

Interlocutory Applications, in particular ABJ, Section 47 CPC
and Execution Applications under Order 21 CPC

by

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I have been given a fairly wide Topic and I will try to do justice to the same as far as possible within the time granted.

First let me address on Interlocutory Application:

“Interlocutory” means, means not that decides the cause but which only settles some intervening matter relating to the cause. After the suit is instituted by the plaintiff and before it is finally disposed off, the court may make interlocutory orders as may appear to the court to be just and convenient. The power to grant Interlocutory orders can be traced to Section 94 of C.P.C. Section 94 summarises general powers of a civil court in regard to different types of Interlocutory orders. The detailed procedure has been set out in the I Schedule of the C.P.C which deals with Orders and Rules.

Interlocutory orders may take various shapes depending upon the requirement of the respective parties during the pendency of the suit. Applications for appointment of Commissioner, Temporary Injunctions, Receivers, payment into court, security for cause, and etc.

Out of these various interlocutory orders that can be passed, the court is called upon to decide questions regarding grant of temporary injunction, receivers and commissions more frequently than other interim orders.

Therefore I am taking up the question of Temporary Injunctions under the provisions of Order 39 Rule 1 to 5 CPC for an elaborate discussions:

As you know, injunctions are two types, (1)"Temporary" and (2) "Permanent".

A Permanent Injunction, restrains a party for ever from doing the specified act and the same can be granted only on merits at the conclusion of the trial after hearing both the parties to the suit. It is governed by Sections 38 to 42 of the Specific Relief Act, 1963. A temporary or interim injunction on the other hand restrains a party temporarily from doing the specified act and can be granted until the disposal of suit. It is regulated by the provisions of Order 39 of the Code of Civil Procedure and it may be granted at any stage of the suit. Injunctions are preventive, prohibitive or restrictive i.e. when they prevent, prohibit or restraint some one from doing some thing or mandatory, i.e. when they compel, command or orders some persons to do some thing.

It is not the plaintiff alone who can apply for Interim Injunction. A defendant can also make an application for grant of an injunction against the plaintiff.

Injunction may be issued only against a party and not against a stranger or 3rd party.

The various circumstances under which the Temporary Injunction can be granted has been provided for under Order 39 Rule 1 C.P.C.

The power to grant temporary injunction is at the discretion of the court. The discretion however should be exercised reasonably, judiciously and on sound legal principles.

Injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief and the court has undoubtedly power to impose such terms and conditions as it thinks fit. A useful reference can be made to the judgment of the Apex Court in **“DALPATKUMAR AND OTHERS VS. PRAHALAD SINGH AND OTHERS”** reported in 1992 (1) SCC 719. The circumstances under which Interlocutory mandatory injunction could be granted has been dealt with in **“DORAB CAWASJI WARDEN VS. COOMI SORAB WARDEN AND OTHERS** reported in 1990 (2) SCC 117”. A useful reference can also be made to **“GLAXO SMITHKLINE CONSUMER HEALTHCARE LIMITED, REGISTERED OFFICE, GRGAON THROUGH ITS MANAGING DIRECTOR AND OTHERS VS. ALL STORES THROUGH ITS PROPRIETOR S.M.ABDUL GANI** reported in 2009 (8) MLJ 845”. It is axiomatic that the court before granting temporary injunction has to ascertain whether the applicant has made out a prima facie case in support of the right claimed by him. The court must be satisfied that there is a bonafide dispute raised by the applicant that there is a strong case for trial and there must be degree of probability that the applicant would be entitled to get relief claimed in the suit. A useful reference can be made to

“MARTIN BURN Ltd. vs. R.N.BANERJEE reported in **AIR 1958 SC 79**”. Once the existence of prima facie case is made out the court should analyze the 2nd condition viz., the irreparable injury. Only if the applicant would suffer irreparable injury if interim injunction is not granted then the injunction can be granted. The court must be satisfied that the refusal of injunction would result

in irreparable injury to the party seeking injunction. This position is made clear in the case of **“ASSISTANT COLLECTOR OF CENTRAL EXCISE, CHANDAN NAGAR, WEST BENGAL VS. DUNLOP INDIA LTD. AND OTHERS in AIR 1985 SC 330”**.

