

**DELAY IN DISPOSAL OF EXECUTION PROCEEDINGS AND UNDERLYING TEST FOR AN EXECUTING COURT IN GOING BEHIND THE DECREE***Hakikat**Dr. Suneet K Srivastava*

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Abstract:

Delay in disposal of cases has always been a serious concern in India. "A litigant coming to court seeking relief is not interested in receiving a paper decree, when he succeeds in establishing his case. What he wants is relief." Above observation made by the Privy Council in 1872 and reiterated by Hon'ble Apex Court in 2009 speaks a lot about the plight of litigants in India. Decision of an execution application takes more time than that of a suit. As on 31.12.2018, as many as 11, 80,275 execution petitions were pending in subordinate courts of the country which figure has rose to 15, 16,629 in November, 2021. Supreme Court has directed that efforts be made to dispose of all the cases which are more than five years old by the end of the year 2017. However, above goal is far away from reality to be reached. 'Third party objections' though permissible under the Code, are significant hindrance against execution of decree. The judgment debtor generally creates every possible hindrance against execution of a decree by playing camouflage with the provisions of law. If seen pragmatically 'Civil Executions' is considered to be the most difficult topic for a law student to prepare, in turn for a lawyer to pursue and ultimately for the executing agencies to practice it into reality. Though the Apex Court and different high courts have illustrated various instances where an executing Court can go behind the decree in executing the same however, no exhaustive list of such circumstances can be prepared. An underlying test is required to be laid for guidance of executing courts in determining the circumstances where it can go or it cannot go behind the decree. A subtle perusal of series of precedents would suggest that an objection for want of territorial jurisdiction does not travel to the root of action or to the inherent lack of jurisdiction of civil Court to entertain a suit. Hence, it is required to be raised at earliest opportunity before Court of first instance and in cases where issues are settled, such an objection must be raised before issues are settled. Where there is consequent failure of justice, such an objection can be entertained. The objection as to pecuniary jurisdiction of Court also do no travel to root of action unless injustice is proved by a party raising such an objection at a later stage. Where the objection relates to inherent lack of jurisdiction of the Court to entertain it in respect of its subject matter, the same will travel to the root of the matter giving a liberty to the executing Court in going behind the decree.

Keywords: Civil executions-Delay-Execution Proceedings-Going behind the decree-Underlying test

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Introduction:

“A litigant coming to court seeking relief is not interested in receiving a paper decree, when he succeeds in establishing his case. What he wants is relief.”¹

Delay in disposal of cases has always been a serious concern in India. Average life span of a civil suit in India is approximately 10-15 years in reaching up to judgment stage. According to Natraj (1995), a termination dispute that is contested all the way can take upto 20 years for disposal. If land is involved it may take even longer time for disposal². As on date 57.71% of total pending cases falls within the category of 3-10 years old category cases and 8.05% cases are more than 10 years old.³ The data is depicting the problem on lower side as it does not include the cases not registered with Central Informatics System (CIS). Moreover, execution of decrees takes longer time than that of a suit. As on 31.12.2018, as many as 11, 80,275 execution petitions were pending in subordinate courts of the country which figure has rose to 15, 16,629 in November, 2021. Supreme Court has directed that efforts be made to dispose off all the cases which are more than five years old by the end of the year 2017⁴ however, the above goal is far away from its achievement. Remedial measures are required to be introduced for avoiding delay in disposal of execution petitions. A decree sans execution is merely a piece of paper. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. In a suit for property decree holder wants property, in a suit for recovery he wants money and in other cases the decree holder wants relief depending upon nature of the decree. Hon'ble Apex Court has observed that it strongly feel that there should not be undue delay in execution of a decree as if the decree holder is not able to enjoy the fruits of the decree by getting it executed, entire result of being successful in case is in vain.⁵ The life of an execution proceeding in India is longer than that of a litigant. In relation to difficulties faced by a decree holder in execution of the decree, in 1872, the Privy Council had observed “...the difficulties of a litigant in India begin when he has obtained a Decree...” and it is again so reiterated by hon'ble Apex Court in the case titled **Satyawati v. Rajinder Singh & Anr. Civil Appeal No.4176 of 2013 decided on 29.04.2013**. Certainly, the courts and the executing agencies have to follow a legal framework while executing a decree however, at the same time it is the duty of courts as well as other executing agencies to pursue the execution process with utmost care and diligence so as to provide the 'fruits of the decree' to decree holder at the earliest.

Plight of Litigant- Starting Point: After obtaining a decree, the decree holder, as a matter of law as well as practice, apply for its execution. Practically it is the starting point when the plight of a litigant begins. Among other reasons, it is because decree holder again goes into flash back of procedure from where a fresh notice is issued to judgment debtor requiring him to appear before the court and to file objections against the execution. The lacunae in the defendant's case are again raised by judgment debtor under the garb of one provision or other.

