

respect to the institutional and regulatory mechanism.<sup>70</sup> Section 236 of the Act enables the purchase of minority shareholding by a registered holder having 90% or more issued share capital in a company, either individually or along with a person acting in concert, by way of an amalgamation, share exchange, conversion of securities or other reason.<sup>71</sup>

The scope of Section 236 of the Act was recently addressed by the NCLAT in the case of *Mr. S. Gopakumar Nair and another v. OBO Betterman India Private Limited and another*.<sup>72</sup>

As a positive measure towards the same, the Ministry of Corporate Affairs in the month of February, 2020, added sub-sections (11) and (12) to Section 230 of the Act and also further enacted the National Company Law (Amendment) Rules, 2020 and the Companies (Compromises, Amalgamations and Arrangements) Amendment Rules, 2020<sup>73</sup>.

### Conclusion

Though a democracy is the will of the majority it does not in any way provide for the oppression of the minority. A perfect democracy, even in business, is one where

the will of the majority is consistent to the minority interests and where the minority is given proper redressal of their grievances and protection of their rights. The Courts following the rule of *Foss v. Harbottle* (supra), does not usually intervene in the affairs of the company. This is because if Courts were to interfere or entertain all cases brought forth by minority shareholders alleging illegality or irregularity by majority shareholders, then most often this will cause oppression of majority. In comparison to the Act of 1956, the present law is a positive change in ensuring shareholder democracy. The provisions of the 2013 Act show that minority interests have been addressed in a more comprehensive manner.<sup>74</sup>

Corporate law has now evolved from its bygone era of simple transactions to more complex problems that require the frequent intervention of law either by way of statutes or by of judicial involvement. While the concepts of shareholder democracy are still much debated and deliberated upon, it can be understood that achieving the perfect democratic balance between majority and minority is probably more distant than we imagine.

## THE SCOPE OF WORDS 'NOT BY SEPARATE SUIT' IN SECTION 47, ORDER 21 RULES 58 AND 101 OF CPC – JURISDICTION OF EXECUTING COURTS

By

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### Introduction :

Jurisdiction in its classical concept means the power to hear and determine a cause,

to adjudicate and exercise any judicial power in relation to it; in other words by jurisdiction is meant the authority on which a Court has to decide a case that is litigated before

70. Supra note : 82.

71. *Harshil Matalia*, Comparative Analysis of Provisions Enabling Majority Shareholders to Squeeze out Minorities, *Vinod Kothari* and Company, 13.2.2020, <http://vinodkothari.com/2020/02/minority-squeeze-out/>, accessed on 1.9.2020.

72. NCLAT, 9.7.2019, Company Appeal (AT) No.272/2018.

73. *Mini Raman*, *Lex Orbis*, 29.2.2020, <https://www.lexorbis.com/minority-squeeze-outs-under-the-companies-act-2013/>, accessed on 1.9.2020.

74. *Akshat Sulalit*, Companies Act, 2013 : Rise of the Minority Shareholder, *India Law Journal*, <https://www.indialawjournal.org/archives/volume6/issue-2/article5.html>, accessed on 1.9.2020.

it or to take cognizance of a matter presented in a formal way for its decision. Section 9 confers power upon the civil Courts to try suits of civil nature. The civil Courts are *prima facie* entitled to determine all civil matters and legislation that ousts jurisdiction must be very carefully examined, and unless the Courts are satisfied that the conditions upon which they are ousted are fulfilled, they are not debarred from inquiring into any matter before them. Exclusion of civil Court's jurisdiction cannot be readily inferred. Such exclusion must either be explicitly expressed or clearly implied. If a statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by Tribunals specially constituted in that behalf and it further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil Court are prescribed or not. A bar against civil suits provided in special statutes and special provisions has to be scrutinized with reference to its scope after determining what jurisdiction was conferred by the Legislature. When a Court lacks jurisdiction it is '*coram non-judice*' and its judgment and decree is a nullity. It is the Court's duty to see to its own competency. In this paper an attempt is made to clarify the scope of the words 'not by separate suit' and the power of executing Courts while executing decrees and deciding claim petitions.