The third condition for granting Interim Injunction is the balance of convenience must be in favour of the applicant. The balance of convenience test must be clearly in favour of the applicant for granting an Interim Injunction order. This is made clear by the **“ASSISTANT COLLECTOR OF CENTRAL EXCISE, CHANDAN NAGAR, WEST BENGAL VS. DUNLOP INDIA LTD. AND OTHERS reported in A.I.R. 1985 SC 330”**. Though it is a case arising out of interim order in a Writ Petition, the position is no different when it comes to grant of temporary injunction.

The power to grant injunction is extra ordinary in nature and it has to be exercised cautiously with circumspection. I would request all of you assembled here to keep in mind the principles enunciated in **“SHIV KUMAR CHADHA VS. MUNICIPAL CORPORATION OF DELHI reported in 1993 (3) SCC 161”**. Grant of injunction is “exdebito Justitiae”, i.e. to meet the ends of justice.

Having said about the temporary injunction, I would be failing in my duty if do not expatiate on the matters which have to be kept in mind while granting injunction exparte before notice to the opposite party. I may invite your attention to the proviso contained in Order 39 Rule 3 C.P.C. The procedure prescribed therein has to be strictly followed. Grant of Exparte injunction is an exception and the notice before injunction is the rule. This aspect of granting an exparte injunction should be in compliance with the proviso to Rule 3 of Order 39. In Shiv Kumar Chadha’s case mentioned above, the Apex Court has ruled that this requirement of recording of reasons as set out in proviso to Rule 3 of

Order 39 is obligatory. Because Parliament has prescribed particular mode for passing of an order of injunction without notice to the other side under exceptional circumstances. Therefore before grant of Exparte Injunction, reasons have to be recorded and the court must be satisfied about the gravity of the situation and the court must set out briefly the reasons why it is granting an exparte injunction. The court can also impose conditions for the grant of interim relief.

If injunction is granted on insufficient ground then ultimately if suit fails, the plaintiff can be directed to pay such amount not exceeding Rs.50,000/- as damages to the defendant. This is made clear in Section 95 of C.P.C. Recently the Apex Court had an occasion to deal with imposition of costs in vexatious, frivolous, malicious or speculative litigation. This decision is reported in “**VINOD SETH VS. DEVINDER BAJAJ & ANOTHER 2010 (8) SCC Page 1**”. This Judgment deals with the nature of order that can be passed at the Interlocutory stage and what sort of conditions can be imposed.

Let me briefly deal with Appointment of Receivers:

The term “Receiver” is not defined in the code of Civil Procedure. Receiver is an impartial person appointed by the court to collect and receive pending the proceedings, the rents, profits of lands, which it does not seem reasonable to the court with either party to collect or receive. A Receiver is appointed to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court when either party should hold it. It is a protective relief. The object is preservation of property in dispute pending judicial determination of the rights of the parties to it. The principles that are to

be kept in mind are that the court must be satisfied whether the plaintiff has an excellent chance of succeeding in the suit. Generally an order appointing Receiver will not be made where it would have the effect of depriving the defendant of the defacto possession. If the property is in medio i.e. to say in enjoyment of no one it would be in common interest of all the parties to appoint a receiver. In exceptional circumstances the court for special reasons to be recorded appoint a party to the suit as receiver. A useful reference may be made to the decision reported in **“T.KRISHNASAMY CHETTY VS. C.THANGAVELU CHETTY AND OTHERS – AIR 1955 MAD 430”**.

An interlocutory proceedings have to be decided keeping in view of the Rules made under the Civil Rules of Practice particularly Rules 29 to 32 of Civil Rules of Practice which govern the procedure. The court has to adhere to the procedure prescribed therein.

Now coming to the execution, now I have been asked to deal particularly about Attachment Before Judgment.

Attachment Before Judgment is a very extra ordinary remedy and the primary object of Attachment Before Judgment is to prevent any attempt on the part of the defendant to defeat the realization of decree that may be passed against him. The remedy of Attachment Before Judgment is an extra ordinary remedy and must be exercised sparingly and strictly in accordance with the law and with utmost care and caution so that it may not become an engine of oppression.