- 1 The General Manager of Raja Durbhunga v. Maharaja Coomar Ramaput Sing (1871-72) 14 Moore's I.A. 605: Shub Karan Bubna @ Shub Karan v. Sita Saran Bubna & Ors. Special Leave Petition (C) No.17932 of 2009 decided on August 21, 2009.
- 2 Hajara, Arnab Kumar and Maja B. Micevska, “The Problem of Court Congestion: Evidence from Indian Lower Courts.” Judicial Reforms in India, Issues and Aspects, New Delhi: Academic Foundation 2007, 137.
- 3 http://njdg.ecourts.gov.in/njdg_public/main.php, National Judicial Data Grid, n.d., accessed on 08, November 2021.
- 4 Hussain & Anr. v. Union of India 2017 LawSuit(SC) 201.
- 5 Satyawati v. Rajinder Singh (2013) 9 SCC 491.

Regarding the requirement of fresh notice to judgment debtor, Order XXI Rule 22 the Code of Civil Procedure, 1908 prescribes that no notice is required to be issued to judgment debtor in the event of an application for execution being filed against him within two years of passing of the decree which provision is also sparingly used by the executing authorities in order to shorten the execution process. In cases where there are numerous judgment debtors, afresh issue of process to all may lead to substantial increase in time in execution of decree.

Significant Hindrances Causing Delay: 'Third party objections' though permissible under the Code, are significant hindrance against execution of decree. This aspect of the process requires executing agencies in differentiating the real objections as against the frivolous ones filed only with a move to protract the proceedings. In order to deal with this, Courts must be judicious in scrutinizing objections keeping in view the interest of both parties. Hon'ble Apex Court in case titled **Shub Karan Bubna (2009)**⁶ has aptly highlighted the problem of delay in execution of decrees in civil cases. Interestingly, the Hon'ble Supreme Court observed that problem is not legislative rather the practice of courts and administrative agencies involved in execution process. To provide justice to litigants, it is essential that plaintiff sees the real fruits of decree in terms of execution. Without execution a decree is of no value to the plaintiff. The Hon'ble Supreme Court in the Case beautifully observed that century old civil procedure contemplates judgments, decrees, preliminary decrees and final decrees and execution of decrees. The process provide for a 'pause' between a decree and execution. A 'pause' has also developed by practice of Courts in between preliminary decree and final decree. The purpose of 'pause' is to enable the defendant to voluntarily comply with the decree or declaration contained in the preliminary decree. The ground reality is that defendants normally do not comply with decrees without the pursuance of an execution. In very few cases, the defendants in a partition suit, voluntarily divide the property on the passing of a preliminary decree. In very few cases, defendants in money suits, pay the decretal amount as per the decrees. Consequently, it is necessary to go to the second stage that is levy of execution, or applications for final decree followed by levy of execution in almost all cases. When litigant files a suit for recovery of money, he should first engage a lawyer and obtain a decree and then again engage a lawyer and execute the decree. Similarly, when he files a suit for partition, he wonders why he has to first secure a preliminary decree, then file an application and obtain a final decree and then file an execution to get the actual relief. The common-sensical query is: why not a continuous process? The litigant is perplexed as to why when a money decree is passed, the court does not fix the date for payment and if it is not paid, proceed with the execution; when a preliminary decree is passed in a partition suit, why the court does not forthwith fix a date for appointment of a Commissioner for division and make a final decree and deliver actual possession of his separated share. Why is it necessary for him to remind the court and approach the court at different stages? Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many trial judges tend to believe that adjudication of the right being the judicial function, they should concentrate on that part. Consequently, adequate importance is not given to the final decree proceedings and execution proceedings which are considered to be ministerial functions. The focus is on disposing of cases, rather than

⁶ *Ibid.* note 1.

ensuring that the litigant gets the relief. But the focus should not only be on early disposal of cases, but also on early and easy securing of relief for which the party approaches the court. Even among lawyers, importance is given only to securing of a decree, not securing of relief. Many a time, a party exhausts his finances and energy by the time he secures the preliminary decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have found cases where a suit is decreed or a preliminary decree is granted within a year or two, the final decree proceeding and execution takes decades for completion. This is an area which contributes to considerable delay and consequential loss of credibility of the civil justice system. Courts and lawyers should give as much importance to final decree proceedings and executions, as they give to the main suits.

