing awarded to him by judgment, decree or order.

Meaning

The term “execution” has not been defined in the code. The expression “execution” means enforcement or implementation or giving an effect to the order or judgment passed by the court of justice. Simply “execution” means the process for enforcing or giving effect to the judgment of the court. Execution is the enforcement of decrees and orders by the process of the court, so as to enable the decree-holder to realize 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.

Illustration: A files a suit against B for Rs 10,000 and obtains a decree against him. Here A is the decree-holder. B is the judgment-debtor, and the amount of Rs 10,000 is the judgment-debt or the decretal amount. Since the decree is passed against B, he is bound to pay Rs 10,000 to A. Suppose in spite of the decree, B refuses to pay the decretal amount to A, and A can recover the said amount from B by executing the decree through judicial process. The principle governing the execution of decree and orders are dealt with in **Sections 36 to 74** (substantive law) and **Order 21** of the code (procedural law).

Supreme Court in **Ghanshyam Das v. Anant Kumar Sinha** dealing with provision of the code relating to execution of decree and orders, stated, “so far as the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all aspects. The numerous rules of Order 21 of the code take care of different situations providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors, as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party inadequate measures and appropriate time, the answer is a regular suit in the civil court.

Principles with regard to Execution of Decree & Order

- Provision of CPC relating to execution of decree and order shall be made applicable to both Appeal and Sue.
- A decree may be executed by the court which passed the judgment and decree or by some other court which is having competency to implement the judgment passed by such other court.
- The court which passed the decree may send it for execution to other court either on application of the applicant (decree-holder) or by the court itself.
- A court may order for execution of decree on the application of decree holder (a) by delivery of any property which was in possession of judgment-debtor and decree has been specifically passed concerning such property (b) by attachment and sale of the property of the judgement-debtor (c) by arrest and detention (civil imprisonment) (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court.
- Upon the application of decree-holder, the court may issue “percept” to any other court which is competent in that regard.
- All questions arising between the parties to the suit in the decree shall be determined by the court while executing the decree and not by a separate suit.
- Where a decree is passed against a party as the “legal representative” of a deceased person and decree is for payment of money out of the property of deceased person, it may be executed by attachment and sale of any such property.
- A judgment-debtor may be arrested at any time and on any date shall be required to be brought before the court which has passed the decree and his detention may be in civil prison of the district where decree shall have to be executed.
- Where immovable property has been sold by the court in execution of a decree such sell shall be absolute. The property shall be deemed to be invested in the favour of purchaser, and the purchaser shall be deemed as a party to litigation.

- The court to which decree is sent for execution shall require certifying to the court which has passed decree stating the manner in which decree has been implementing concerning the fact of such execution.

Procedure in Execution

Section 51 to 54 talks about the procedure in execution or mode for execution.

Section 51: this section gives the power to the court to enforce the decree in general. This section defines the jurisdiction and power of the court to enforce execution. Application for execution of the decree under this section may be either oral (**Order 21 Rule 10**) or written (**Order 21, Rule 11**). Party has to choose the mode of implementation of the decree. The court may execute decree as per the choice prayed by the decree-holder or as the court may think fit.

Mode of executing decree under section 51:

- By delivery of any property specifically decreed. Property may be movable or immovable
- By attachment and sale of the property or by sale without attachment of the property. Under clause (B) of **Section 51**, it is within the power of the court to attach the property if it is situated within its jurisdiction.
- Court can execute decree by mode of arrest and detention. no execution of decree by arrest or detention of judgment-debtor unless reasonable opportunity is given in the form of show cause notice as for why he should not be imprisoned.
- It can be executed by appointing a receiver. Within the purview of this section, it is permissible to appoint decree-holder himself as the receiver of the judgment-debtors land.
- Clause (e) is the residuary clause and comes into play only when the decree cannot be executed in any of the modes prescribed under clause (a) to (d).

Section 52: Enforcement of decree against Legal representative

Section 52 deals with a case where the decree is passed against the legal representative of the judgment-debtor.

Section 52 (1) empowers a creditor to execute his decree against the property of deceased in the hands of legal representative so long as it remains in his hand. For application of this clause, the decree should have passed against the party as the legal representative of the deceased person, and it should be for the payment of money out of the property of the deceased.

Section 52 (2) empowers a creditor to execute his decree against the legal representative personally if he fails to accounts for the properties received by him from deceased person.

Exception to section 52: Court can implement the decree against the personal property of the legal representative provided if he is avoiding, neglecting or evading to make the payment from the property of deceased. Where he has mis-utilized the property of the deceased and where the legal representative has alienated the property of the deceased person.

Section 53: Liability of ancestral property

No legal representative should be held personally accountable where the suit has been filed against a joint Hindu family unless he has received some property of a joint Hindu family.

Under pious obligation, if has received the property of joint Hindu family then will be held liable. Where the decree has been passed against Karta, no execution be made against the son under pious obligation if the decree is passed after partition. Event after partition a son can be held liable if the suit was pending before partition.

The son will be held accountable if after the death of Karta the decree has been executed and son has distributed the property of Karta among themselves. The member of the joint Hindu family will be held liable if Karta has taken debt for moral purpose or family purpose.