It is incumbent upon the court before granting an order of attachment before judgment to be satisfied about the following two conditions:

(1) That the Defendant is about to dispose of the whole or any part of his property; and

(2) That the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him.

The Rules or the grounds upon which the attachment before judgment is adumbrated in Order 38 Rule 5 C.P.C. In Order 38 Rule 5 C.P.C., sub clause (1) is very important and if attachment before judgment order is passed without complying the provisions of Order 38 Rule 5 Sub clause (1), such attachment is void. A useful reference to the following decisions will be of great assistance to all of you as number of money suits will come 'up for trial and applications will be moved to secure attachment of properties of the defendant before judgment. The first in the series of judgment is "**AIR 1984 MADRAS 70 N.PAPPAMMAL VS. CHIDAMBARAM**" In this judgment the Madras High Court had set out the essential requirements for invoking the power of court to effect an attachment under Order 38 Rule 5 sub rule (1). The High Court has clearly pointed out that in view of the Order 38 Rule 5 Sub Rule (4) an attachment before judgment indiscriminately without notice giving an opportunity to the defendant to stave of the attachment by offer of security and without rigidly conforming to the requirement of Sub Rule (1) would be invalid. All of you would do well to go through the said judgment.

Similarly the following 2 judgments further clarify the need to be careful while dealing with the application under Order 38 Rule 5 C.P.C.

**“T.SRINIVASAN AND ANOTHER VS. V/SRINIVASAN
REPORTED IN AIR 1985 –pg- 269 MADRAS”
AND
“P.RAMASAMY VS. SRI DHANDAYUTHAPANI
FINANCE, SANKARI, REPORTED IN AIR 1986 –360
MADRAS”**

As far as the mode of making an attachment before judgment it shall be in the same manner as prescribed for the attachment of property in execution of a decree. It would mean that the provision contained in Order 21 Rule 54 C.P.C. has to be followed. And as per Order 38 Rule 11(b) High Court Amendment Madras which in effect is that the, order of attachment passed under Rule 5 or 6 of the orders of raising the attachment passed under Rule 9 to be communicated to the Registering Office within the limits of the jurisdiction the whole or any part of the immovable comprised in such order is situate.

As per the provisions of Order 38 Rule (8) where any claim is preferred to the property attached before judgment, such claim shall be adjudicated in the same manner as provided under Order 21 Rule 58 of C.P.C. Another illuminating judgment on the aspect of Order 38 Rule 5 and 6 is the Judgment of Calcutta High Court in **“PREMRAJ VS. Md. MANECK GAZI & OTHERS REPORTED IN AIR 1951 CAL. 156.”** A useful reference can also be made to **AIR 1982 SC- 989 SARDAR GOVINDHRAO MAHADIK & ANOTHER VS. DEVI SAHAI & OTHERS”**.

The Court can pass conditional order of attachment even before the notice and if the defendant fails to show cause why he need not furnish security

the court can order the conditional attachment be made absolute. As set out above in **AIR 1984 MADRAS 70 N.PAPPAMMAL -VS- L.CHIDAMBARAM** the order of the court was in the following version:

“Heard. Interim attachment and notice 10th February 1982. Even on 8th day of February 1982 the defendant has filed his counter and ready for enquiry on 10th February 1982. After the matter was called second time the court passed order in the following terms:

“The only objection raised by the respondent (petitioner in the civil revision petition) (words in brackets nine) is that she was not given show cause notice before attachment is ordered to furnish security. In every order of attachment before judgment, if security is furnished, the attachment is not effected. Hence, I.A.1209 of 1982 is allowed and the attachment already effected is made absolute”.