### ***Jurisdiction of Executing Courts :***

The expression "Court which passed a decree" is defined in Section 37 of Code of Civil Procedure. The power to execute a decree is vested in the Court which passed the decree. It is settled law that the Court which actually passed the decree does not lose its jurisdiction to execute it, by reason of the subject-matter being transferred subsequently to the jurisdiction of another Court. The expression 'jurisdiction to execute

it' means and includes the competency of the Court to entertain an application for execution of the decree. Where a decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance is the Court which passed a decree and the Court of first instance has to execute the same. A decree might have been passed by a first appellate Court or by a High Court in second appeal, or by a revisional Court, or even by the Supreme Court, the proper Court to execute that decree is the Court of first instance. The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction, it would be exercised by the Court which would have power to try the suit at time the application was filed. A Court can be said to have 'ceased to exist' only when it has been abolished and not revived. Change of territorial jurisdiction, abolition of Court, transfer of jurisdiction to another Court and transfer of local area are the instances of change of jurisdiction. The Hon'ble High Court of A.P. dealing with Explanation in Section 37 of the C.P.C. in *Eleti Raji Reddy and others v. Pusukuri Damodar Rao (died) per LRs. and others*, 2014 (2) ALT 45, held that—

"9. A plain reading of the Explanation leaves no room of doubt that the Court which has passed the decree does not cease to have jurisdiction even if the area within its territory has been transferred to another Court. Secondly, the Court then either existing or newly created to which earlier area has been transferred also has jurisdiction as if the same Court has passed the decree."

Section 38 of the Code of Civil Procedure says that "a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution." A Court which is neither the Court that passed the decree nor the Court to which it is sent for execution, cannot

ordinarily execute the decree. Execution is the enforcement of a decree by a judicial process which enables the decree-holder to realize the fruits of the decree and judgment passed by the competent Court in his favour. The Hon'ble Apex Court dealing with provisions of the Code relating to execution of decrees and orders in *Ghanshyam Das v. Anant Kumar Sinha*, AIR 1991 SC 2251, observed as follows :

“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.”

As a general rule, territorial jurisdiction is a condition precedent for the execution of the decree. If the property is situated outside the local limits of jurisdiction, neither the Court which passed the decree nor the Court to which it is sent for execution can execute it. But there are certain exceptions to the general rule. When there are two properties, one of which is situated within the jurisdiction and another outside the jurisdiction, the decree can be executed by the Court which passed a decree. Where after passing of a decree certain area covering the properties is transferred to another Court, the Court passing a decree has jurisdiction alongwith the Court to which the territory is transferred. The salary of a public officer or a servant of railway or local authority can be attached by the executing Court though the disbursing officer is not within the local limits of the jurisdiction of the Court. An executing Court can appoint a receiver and order sale of property situated outside the territorial jurisdiction. The property in the custody of a Court or public officer, who are not within the territorial jurisdiction, can be ordered attachment by the executing Court.

Where immovable property is situated within local limits of more than one Court, any of such Courts can execute the decree by attachment and sale of the entire property.

A Court executing a decree cannot go behind the decree. The Court must take the decree as it finds it. It cannot entertain any objection that, the decree is incorrect in law or on facts. The decree has to be set aside by an appropriate proceedings in appeal, or in revision, a decree even if erroneous, is binding between the parties. It has to see the decree as it is and execute it in accordance with the terms therein. In *Topanmal v. M/s. Kundomal Gangaram*, AIR 1960 SC 388, it was held that—

“An executing Court must take the decree as it stands. An executing Court cannot go behind the decree. It can neither add something in the decree already passed, nor alter the decree. It cannot grant relief which is not contemplated by the decree.”

However, if the Court which passed the decree has no inherent jurisdiction, the decree is incapable of execution. In *Karan Singh v. Chaman Pawan*, (1955) 1 SCR 117, the Hon'ble Supreme Court held that—

“A decree passed by a Court without jurisdiction is a nullity, and its validity can be set up whenever and wherever, it is sought to be enforced or relied upon, including the state of its execution.”

The Executing Court gets jurisdiction only after passing of a decree. The *sine qua non*, for a person seeking execution is that he must be a decree-holder.