The nature of suits determines how decree should be implemented.

Illustration: a promissory note has been executed by the father for the purpose of borrowing money. After the death of the father, the creditor instituted proceeding against son.

Where suit is filed basing on promissory note first it will be seen that whether suit is maintainable or not- if it is filed within three years then the suit will be maintainable. General rule is that son will be held liable if they have received ancestral property.

Where the son is not having knowledge about the execution of the promissory note, in such case will not be held liable even though has received the ancestral property.

Section 54: Partition of estate or separation of share

Section 54 comes into play when a decree has been passed for partition, or for the separate possession of a share of an undivided state paying revenue to the government, that is the partition of the state or share will be made by the collector. However if the collector refuses to make the partition of the revenue paying property, the civil court can do so. To attract the provision of this section it is not necessary that the plaintiff should ask for the division of government revenue.

Section 54 deals with a case where though the civil court has the power to pass a decree yet it is not competent to execute the same. Under this section, the execution of decree shall be made by collector.

Process for Execution

Order 21 rule 24 and 25 talks about the process for execution.

Order 21

Rule 24.

Process for execution

The court has inherent power to defer the issue of process as envisaged under **Rule 24** and can give time to judgment-debtor in appropriate cases.

Rule 24 prescribes the procedure in case of execution of decree. In these matters, the [xi] court exercises judicial discretion, which cannot be interfered with by the district judge by issuing administrative order.

According to **24(3)**, execution must be completed by the date specified on the process for the purpose- Warrants for delivery of possession, therefore, ceased to be executable after the expiry of the date appearing on the warrant.

After the process of execution is issued, **Rule 17 of Order 21** cannot be invoked for amendment of execution application. If the amendment seeks to change the nature of execution, the power under **Section 151** and **153**, also cannot be invoked.

Execution proceeding on the death of the decree-holder:-

Possession certificate under **Section 214 of Indian Succession Act 1925**, will not be necessary for the continuation of proceeding by his legal Heirs, even if legal Heirs are not brought on record, the execution proceeding will not abate.

Delivery of possession to the decree-holder without notice to Judgment-debtor is not proper:

Application by judgment-debtor for re-delivery of the possession on the ground that he had no notice of the execution proceedings, dismissed by the trial court, however, allowed by the High Court in revision, held, re-delivery of possession to the judgment-debtor was not proper, however, compensation of Rs, 2,000 was awarded to the judgment-debtor.

Execution of decree

Notice under **Order 21 Rule 21** is necessary only when the decree holder files an execution of decree for the first time against the legal representative of the deceased.

Rule 25.

Endorsement on the process

The officer who entrusted with the execution of the process shall endorse upon the same date and the manner in which it was executed and also endorsed upon in the reason of delay and in case the process was not executed, will also state reasons thereof. However, a person cannot be re-arrested on the ground of absence of endorsement.

Mode of Execution

The code lays down various mode of execution. After the decree-holder files an application for execution of decree, the executing court can enforce execution.

A decree may be enforced by delivery of any property specified in the decree, by attachment and sale or by sale without attachment of the property, or by arrest and detention, or by appointing a receiver, or by effecting partition, or any such manner which the nature of relief requires.

Arrest and Detention

One of the modes of executing a decree is arrest and detention of the judgment-debtor in civil imprisonment. Where the decree is for payment of money, it can be executed by arrest and detention of the judgment-debtor.

A judgment-debtor may be arrested at any time on any day in the execution of a decree. After this arrest, he must be brought before the court as soon as practicable. For the purpose of making arrest, no dwelling house may be entered after sunset or before sunrise. Further, no outer door of a dwelling house may be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or prevents access thereto.

No order of detention of the judgment-debtor shall be made where the decretal amount does not exceed Rs.2000. Where the judgment-debtor pays the decretal amount and costs of arrest to the officer, he should be released once. Women, judicial officers, the parties, their pleaders, member of legislative bodies, a judgment-debtor where the decretal amount does not exceed Rs 2,000, this person cannot be arrested and detained in civil imprisonment.

A decree for money cannot be executed by arrest and detention where the judgment-debtor is a woman, or a minor, or a legal representative of a deceased judgment-debtor.

Attachment of Property

A decree may also be executed on the application of the decree-holder by attachment and sale the only sale without attachment of property. The code recognizes the right of the decree-holder to attach the property of the judgment debtor in execution proceeding and lays down the procedure to effect attachment. **Sections 60 to 64 and Rules 41 to 57 of Order 21** deals with the subject of attachment of property. The code enumerates properties which are liable to be attached and sold in execution of a decree. It also specifies properties which are not liable to be attached or sold. It also prescribes the procedure where the same property is attached in execution of decrees by more than one court. The code also declares that a private alienation of property after attachment is void.

Section 60(1) declares what properties are liable to attachment and sale in execution of a decree, and what properties are exempt therefrom. All saleable property (movable or immovable) belonging to the judgment-debtor or over which or the portion of which he has a disposing power which he may exercise for his own benefit may be attached and sold in execution of a decree against him.