This order was set aside on the ground that the provision of Order 38 Rule 5 had not been complied with as notice was not issued in the proper form. Therefore the court has to take care the proper notice is to be served as per the Form No.5 or 6 or 7 or 7A to Appendix F of the code of Civil Procedure. The Judgment reported in “**K.Jayalakshmi Vs. S.M.Muthiah 1989 I Law Weekly page 549**” has set out the manner in which the order of conditional attachment can be passed even without notice. The court cannot pass a rolled up order in the following manner”

“Heard counsel, perused documents. Notice to respondent to order security for Rs.50,000/-, failing which to attach by 11th March 1986”.

If conditional attachment has to be passed the defendant has to be directed to furnish security and thereafter interim conditional attachment can be

passed if the defendant did not furnish security or show cause why attachment cannot be made then the attachment can be made absolute.

Attachment before judgment can also be ordered in respect of the property situate outside the jurisdiction of the court in such a case the procedure under Section 136 of C.P.C. has to be followed.

Before I take up Section 47 CPC it is necessary to deal with some provisions under Order 21 C.P.C. It is axiomatic that in India woes of the decree holder begins after the decree. The provisions contained in Sections 51 to 74 deal with the substantive law relating to execution and the procedural aspects is taken care of in Order 21 Rules 1 to 106. And Part 2 of C.P.C. commencing from Sections 36 to 46 deal with execution in general and section 47 is a separate provision which deals with the questions that arise 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. This is relevant because after the decree the executing court cannot decide matters which have become final and which ought to have raised in the suit. As far as Section 51 of C.P.C. is concerned, the various modes of execution of the decree are given. The decree would be either for recovery of money, delivery of property, injunction or specific performance. For all of them procedures are contained in order 21 Rule 1 to 106, Section 47 is a common provision. If a matter relates to execution, discharge or satisfaction of the decree the same shall be determined by the court executing the decree and not by separate suit. This determination is common to the execution of any kind of decree. For an illustration let me take

enforcement of a money decree. Money decree can be enforced by attachment of sale or by sale without attachment of any property of judgment debtor. By arrest and detention in prison of the judgment debtor. Even by appointing a receiver for collection of the money. The execution is commenced on an application filed under Order 21 Rule 11 C.P.C. and on such application notice to show cause is issued under Order 21 Rule 22 of C.P.C. Now the application under Order 21 Rule 11 C.P.C. the mode in which the assistance of the court is required is set out in sub clause (j) of Order 21 Rule **11(2) C.P.C.** If the recovery is sought for by arrest and detention in civil prison, provisions contained under Order 21 Rule 37 to 40 have to be followed. In **AIR 1980 SC 470, the Supreme Court** held that there no order of arrest can be made unless there is willful failure inspite of sufficient means. In fact Section 51 of the Code of Civil Procedure clearly sets out that only if the judgment debtor had the means to pay the decree and inspite of such means has neglected to pay the amount, then the order of arrest can be ordered. Therefore the court must take evidence whether the judgment debtor has means to pay the decree amount or not. The court should also have in mind the provisions of Section 55 to 58 of *C.P.C.* Before order of arrest and detention in prison is made, courts should give an opportunity to judgment debtor for showing cause as to why he should not be committed to prison for reasons to be recorded in writing is satisfied of any requirement prescribed under code vide **M.M.SALEEM VS. R.PRAVEEN KUMAR REDDY 2010 (5) CTC 469**

If the mode of recovery by attachment of property, it is important to keep in mind, the section 60 of C.P.C. and the procedure contained in Order 21 Rule 54 in case of attachment of immovable property and thereafter under Order 21 Rule 64 to 73 in case of sale generally and Order 21 Rule 82 to 96 as well. Now

after filing of the application for execution, the decree holder shall specify the property that has to be sold for realizing the decree amount. The property shall be first attached under Order 21 Rule 54 C.P.C. and thereafter by resort to Rule 66 Proclamation for the sale can be drawn up and this has to be done after notice to the decree holder and to the judgment debtor. The proclamation will contain the particulars mentioned in order 21 Rule 66 sub rule (2) of C.P.C. Once the proclamation is drawn up it shall be published in the same manner as prescribed under Rule 54. The procedure under Order 21 Rule 68 of C.P.C. regarding the time of sale has to be followed. Provision has been made under Rule 69 of Order 21 of C.P.C. regarding adjournment or stoppage of sale. If for any reason sale is adjourned beyond 30 days a fresh proclamation under Rule 67 should be published unless the judgment debtor consents to waive it.

