

INTERFERENCE IN EXECUTION BY CIVIL PROCESS-AN UNRESOLVED DILEMMA: AN ANALYSIS

*Puja Sondhi and Shilpa Mankar**

Execution in general

The expression 'execution' signifies the enforcement of decrees and orders by the process of court, so as to enable the decree-holder to realise the fruits of the decree.¹ S.51, C.P.C., defines the jurisdiction and power of the court to enforce execution. It enumerates the different modes in which the court may order execution of a decree according to the relief granted in favour of a decree-holder. It is for the decree-holder to decide in which of the several modes he will execute his decree.² A decree can be enforced by delivery of any property specified in the decree, by attachment and sale, or by sale without attachment of any property, by arrest and detention in civil prison of the judgement-debtor, or in such manner as the nature of the relief may require. But execution is subject to the conditions and limitations prescribed by the Code and the discretion of the court.³

This article will examine how some of these provisions of the Code have been used to cause delay, or otherwise created difficulties, to the decree-holder in the execution process, and thus question the feasibility of the inclusion of these provisions.

Requirement of documentary evidence to prove out-of-court payment of decretal amount O.21 R.2-A was added by the 1976 Amendment Act. It provides that in cases of out-of-court payment to the decree-holder, towards part/whole satisfaction of the decree, there has to be documentary evidence for the same.

But this provision has been misused by the judgement-debtor, who can produce forged documents before the court, to the effect that he has made much payment to the decree-holder. Then the court has to look into

* IVth year students of the National Law School of India University Bangalore.

1. Sreenath Roy v. Radhunath Mookerjee, (1882) 9 Cal 773; Ghosh v. Banarjee, 79 Cal WN 76; State of Rajasthan v. Savaksha, AIR 1972 Guj 179.
2. Ibid. See Also, Umakanta v. Penwick & Co. Ltd., AIR 1953 Cal 717; Shyam Singh v. Collector, District Hamirpur, 1993 Supp (I) SCC 693.
3. Ibid, See Also, Anandi Lal, v. Ram Sarup, AIR 1936 All 495(FB); Ram Lochan v. Mahadeo Prasad, AIR 1970 All 544(FB).

the genuineness of the document and ascertain the veracity of the judgement-debtor's assertions. This takes up a lot of time and delays the execution of the decree. But it is necessary to have this rule because in case, the judgement-debtor has actually paid the decree-holder, but the latter denies it, then the same can be proved by the production of documentary evidence, and the judgement-debtor is not made to pay twice. Also it prevents judgement-debtors from randomly approaching the courts and asserting that they have paid the decree amount outside court, because without documentary evidence the court will now not consider their claims.

Difficulties faced by the decree-holder in executing his decree by arrest and detention of the judgement-debtor

2. S.51(c), CPC, empowers the court to order execution of a decree, by arrest and detention of the judgement-holder in the civil prison. But there are various obstacles faced by the decree-holder, if he desires to execute his decree, by virtue of arrest and detention of the judgement-debtor. Some of these have been enumerated below:

- (a) **Requirement of affidavit and notice:** In an application for the arrest and detention of the judgement-debtor in prison, the decree-holder must state or must file an affidavit stating the grounds on which arrest is sought for.⁴ Then the court will issue a notice to the judgement debtor to show cause as to why he should not be arrested.
- (b) **Insolvency:** The court will not order arrest in cases where the judgement-debtor, on being served notice to explain as to why he should not be arrested, appears in court and proves to the court's satisfaction, that he has no property-movable or immovable, out of which to pay the decree-holder. He has to then file an application to be declared an insolvent and produce a copy of such an application before the executing court. It will take time for the Insolvency Court to decide whether the judgement-debtor is actually insolvent or not, but till then the execution proceedings will be stalled. If he is adjudged to be an insolvent, then an Official Receiver will be appointed, to look into all the liabilities of the insolvent.
- (c) **Mere non-payment of decretal amount not enough to warrant arrest:** Further, the proviso to, S.51, lays down that where the

4. O.21, R.11-A

- (vi) members of legislative bodies¹³
- (vii) any person or class of persons, whose arrest, according to the State Government might be attended with danger or inconvenience to the public¹⁴

This clearly restricts the decree-holder's right to get the decree executed by means of arrest and detention, but special exemptions, similar to this one, have been provided to these classes of persons in other enactments and codes also, by virtue of their special position in society (like women, children), or the nature of their job (like legislators), or for reasons of judicial expediency (like witnesses).