### **Questions to be decided by Executing Court :**

Section 47 of the Code deals with questions to be determined by the Court executing decree. All questions arising between the parties to the suit in which the

decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. By the Code of Civil Procedure (Amendment) Act, 1976, substantial changes have been made in Section 47. The sub-section (2) has been omitted and old Explanation has been substituted by renumbering as Explanation-I. Explanation-II has been inserted. Section 47 corresponds to Section 244 of the Code of Civil Procedure, 1882. In the Statement of Objects and Reasons, it was stated that : "Section 47 is being amended for the purpose of setting at rest the conflict of decisions on the point whether a claim for possession by a purchaser in Court auction in pursuance of execution of a decree is or is not a question relating to the execution of a decree. The amendment seeks to make it clear that such a question is a question falling under this section." The underlying object of Section 47 is to provide inexpensive and expeditious remedy for determination of all questions relating to the execution of a decree only in execution proceedings without recourse to a separate suit. Exclusive jurisdiction has been conferred on the executing Court in respect of all matters relating to execution, discharge or satisfaction of a decree arising between the parties or their representatives. Hence, all objections must be raised in execution proceedings and should be determined by the executing Court. Thus, a separate suit would not lie for declaration that the decree was satisfied, or for cancellation of execution sale on the ground of fraud or sale held during the pendency of proceedings was illegal; or that the property sold in execution of decree was not liable to be sold; or that the property was wrongfully attached by the decree-holder; or that the decree passed against the judgment-debtor was erroneous; or for delivery of possession *etc.* *The phrase 'not by a separate suit' refers to a suit of the nature in which the decree has been passed.*

Order 21 Rule 58 deals with adjudication of claims to, or objections to attachment of, property. All questions including questions relating to right, title or interest in the property attached, shall be determined by the Court dealing with the claim or objection and not by a separate suit. It deals with investigation of claims and objections to attachment in execution on the ground that the property is not liable to attachment. In *Gurram Seetharam v. Gunti Yashoda*, 2004 (6) ALD 175 (FB) = AIR 2005 AP 95, the Full Bench of the Hon'ble High Court of A.P., considered the scheme of Rule 58 in the light of other provisions of the Code and stated :

"A perusal of Rule 58 discloses that all questions, including those relating to right, title or interest in the attached property, are required to be decided by the same Court and not by separate suit. Indirectly, an application filed under Rule 58 is conferred the status of a suit. The necessity to file a suit, in relation to such claims, would arise, if only the executing Court refuses to entertain the claims or objections. The grounds for not entertaining the claims or objections are confined to those enumerated under proviso to sub-rule (1) of Rule 58. The nature of disposal to be given to the claims or objections, filed under sub-rule (1), is indicated in sub-rule (3). Under sub-rule (4) the order passed on such claims or objections, is to have the same force and be subject to the same conditions as if it were a decree, for the purpose of preferring the appeal and other related matters. The intention of the Legislature in extending the force of a decree, to an order passed under Rule 58, particularly in the context of appeal, is very clear."

The enquiry is a full-fledged, realistic and complete enquiry adjudicating right, title and interest of the parties after affording opportunity to them to prove their claims

over the property or objections against attachment. Under this rule a person whose property is wrongfully attached in execution of a decree, has right to object such attachment. The cause of action for filing an application arises only when attachment is effected. In the absence of effective attachment, there is no occasion to file an application.

Section 47 of the Code enacts that all questions relating to the execution, discharge or satisfaction of the decree between the parties to the suit or their representatives should be determined by the executing Court and not by a separate suit. Sub-rule (2) of Rule 58 of Order 21 declares that all questions relating to right, title or interest in the property attached between the parties to a proceeding or their representatives should be determined by the executing Court and not by a separate suit. The provisions make it clear that they are similar in certain aspects. But there is essential distinction between the two. Section 47 applies to the parties to the suit or their representatives, whereas Rule 58 of Order 21 applies to the parties to the proceeding *i.e.*, other than the parties to the suit or their representatives. Section 47 not only bars a suit but bars an appeal in view of change in the definition of decree in Section 2(2), Rule 58 of Order 21 bars as suit, but not an appeal. On the contrary, sub-rule (4) of Rule 58 expressly states that the order passed by the executing Court "shall have the same force and be subject to the same conditions as to appeal as if it were a decree". *Bar of suit under Section 47 is absolute and unqualified, while the bar under Order 21 Rule 58 is conditional and qualified.* It allows filing of suit in cases in which claim preferred or objection raised is not entertained by the executing Court on one of the two grounds referred to in proviso to Rule 58(1). A suit referred to under Rule 58(5) be filed within one year from the date of refusal to entertain claim or objection. Section 5 of the Limitation Act, 1963 has no application to such cases.