A decree holder cannot bid or purchase without permission of court under Order 21 Rule 72 C.P.C. In certain circumstances as per Order 21 Rule 83 C.P.C. the sale can be postponed to enable the judgment debtor to raise the amount of the decree.

As per Order 21 Rule 84 of C.P.C. the successful purchaser should deposit the 25% of the sale amount on the date of the auction and if he fails to do, the property shall be resold. The full payment of purchase money should be paid before the court closes on the 15th day from date of the sale of property as per Order 21 Rule 85 C.P.C. This rule is mandatory.

As regards setting aside the court auction sale, resort can be had as per order 21 Rule 89, 90 or Section 47 C.P.C. As far as order 21 Rule 89 C.P.C. is concerned a sale is set aside on the deposit of the amounts mentioned therein. The amount has to be deposited within 60 days from the date of auction as per order 21 Rule 92 sub clause (2) of C.P.C. If there has been a material irregularity

or fraud in publishing or conducting a sale, the same can be questioned by applying under order 21 Rule 90 of CPC. The sale will be set aside on the ground that the applicant has suffered substantial injury by the reasons of such irregularity or fraud. An application under this rule can be entertained only if the applicant has taken up defects subsequent to proclamation of sale was drawn up. The absence of defects in attachment by itself would not be a ground for setting aside the sale. But however, the court auction sale can be set aside for any illegality which had arisen in the sale prior to the proclamation of the sale by resorting to an application under Section 47 of C.P.C. Whether the objection fall under Section 47 or Order 21 Rule 90 the same have to be construed by the court depending upon the objection taken. In this respect reference may be made to **AIR 1981 – SC 693 S.A. SUNDARARAJAN -VS- A.P.RAJENDRAN** See also **AIR 1990 MAD 226 & AIR 1999 A.P. 55**

If the sale itself is nullity as the property was brought to sale even without proper notice under Order 21 Rule 22 of C.P.C. to the judgment debtor then it can be challenged under Section 47 C.P.C.

In case of excessive execution as it is mandatory for the court to sell only such portion of the property, i.e. necessary for the discharge of the decree amount the sale of more property in excess of requirement can be called in question under Section 47 r/w Order 21 Rules 64 & 66(2)(a). Vide;- i) **Sai Enterprises — vs- Bhimreddy Laxmaiah & another- 2007-2-CTC-826**, ii). **K.J.Prakash Kumar & others —vs- Rasheeda Yasin & ANOTHER- 2009-2-L.W. 375**

If the Judgment debtor had expressed no objection while fixing the upset price, he is entitled to object the court on a later date contenting that the

market value of the property is scanty. Vide ;- **2010 (3) CTC.-66. CHANDIRA —VS SUBRAMANIAN**

Executability of decree can be challenged under Section 47 VIDE

i) **2001 -6-SCC. Pg. 534, DHURANDHAR PRASAD SINGH-VS- JAI PRAKASH UNIVERSITY & OTHERS.**

ii) **A.I.R. 1954 SC 340, KIRAN SINGH 7 OTHERS —VSCHAMAN PASWAN & OTHERS.**

iii) **A.I.R. 1970 SC 1475 VASUDEV DHANJIBHAI MODI - VS- RAJABHAI ABDUL REHMAN & OTHERS.**

iv) **A.I.R. 1977 SC 1201. SUNDER BASS —VS- RAM PARKASH**

If the court which passed the decree was incompetent (**VIDE 2010 (4) CTC 299 T.K.AYUB VS. MOHAMMED HANIF AND TWO OTHERS**) and is “coram non judice” such a decree is a nullity and it can be challenged in execution under Section 47 C.P.C.

To declare auction sale a nullity on the ground that the deposit was not made on the date of sale was held to be one under Section 47 C.P.C. **AIR 1967 SC 1344 (RAMCHAND SPG. AND WVG. MILLS VS. BIJLI COTTON MILLS (P) LTD. & OTHERS)**