- (f) **Premature release of arrested judgement-debtor:** The judgement-holder may be released by the court, or the government early on the ground of illness.¹⁵ Thus premature release of the judgement-debtor on account of illness, would interfere in the execution of the decree also. But it has to be understood that the provisions of S.59 are based on purely humanitarian grounds, and cannot be dispensed with.

Statutorily imposed restrictions on the decree-holder regarding attachment of property for the attachment of a decree.

3. One of the modes by which execution of decree takes place is by the attachment of property, before its sale, but this is subject to S.60 of the Code.

- (a) **Properties exempt from attachment:** S.60 declares what properties are liable to attachment and sale in execution of a decree, and what properties are exempt there from. The proviso to S.60(1) gives a list of properties which are exempt from attachment and sale in the execution of a decree and the list includes: necessary wearing apparel, cooking vessels, bedding, tools of artisans, implements of husbandry, houses of agriculturists, wages, salaries, pensions and gratuities, compulsory deposits, right to future maintenance, etc. By the 1976 Amendment Act, it has been clarified that any agreement to waive the benefit of any exemption under S.60 shall be void. S.61 empowers the state government to exempt agricultural produce from attachment or sale.

13. S. 135-A.

14. S.55(2).

15. S. 59.

- (b) **Salary:** With specific reference to salary, S 60(1) proviso (i) provides that salary shall not be liable to attachment and sale to the extent of the first four hundred rupees and two-thirds of the remainder, in execution of a decree, other than a decree for maintenance (in case of execution of a decree for maintenance, only one-third of the salary shall not be liable to attachment). Further, where the attachable portion of the salary has been under attachment for a period of 24 months, either continuously, or intermittently, such portion shall be exempt from attachment, until the expiry of a further period of 12 months. If such attachment has been made for a period of 24 months for the execution of the same decree, then after 24 months, the salary shall be finally exempt from attachment for that decree. Where more than one decree-holders have asked for attachment of the salary of the same judgement-debtor, it is for the disbursing officer to determine what portion of the salary is attachable and inform the court of the same, and pay accordingly.

The reasons for these items, including a portion of the salary of the judgement-debtor to be exempt from attachment is evident. It is to ensure that he is not denied of his means of subsistence and of the items, necessary for his daily existence.

- (c) **Inventory of movable property to be attached required:** Under O.21, R.(12) of the Code, when the decree-holder makes an application for attachment of movable property, belonging to the judgement-debtor, but not in his possession, he has to also annex with the application, an inventory of the property to be attached, containing a reasonably accurate description of the property. It is been held that the provisions of this rule are mandatory and require strict adherence.¹⁶ Where a decree-holder fails to annex to the application for execution of the decree, such an inventory of the property to be attached, with a reasonably accurate description of the property to be attached, the application is not one in accordance with law.¹⁷ Further it has been held by the court that there is no obligation on the judgement-debtor to post the decree-holder with all the details of his properties, it is the decree-holder's business to gather knowledge about the properties so that he can realise the fruits of his decree.¹⁸

16. AIR 1985 Ker 83.

17. AIR 1915 All. 320.

18. AIR 1951 SC 16.

- (d) **Description of immovable property to be attached required:** O.21, R.13 requires that where an application is made for the attachment of any immovable property of the judgement-debtor, it should contain an accurate description of such property including its boundaries or numbers and the interest or share of the judgement-debtor in this property. The provisions of this rule are also mandatory, but a defect in the application can be rectified, by way of an amendment under O.6, R.17, CPC.

O.21, Rr.12 and 13 seem to impose too harsh a burden on the decree-holder, in expecting him to find out all the necessary details of the property to be attached, though he can make changes, by way of amendment in his application for attachment. This is one of the provisions, which can probably be amended to make it more conducive to the interests of the decree-holder.

- (e) **Objections or claims to attachment:** Where a property has been attached in execution of a decree, there may be objections to such attachment either by a party or his representative or by a third party.

Adjudication of claims or objections to attachment

4. O.21, R.58 deals with adjudication of claims to, or objections to attachment of property. The proviso to R.58(1) enacts that the court shall not entertain the objection or claim where

- (1) before the claim is preferred or objection is made, the property attached has already been sold, or
- (2) where the court considers that the claim or objection was designedly or unnecessarily delayed.