Order 21 Rule 101 also deals with the questions to be determined. All questions including questions relating to right, title, or interest in the property arising between the parties to a proceeding or their representatives shall be determined by the Court dealing with application under Rule 97 or Rule 99, and not by a separate suit. Rule 101 of Order 21 is a mandatory provision. The language of the rule is peremptory. The questions referred to in the rule shall be determined by the executing Court and suit is barred. The executing Court is thus enjoined to determine all the questions provided the conditions laid down in Rule 101 are fulfilled.

In *Shreenath and another v. Rajesh and others*, (1998) 4 SCC 543 = AIR 1998 SC 1827, the Hon'ble Supreme Court observed that—

"So, under Order 21 Rule 101 all disputes between the decree holder and any such person is to be adjudicated by the executing Court. A party is not thrown out to relegate itself to the long-drawn-out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule 35 deals with cases of delivery of possession of an immovable property to the decree holder by delivery of actual physical possession and by removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where the tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to decree holder or purchase is resisted by any person. "Any person", as aforesaid is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including a stranger."

In *Silverline Forum (P) Ltd. v. Rajiv Trust and another*, AIR 1998 SC 1754, the Hon'ble Supreme Court on the point of filing of application against a third party, held that—

“9. At the outset, we may observe that it is difficult to agree with the High Court that resistance or obstructions made by a third party to the decree of execution cannot be gone into under Order 21 Rule 97 of the Code. Rules 97 to 106 in Order 21 of the Code are submitted under the caption resistance to delivery of possession to decree holder or purchaser. Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by any person in obtaining possession of the property, such decree holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the Court to proceed to adjudicate upon such complaint in accordance with the procedure laid down.

10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree holder. Rule 101 stipulates that all questions arising between the parties to a proceeding on an application under Rule 97 or Rule 99 shall be determined by the executing Court, if such questions are relevant to the adjudication of the application. A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or objection made by him to the execution of the decree. No doubt, if the resistance was made by a transferee *pendente lite* of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution Court has to hold

that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.”

In *N.S.S. Narayana Sarma and others v. Goldstone Exports (P) Ltd. and others*, AIR 2002 SC 251, referring to earlier cases, the Hon'ble Supreme Court stated :—

“19. From the principles laid down in the decisions noted above, the position is manifest that when any person claiming title to the property in his possession obstructing the attempt by the decree holder to dispossess him from the said property, the executing Court is competent to consider all questions raised by the persons offering obstruction against execution of the decree and pass appropriate order which under the provisions of Order 21 Rule 103 is to be treated as a decree.”

Section 47 and Rule 101 of Order 21 of the Code contemplate different situations and operate in different fields. Under Section 47 all questions relating to execution, discharge or satisfaction of the decree arising between the parties to the suit or their representatives should be determined by an executing Court. Under Rule 101 of Order 21 all questions including questions relating to right, title or interest in property arising between the parties to the proceeding or their representatives must be decided by the executing Court in such proceeding. Section 47 is general provision and deals with execution of all kinds of decrees, whereas Rule 101 is a special provision relating to execution of decrees for possession of immovable properties and applies to cases wherein applications have been submitted under Rule 97 or 99 of Order 21. The questions to be determined under Rules 58 and 101 of Order 21 are similar. The only difference is that Order 21 Rule 58 arises

when there is attachment and Rule 101 arises when applications are made under Rules 97 and 99 opposing the delivery of possession of property by the executing Court. Rule 58 relates to adjudication of claims and objections to attachment of property in execution proceedings, whereas Rule 101 requires the executing Court to decide all questions when an application is filed complaining resistance or obstruction to delivery of possession or complaining dispossession. In the absence of any such application, the executing Court cannot exercise jurisdiction under Rule 101.

In *Nooruddin v. Dr. K.L. Anand*, (1995) 1 SCC 242, the Hon'ble Supreme Court discussing the scheme, held that—

“8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21 Rule 97, the Court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code (Amendment) Act, 1976, right of suit under Order 21 Rule 103 of 1908 Code was available, which has been now taken away. By necessary implication, the Legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution.”