Section 61 deals where the judgment-debtor is an agriculturalist. It states that judgment-debtor is an agriculturalist. Any agriculturalist produce is subject matter of agriculturalist. The quantum of attachment of agricultural product depends upon the quantum of decretal amount.

Section 63 where two different courts have attached the same property through different decree, then it will be looked, that which court is superior. The value of the property will determine whether further attachment can be done or not.

Percept

Section 46— “precept” means a command, an order, a writ or a warrant. A percept is an order or direction given by court which passed the decree to a court which would be competent to execute the decree to attach any property belonging to the judgment-debtor.

Section 46 provides that court which passed a decree may, upon an application by the decree-holder, issue a percept to that court within whose jurisdiction the property of the judgment-debtor is lying to attach any property specified in the percept.

A percept seeks to prevent alienation of property of the judgment-debtor not located within the jurisdiction of the court which passed the decree so that interest of the decree-holder is safeguarded and protected.

It is the interim attachment of the property which lies outside the jurisdiction of the court which has passed the order. To protect the interest of the decree holder on his application will issue percept to the court in whose jurisdiction property is situated to attach the property of the judgment-debtor. The interim order for attachment is valid for the period of only 2 months.

Garnishee Order

It is the proceeding by which the decree-holder seeks to reach money or property of the judgment-debtor in the hands of a third party (debtor of judgment-debtor).

Suppose A owes Rs 1000 to B and B owes Rs 1000 to c. By a garnishee order, the court may require A not to pay money owed by him to B, but instead to pay C, since B owes the said amount to C, who has obtained the order.

“Garnishee order” is an order passed by a court ordering a garnishee not to pay money to the judgment-debtor because the latter is indebted to the garnisher.

Sale of the Property

A decree may be executed by attachment and sale or sale without attachment of any property. **Section 65 to 73** and **Rules 64 to 94** of **Order 21** deals with the subject relating to the sale of movable and immovable property.

- Power of court: **Rule 64-65**

Rule 64: a court may sell the property, which he has taken into custody under an attachment under Order 60.

Rule 65: appointment of officer by the court who will be charged to sell the property. Officer will be the representative of the court and will sell the property for execution of decree.

- Proclamation of sale: **Rule 66-67**

It is a kind of order or declaration. It operates as a public notice regarding the sale. It's said that people can participate in auction and sale. The proclamation can be in writing or by customary mode.

Contents of the proclamation:

1. Time and place of sale
2. Property to be sold
3. Revenue, if any, assessed upon the property;
4. Encumbrance, if any, to which property is liable;
5. Amount to be recovered;
6. Details relating to property, such as title deed, length etc.

- **Time of sale: Rule 68**

No sale without the consent in writing of the judgment-debtor can take place before fifteen days in case of immovable property and before 7 days in case of movable property from the date of proclamation in the courthouse. A sell can be conducted immediately if the property is of perishable nature.

- **Adjournment of sale: Rule 69**

If the judgment-debtor after the issue of proclamation and before sell has paid the amount or has partly promised to pay on the given date before completion of public order, if there is any justified reason, in those circumstances, court has discretionary power to postpone the sell. If it has been postponed for a period of 30 days, the fresh proclamation has to be issued and again the process of **Rule 67, 68** and **69** will follow.

Sell cannot be postponed where judgment-debtor dies before the date of sell or after the issue of proclamation, or on the date of the auction.

- **Restriction to bid: Rule 72-73**

A decree-holder cannot, without the express permission of the court, purchase the property sold in execution of his own decree.

A mortgagee of immovable property cannot, without the leave of the court, purchase the property sold in execution of the decree on the mortgage.

Any officer or other person having any duty to perform in connection with the execution sale cannot either directly or indirectly, acquire or any attempt to acquire any interest in the property sold in execution.

- **Sale of movable property: Rule 78-78**

It relates to the sale of agricultural produce and growing crops. **Rule 76** covers negotiable instruments and shares. Sale of movable property should be held by public auction. A sale of the movable property will not be said aside on the ground of irregularity in publishing or conducting the sale (**Rule 78**).

- **Sale of immovable property: Rule 82-94**

Rule 83 enables the executing court to postpone sale to enable the judgment-debtor to raise decretal dues by private alienation.

- Payment of purchase money by auction-purchaser: **Rule 84-85**.

Rule 86 talks about cases of default by auction-purchaser in making requisite payment and resale of the property. **Rule 89-91** and **93** deals with setting aside sale and effect thereof. **Rules 92-94** provide confirmation of sale and issuance of sale- certificate. **Section 65** declares the effect of sale.

End Note:

Execution is the enforcement of decrees and orders by the process of court, so as to enable the decree-holder to realize 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.

Order 21 of the code contain elaborate and exhaustive provision for execution of decrees and order, take care of the different type of situation and provide effective remedies not only to the decree-holder and judgment-debtors but also to the objectors and third parties.

A decree can be executed by various modes which include delivery of possession, arrest, and detention of the judgment-debtor, attachment of the property, by sale, by appointment of receiver, partition, cross-decrees, and cross-claims, payment of money etc.

On exceptional situation, where provisions are rendered ineffective or incapable of giving relief to an aggrieved party, he can file suit in civil court.

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