In both these cases the order refusing to entertain objection or claim is subject to suit.¹⁹

Where the court entertains a claim or objection, it must investigate fully and not summarily and must adjudicate upon all questions, including the questions of right, title and interest in the property under attachment. The court shall, in accordance with such determination-

19. R. 58(5)

- (i) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
- (ii) disallow the claim or objection; or
- (iii) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or
- (iv) pass such order as in the circumstances of the case it deems fit.²⁰

Thus, clearly the procedure has been laid down for how and when the court is to adjudicate upon a claim to, or objection to attachment of property. The proviso to O.21, R. 58 clearly states no such claim or objection shall be entertained by the court in cases where the court considers it to be designedly, or unnecessarily delayed, or it is made after the property attached has already been sold. This would give the impression that the court is trying to avoid delay and harassment to the decree holder. But if this is the object of the proviso, then it is largely defeated by the following two things:

- (i) an order refusing to entertain such a claim or objection is subject to suit.²¹
- (ii) an order passed by the court after adjudicating upon the claim or objection, is appealable, like a decree.

This would greatly delay the execution process. By virtue of the 1976 amendment to S.47 of the Code, all orders made therein are no longer appealable, and the only remedy available now is to file a revision petition against those orders. This rule is an exception to S.47, in so far as it provides for appeals and instituting of fresh suits, in the manner provided above, and is greatly misused by judgement-debtors to delay proceedings.

But whether S.47 itself, which dispenses with the provisions for appeals is more beneficial to the decree-holder or not, is the next question.

20. R 58(3).

21. O.21, R.58(5).

Effect of amendment to S.47-is it more beneficial to the decree holder in execution

S. 47 lays down the principle that matters relating to the execution, discharge or satisfaction of a decree arising between the parties including a purchaser of a share in execution should be determined in execution proceedings and not by a separate suit.

In order for S.47 to apply, the following conditions must be met:

- (1) the question must be one arising between the parties to the suit in which the decree has been passed, or their representatives; and
- (2) It must relate to the execution, discharge or satisfaction of the decree.

Where a third party has any objection to the attachment of property, after the Amendment Act of 1976, all the questions, including the question of title shall be decided by the executing court in the execution court and not by separate suit.²²

Before the 1976 Amendment Act, which deleted S.47 from S.2(2), the order passed by the executing court shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.²³ But now, the order passed under S.47 is not a deemed decree, hence it is not appealable under S.96(first appeal) and S.100 (second appeal). Thus, the only recourse available to the party aggrieved of the order, passes by the executing court under S.47 is to prefer a revision application under S.115, CPC, provided the conditions laid down in S.115 are satisfied.

We need to examine whether this amendment has been beneficial to the decree-holder or not. For this firstly, a persual of the legislative intent behind the amendment of S.47 has to be undertaken. The Object and Reasons, clearly states that S.47(as it stood before the amendment in 1976), was mainly responsible for the delay in the execution of decrees, and the Joint Committee therefore, recommended to omit the determination of a question under S.47, from the definition of a decree

22. O.21, R.58(1)&(2).

23. O.21, R.58(4).

under S.2(2)²⁴. The result is that all questions between the parties to the suit, in which the decree has been passed and their representatives should be disposed of under S.47 and not by a separate suit., and the determination of all such questions under S.47 will no longer be appealable as a decree. But wherever any order is intended to be made appealable as a decree, a specific provision is made to that effect in the Code itself, like under O.21, Rr.43-s(2)(c), 46-B, 46-C, 46-E, 46-H, 58(4), 98, 100, 103. Thus it is evident, that the legislative intent was to dispense with the provision for appeals to these orders passed under S.47, so as to avoid delay, so that the decree-holder could realise the fruits of his decree quickly. Before the amendment, the judgement-debtor used to delay execution endlessly, by filing for appeals. Now, only revision can be preferred under the limited grounds provided under S. 115. But though this amendment sought to make S.47 more beneficial to the decree-holder and to expedite execution of the decree, it has also had its pitfalls for the decree-holder. He himself is also bound by the provisions of S.47 and cannot prefer an appeal, when the order is against his interests.

ILLUSTRATION: Suppose A is the judgement-debtor, who contends that he has paid the decree amount outside court to the decree-holder. As proof, he submits some forged documents. But the executing court fails to notice that these documents are forged and adjudges that the decree-holder has been paid outside court. Now, B, after the amendment to S.47 cannot prefer an appeal to this order of the executing court. The only recourse open to him is to file a revision petition under S.115. But in revision, the court will not go into appreciation of evidence, so in effect, B will be left with no relief.