In *Ashban Devi and another v. Phulvasi Devi and others*, AIR 2004 SC 511, the Hon'ble Supreme Court interpreted the provisions of Rules 99 and 97 as follows :—

“27. ... An interpretation of the provision which promotes or fulfills the object of the amended provisions of the Code of curtailing litigation, has to be preferred to the one which frustrates it. The High Court also lost sight of the fact that the property involved was a vacant land and it could have been possessed only by having ownership and control over it. Mere physical absence of the third party at the time of the execution of the decree was not a relevant fact to reject application under Order 21 Rule 99 of the Code. From the trend and ratio of decisions of this Court surveyed above, if the objectors would have been present at or near the vacant land at the time of execution of a decree and had offered obstruction or resistance to the execution, they would have been entitled to seek adjudication of their rights and claims through the executing Court under Order XXI Rule 97. On the same legal position and reasoning, even though the objectors were not in actual and physical possession of the vacant land, but as a result of delivery of possession of the land through *Nazir* to the decree holder, lost their right and control over the land to put to it their use, they will have to be treated to have been ‘dispossessed’ within the meaning of Order XXI Rule 99 of the Code. Such interpretation would fulfill aim and object of the amended provisions of the Code by allowing adjudication of disputes of title between the decree holder and the third party in the executing Court itself without relegating them to an independent litigation.”

So, under Order 21 Rule 101, all disputes between the decree holder and any such person are to be adjudicated by the executing Court. A party is not thrown out to relegate itself to the long-drawn-out arduous

procedure of a fresh suit. This is to salvage the possible hardship both to the decree holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings.

### ***Enforceability of Orders/Decrees :***

*Section 2(2) defines 'decree', as follows :—*

“ ‘Decree’ means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

*Explanation :—*A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

*Order 21 Rule 58(4)*, says that—

“Where a claim or objection has been adjudicated, it shall have the same force and subject to same conditions as to appeal or otherwise as if it were a decree.”

*Order 21 Rule 103*, says that—

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

The Hon'ble Supreme Court dealing with the purview of scrutiny under Section 47 of C.P.C. in *M/s. Brakevel Automotive Components (India) Pvt. Ltd. v. P.R. Selvam Alagappan*, 2017 (3) ALT 21 (SC), held that—

“22. Though this view has echoed time out of number in similar pronouncements of this Court, in *Dhurandhar Prasad Singh v. Jai Prakash University and others*, AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the Court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing Court can allow objection to the executability of the decree if it is found that the same is *void ab initio* and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law promulgated making a decree inexecutable after its passing.”

In *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and others*, 1971 (1) SCR 66, it was held that—

“A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on



the face of the record : where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.”

Section 47 enjoins the executing Court to decide all questions relating to execution, discharge or satisfaction of the decree. ‘All questions arising’ would mean all questions which could properly arise or which could properly have been raised in execution proceedings between the parties to the suit or their representatives. Such questions must relate to or affect the rights of parties to the suit in which a decree is passed. *The section refers to those questions which were not raised in the suit and decided by the Trial Court.* If a question was raised before a Court and decided at the trial, it cannot be raised at the stage of execution. Likewise, if a question is ought to have been raised by a party before the Trial Court and he omits to raise it, he will be precluded from raising it before the executing Court. The questions must relate to enforcement of the obligations created under the decree and must be subsequent to passing of the decree and not antecedent to it. The order passed under Section 47 relate to the questions raised in the execution with regard to execution, discharge or satisfaction of the decree and these questions must have arisen between the parties to the suit or their representatives. In *Addepalli Bhaskar Rao v. Karmanchi Anil Kumar and another*, 2017 (6) ALT 544, the Hon’ble High Court of A.P., dealing with scope of Section 47, held that—

“8. ... A reading of Section 47 of CPC goes to show that all the questions arising between the parties to the suit in which the decree was passed, shall be determined

by the Court executing decree and not by a separate suit. Obviously, the said provision has no application to the facts of the present case on hand, since the 1st respondent is not a party to the suit *i.e.*, OS No.35/2002.”

The provision under Section 47 of CPC applies to the parties to the suit or their representatives and not to others. The Order passed under Section 47 of CPC is only relates to questions of execution, discharge and satisfaction of decree and it is not an executable order as it is passed in the execution proceedings. It is also not an appealable order. In *Gurram Seetharam Reddy v. Gunti Yashoda*, 2004 (6) ALD 175 (FB), the Full Bench of the Hon’ble High Court of A.P., held that—

“Prior to 1976 the definition of decree was wide enough to include in it, the orders passed under Section 47. But with a view to streamline the execution proceedings, the definition of a decree was narrowed down by removing the Order passed under Section 47. Such blanket exclusion was to have resulted in rendering none of orders passed under Section 47 appealable.”