Thus, though the amendment was to dispense with appeals under S.47, to save the decree-holder the harassment of undue delay, in execution of his decree, the provision has been used by dishonest judgement-debtors to forge documents and to deny the decree-holder of execution itself.

24. "The committee note that according to the definition of the expression 'decree' given in the Code, the determination of any question under S.47 amounts to a decree, and as such, an appeal and second appeal would lie against such determination. The Committee is of the view that this provision of the Code is mainly responsible for the delay in the execution of the decrees. The Committee, therefore tell that the definition of the term 'decree' should be amended so that the determination of the question under S.47 may not amount to a decree."

Stay of execution

Under O.21, R.26, CPC, the executing court can stay execution only for a reasonable time and only for particular purposes, so as to enable the judgement-debtor to approach the court which passed the decree and to:

- (i) get the decree amended
- (ii) show that the decree is satisfied or is not existing
- (iii) get the decree passed against him expert set aside
- (iv) get the decree passed against him set aside on the ground that it was obtained by fraud
- (v) show that the decree is barred by limitation

Stay of execution, pending the disposal of suit between judgement-debtor and decree-holder

7. Rule 29, O.21 provides for stay of execution, pending disposal of suit between judgement-debtor and decree-holder. For this rule to apply, there must be two simultaneous proceedings in court:

(1) a proceeding in execution of the decree at the instance of the decree-holder against the judgement-debtor and, a suit at the instance of the judgement-debtor against the decree-holder.²⁵

The provisions of Rule 29 are not mandatory, but discretionary.²⁶ The discretion, however must be exercised judicially, and in the interests of justice, and not mechanically and as a matter of course.²⁷ It cannot be exercised so as to allow a party to abuse the process of law.²⁸

25. Shaukat Hussain v. Bhuneshwari Devi, AIR 1973 SC 528; Krishna Singh v. Mathura Ahir, AIR 1982 SC 686; Hansraj v. Satnarain, AIR 1957 Raj 219; Subhash Kumar v. Sheo Balak, AIR 1975 Pat. 307.

26. Anop Chand v. Hirachand, AIR 1962 Raj. 223; Quazi Rahman v. Nurbanu Bibi, AIR 1976 Gau 39.

27. Quazi Rahman v. Nurbanu Bibi, AIR 1976 Gau 39; Quazi Rehman v. Sital Prasad, AIR 1977 Gau 25.

28. Quazi Rahman v. Nurbanu Bibi, AIR 1976 Gau 39;

The essence of this provision is expressed very accurately in the words of Mitra, J., in the case of *Judhisthir v. Surendra*²⁹:

"the fundamental consideration is that the decree has been obtained by a party and he should not be deprived of the fruits of that decree except for good reasons. Until that decree is set aside, it stands good and it should not be lightly dealt with on the off-chance that another suit to set aside the decree might succeed----- the decree must be allowed to be executed, and unless an extraordinary case is made out, no stay should be granted. Even if stay is granted, it must be on suitable terms so that the earlier decree is not stifled."³⁰

The reasoning stems from the principle that a judgement-debtor may not be harassed, or deprived of the fruits of the decree, merely because a suit has been subsequently been filed for setting aside that decree.

Grounds for challenging sale of property that has been sold in execution of the decree

4. To challenge sale of movable property the applicant has to approach the court under O.21, R.78, and for immovable property, under O.21, r.90, C.P.C. Under both these rules, he has to prove two things:

- (1) there was irregularity in publishing or conducting the sale of movable property, and
- (2) injury was caused by virtue of this irregularity to particular person by any other person

Movable Property

3. If these two conditions are satisfied under O.21, R.78, then the sale of movable property does not get vitiated. But the person aggrieved can institute a suit against the person responsible for such irregularity and injury to him, for the recovery of the specific property (if that person is the purchaser), or alternatively, for compensation.

29. *Judhisthir v. Surendra*, AIR 1969 Ori 233.

30. *Ibid* at 234. See Also, *Quazi Rahman v. Nurbanu Bibi*, AIR 1976 Gau 39; *Quazi Rehman iv. Sital Prasad*, AIR 1977 Gau 25.

Immovable property

In the case of immovable property, if the above two conditions are satisfied under O.21, R.90, then the person aggrieved can file an application before the executing court, to get such sale set aside.

Though these provisions call for interference in execution, they rightfully do so. The burden is very high on the person challenging the sale, to not only prove irregularity or fraud in publishing or conducting the sale, but also to prove injury to himself by virtue of such fraud or irregularity. Further, the sale can be set aside only in such cases where the property is immovable. But for movable property where the entire sum has already been paid and no further confirmation to the sale is required, to avoid any hardship to the auction-purchaser, it has been stated that such sale will not be vitiated.

The purpose of these provisions is basically to prevent any hardship to the judgement-debtor, where there has clearly been irregularity or fraud in matters of sale, thus affecting him prejudicially. For example, where there is connivance between the decree-holder, the sale officer and the auction purchaser to sell the property off at a low price, these provisions provide redressal to the judgement-debtor. But these provisions have been misused by the judgement-debtors, to unnecessarily delay matters and harass the decree-holder, by filing applications under these rules, without any basis.

Resistance to delivery of possession to decree-holders and auction-purchasers

S.74 and Rules 97-103 of O.21 deal with resistance to delivery of possession to decree holders and auction-purchasers. Under R.97, where the decree-holder or auction-purchaser of immovable property is resisted or obstructed by any person in obtaining possession of such property, he may make an application to the court complaining of such resistance or obstruction. Under R.99, any person other than the judgement-debtor, if dispossessed by the decree-holder or auction-purchaser, may make an application to the court complaining of such dispossession.

The court shall on application under R.97 or rule 99, proceed to adjudicate upon it as per R. 101. The court will hold full-fledged inquiry, and not just a summary inquiry and determine upon all questions, including the questions of right, title and interest in the property under

attachment. Accordingly, the court shall either-

- (a) order the auction-purchaser or decree-holder to be put in possession, where it is satisfied that the resistance or obstruction was occasioned without any just cause, by the judgement-debtor, or by some other person at his instigation or on his behalf or by any transferee, where such transfer was made during the pendency of the suit or the execution proceeding. And if the applicant is resisted or obstructed even thereafter in obtaining possession, the court may at the instance of the applicant order the osbtructor to be detained in prison upto 30 days.
- (b) order the dispossessed person to be put back into possession
- (c) pass such order as in the circumstances of the case it deems fit.

These rules discussed above, represent the last stage at which the court can interfere in matters concerning execution. Strictly speaking, execution has already been ordered, but these rules provide resort to the aggrieved parties, for problems arising after execution has been ordered.

If we look at the case law of the Supreme Court also regarding interference in execution of civil process, we find that the court is reluctant to interfere in matters decided by the executing court. The places the court has interfered is, (a) where the lower courts have wrongly interfered and to set aside their orders; (b) where the executing court has looked into matters which it is not supposed to, like legality of the decree, or limitation period etc, and (c) where non-interference would result in gross injustice to one of the parties.

Thus, after an examination of various provisions relating to execution of the decree, which do pose problems to the decree-holder, it is the author's opinion that despite these difficulties, the legislative wisdom in incorporating these provisions is justified.

The legislative intent behind the various provisions examined seems to be, to strike a balance between the rights of the judgement-debtor and the decree-holder, mainly:

- the right of the decree-holder to get the fruits of his decree, and to realise the contractual obligations owed to him; and

- the right of the judgement-debtor to reasonable and fair procedure under Art.14, of the Constitution and a guarantee of certain safeguards.

These provisions are mostly there to safeguard the interests of honest judgement-debtors. The problems are not being posed by these provisions to the decree-holders, but by the misuse of these provisions, by dishonest judgement-debtors. If we dispense with these provisions it will be unjust to the honest judgement-debtors, and may, also be detrimental to the decree-holder. For example, the 1976 amendment to S.47 was made with the object of preventing delay, by dispensing with appeals to orders passed therein, and thus, expediting the execution process. But as has been seen above, this too has its pitfalls, because it denies the decree-holder also the forum of appeal, in cases where the revisional proceedings are unable to address grievances of the decree-holder, which could have been properly handled in an appeal, like appreciation of evidence.

Further, there are some provisions, which are there for the benefit of both decree-holder and judgement-debtor, like resorting to the court when there is resistance to, or obstruction in possession of property by decree-holder or auction-purchaser.

Thus, just because these provisions are open to abuse, that by itself, is not rationale enough to warrant the deletion of these provisions from the Code and deny the judgement-debtors, as a class of the benefit and protection of these provisions.