Order 21 Rule 58 deals with the claim petitions, when there is attachment of property. Attachment is ‘*sine qua non*’ for filing a claim petition under Order 21 Rule 58. Attachments are generally made in the execution petitions filed for sale of property. The provisions of Rule 58 of Order 21 also apply to the properties attached before judgment under Order 38. After decree is passed and execution petition is presented, by virtue of Rules 11 and 11-A of Order 38, attachment before judgment gets converted into execution proceedings. It provides that all questions including questions of right, title and interest are to be settled finally in execution proceedings and not by a separate suit. It has been also provided that an order passed by the executing Court in adjudication of claims or objections shall have the same

force and is subject to the same conditions as to appeal or otherwise as if it were a decree. Sub-rule (3) of Rule 58 deals with the orders to be made upon determination of the questions referred to in sub-rule (2). The Court shall, in accordance with such determination, allow the claim or objection and release the property from attachment either wholly or partly. When the claim is allowed or objection is upheld, the property is released from attachment by the same order and the purpose of order gets served and there will be nothing to execute further. When the Court disallows the claim or objection, then also there will be nothing to execute further on that order. When a claim or objection is made by a mortgagee or person having charge or interest, then the Court shall continue the attachment subject to same. The purpose of order will be complete, the moment it is recorded that the attachment is subject to mortgage, charge or interest and there will be nothing to execute further on that order. Lastly, the Court shall pass such order as it deems fit in the circumstances of the case. This is in the nature of residuary power which has to be exercised on the basis of justice, equity and good conscience. The moment an order is passed under clauses (a), (b), (c) and (d) of sub-rule (3) of Rule 58, it serves the purpose of claim or objection. There will be nothing further to execute the said order. The orders are appealable under Section 96 of the Code as per Full Bench judgment in *Gurram Seetharam v. Gunti Yashoda* (supra).

Order 21 Rule 101 says that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding or their representatives under Rule 97 or Rule 99 shall be determined by the executing Court and not by a separate suit. On adjudication of application under Rule 97, what are the orders to be passed is dealt within Rule 98. The Court shall, upon the determination of questions referred to in Rule 101, make an order allowing the application and the

applicant be put into the possession of property or dismiss the application. The purpose of the order is served by putting the applicant in possession, in the same execution petition. There is no further purpose of the order. The Court can also pass such other order as it may deem fit in the circumstances of the case. This is the residuary power which the Court may exercise in the interest of justice. When an order is passed to put the applicant in possession, if the applicant is a third party who is in possession of property, then the purpose of the order is complete. If the applicant is the person who filed execution petition and it was ordered to put him in possession and still it was resisted or obstructed, then the person who resists or obstructs can be detained in the civil prison. This process is taken up in the same execution petition and not separately. Rule 99 deals with cases where a person other than the judgment-debtor is dispossessed by the decree-holder or auction-purchaser. The Court shall, upon determination of the questions referred to in Rule 101, make an order allowing the application and directing that the applicant be put into the possession of the property. When such an order is passed, then the steps to be taken in the same execution petition to put the applicant into possession. A separate execution petition for the said purpose is not necessary. The Court can also pass such other order which it deems fit in the circumstances of the case or it can dismiss the application. The proceedings under Rules 97 to 101 partake the nature of suit and the order passed in such proceedings has the effect of a decree. But the orders/decrees are not separately enforceable except that they are appealable.

### **Conclusion :**

The provision of Rule 104 of Order 21 is a saving provision. Rule 104 saves pending suits. It enacts that every order under Rule 101 or 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. The orders made under Rule 101 or 103 are subject to the result of suit. If such suit is decreed, the plaintiff would be entitled to restoration of possession. From this provision it is clear that the decree passed in a suit will prevail over the order passed in a claim petition, if the suit is already pending. The provisions of Section 47, Order 21 Rule 58 and Rule 101 will come into picture only in execution proceedings. Section 47 bars a separate suit only in respect of questions relating to the execution, discharge or satisfaction of the decree. The question whether a decree is capable or incapable of execution is pre-eminently covered by Section 47. The question that a particular property was wrongly attached or sold in execution, can be decided under this section. The question whether a particular property is or is not covered by the decree falls under this section. The property purchased by decree-holder without permission to bid is covered by Section 47. The question whether the decree passed by the Court was fully executed and satisfied is a question relating to execution, discharge or satisfaction covered by Section 47.

*The phrase "not by a separate suit" refers to a suit of the nature in which the decree has been passed. It does not refer to a suit of a totally different and distinct nature. If the case is not covered and the objection does not fall within the four corners of Section 47, the dispute cannot be said to be one relating to execution, discharge or satisfaction of the decree and the bar of Section 47 cannot be attracted.*

The language of Rule 58 goes to show that the basis of the objections under that rule is 'that such property is not liable to such attachment'. The words 'such attachment' in Rule 58 point to the conclusion that the order passed on the objections is operative only in respect of the particular attachment against which objections are filed and not with regard to the attachment which may be made in execution

of some other decree against that judgment-debtor. An order in favour of a decree-holder does not enure for the benefit of the other decree-holders who are not parties to the proceedings. An order for release has not the effect of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property as he likes. If, thereafter, the decree-holder succeeds in his appeal, the effect would be that the order of release would be set aside and the attachment originally made would be deemed to have continued uninterrupted. The release from attachment is only provisional in character and is subject to the result of the appeal. An order on a claim petition under Order 21 Rule 58, or in appeal against said order does not extend beyond the execution of the decree which has given rise to those proceedings.

Rule 101 states that the executing Court on receipt of an application under Rule 97 or 99 will hold a full-fledged enquiry and determine all questions including the questions relating to right, title or interest in the property arising between the parties to the proceeding or their representatives and not by a separate suit. In *Silverline Forum (P) Ltd. v. Rajiv Trust and another* (supra), the Hon'ble Supreme Court held that the words "all questions arising between the parties to a proceeding" would envelop only those questions as would legally arise for determination between them. The period of limitation for filing an application under Rule 97 is thirty days from the date of resistance or obstruction. Section 5 of the Limitation Act does not apply to it. The executing Court has, therefore, no power to condone delay in making application.

Rule 99 deals with cases where a person other than the judgment-debtor is dispossessed by the decree-holder or auction-purchaser. It is enabling in nature. It allows a person other than judgment-debtor who has been dispossessed to make an application complaining of such dispossession. The use

of word “may” gives an option to a person dispossessed of property to invoke Rule 99 by making an application to the executing Court. In *Pavan Kumar and another v. K. Gopalakrishna and another*, 1998 (2) ALT 313, the Division Bench of the Hon’ble High Court of A.P., held that—

“10. ....The remedy under Order 21 Rule 99 CPC is no doubt one of the remedies available to the person dispossessed. But, we are unable to construe Order 21 Rule 99 as placing a bar or bringing an independent suit for possession, without filing an application under the said Rule. Such a bar, in our view, does not arise even by necessary implication.”

When a question arose before the Hon’ble Supreme Court in *Pattam Khader Khan v. Pattam Sardar Khan and another*, (1996) 5 SCC 48, whether a regular suit for possession by the auction Purchaser is maintainable, it was held that—

“It is not from the date when sale certificate is issued that the limitation starts running. The sale becomes absolute on confirmation under XXI Rule 92 of the Code effectively passing title. It cannot be said to attain finality only when sale certificate is issued under Order XXI Rule 94. There can be variety of facts conceivable for which delay can be caused in issuing a sale certificate. The period of one year limitation now prescribed under Article 134 of Limitation Act in substitution of a three year period prescribed under Article 180 of the Indian Limitation Act, 1908 is reflective of the Legislative policy, for finalizing proceedings in execution as quickly as possible by providing a good forum to the auction-purchaser to ask for delivery of possession of the property purchased within that period from the date of sale becoming

absolute rather than from the date of issuance of the sale certificate. *On his failure to avail such a quick remedy the law relegates him to the remedy of a regular suit for possession based on title, subject again to limitation.*”

Before concluding, it is worth to note the caution made by the Hon’ble Supreme Court in *Shreenath and another v. Rajesh and others* (supra), which is as follows :

“3. In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice is to be adopted. The procedural law is always subservient to and is aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.”

Further, in *Shub Karan Bubna @ Shub Karan v. Sita Saran Bubna*, (2009) 9 SCC 689, the Hon’ble Supreme Court emphasized the importance of conceptual change in civil litigation in the following terms :

“14. .. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to litigant. ...”

As desired by the Hon’ble Supreme Court the Law Commission and the Parliament shall bestow their attention on this issue and make appropriate recommendations/ amendments so that the suit will be a continuous process from the stage of its initiation to the stage of securing actual relief.