Referring to realist school of jurisprudence, law is what actually happens in Court.⁷ Parties try to dilute the adverse effect of judgment on them by delaying executions. However, in some cases these types of delay may cause irreparable harm to the decree-holder. The judgment debtor generally creates every possible hindrance against execution of a decree by playing camouflage with the provisions of law. If seen pragmatically 'Civil Executions' is considered to be the most difficult topic for a law student to prepare, in turn for a lawyer to pursue and ultimately for the executing agencies to practice it into reality. The vast scheme of law once enacted with an objective to rule out any difficulty to parties before an executing Court can at times be seen adding to plights of litigants.

Questions to be Determined by the Court Executing the Decree:- Section 47 of the CPC provides that all questions arising between parties to suit wherein decree was passed or their representatives relating to satisfaction, execution or discharge of decree shall be decided by executing Court and not by a separate suit. A question as to whether a person is or is not representative of a party shall also be decided by the executing Court. Dispute raised by a garnishee can also be decided by the Court executing decree. Once decree has reached finality, it is not open for JD to plead new facts. No new plea can't be allowed to be raised first time in execution proceedings. Execution of decree being result of suit cannot be refused unless the decree is a nullity in itself. Section 47 of the CPC contemplates adjudication of limited issues relating to satisfaction or discharge of decree and is aligned with provisions of Order XXI. This provision is intended to prevent multiple proceedings. It lays down procedure whereby Court reaches to its decision. Two requisite conditions *i.e.* the question must be arising between the parties and the other that dispute relates to satisfaction, execution and discharge of decree, must be kept in mind for applicability of this provision. Provisions of Order I Rule 10 (2) CPC empowering the Court to add any party whose presence may be necessary to determine the question in controversy and provisions of Order XXII Rule 10 CPC providing that in cases of creation, assignment or devolution of an interest during pendency of suit, the suit may be continued against that person also with the leave of Court, are also aligned with scheme of Code contained in Section 47 CPC and Rule 97 of Order XXI CPC.

Object and Rationale behind the Provision: - The underlined object and rationale behind enacting Section 47 of the CPC is to avoid multiplicity of proceedings. It enables the executing Court to decide all questions relating to execution, discharge and satisfaction of decree restricting need to file fresh suit for same purpose. It contemplates that the executing Court must not go beyond the decree however, there is rise of proceedings akin to retrial at the time of execution

⁷ "Jurisprudence - Realism - Law, Legal, Realists, and Judges - JRank Articles."

resulting into failure of realization of fruits of decree. The exhaustive scheme of Code of Civil Procedure, 1908 stipulate that in a civil suit, all issues and questions that may arise, are required to be decided in one trial.

Cases in which Executing Court can go Behind the Decree:- As a general rule executing Court has to execute the decree as it stands. It can not go behind the decree. Meaning thereby it can not inquire into validity of decree. An executing Court can only go behind the decree only under circumstances provided in Section 47 of the CPC. It can go behind the decree to decide questions relating to execution, discharge and satisfaction of decree arising between parties to suit or their representatives. Question as to whether a person is or is not representative of a party shall also be determined by the Court executing decree. As per explanation II appended to Section 47 of the CPC, an auction purchaser shall also be deemed to be a party to suit in which decree was passed. Section 47 lays down a principle that all question between the parties and also question raised by auction purchaser shall be decided by Court executing decree and not by a separate suit. The underlying object is to provide effective and expeditious remedy regarding certain questions in execution proceedings instead of availing recourse of separate suit thus preventing needless and unnecessary litigation. Where a persons approaches executing Court claiming that he is representative of decree holder's interest and decree holder disputes it, executing Court is required to resolve this dispute for proceeding with execution of decree. Based upon provisions of law and judicial interpretation given thereon by various courts by way of precedents, an executing Court can go behind the decree in following cases:-

- i) where the decree is nullity in the eyes of law *i.e.* decree passed against a dead person.
- ii) where decree is vague and ambiguous, executing Court can construe to ascertain its precise meaning and for this purpose, court may not only refer to judgment but also to pleadings of case.
- iii) where decree is passed by Court in its inherent lack of jurisdiction.
- iv) where the decree by any subsequent developments has ceased to be executable as per its terms.
- v) where the decree has become inexecutable by operation of law.

Test to be Followed by an Executing Court in Going Behind the Decree: Above circumstances, where an executing Court can go behind the decree are not exhaustive in nature. There may be some peculiar circumstances where an executing Court may raise a doubt as to whether it should vary terms or decree or not. In such circumstances the executing Court is required to be guided by certain basic principles where it should or it should not opt to change terms of decree while executing the same. In **Kiran Singh v. Chaman Paswan**⁸ the Supreme Court while considering scope of 'prejudice' under Section 11 of the Suits Valuation Act held as under:-

“We are therefore clearly of opinion that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined.” (Emphasis supplied.)

“If the law were that the decree of a court which would have had no jurisdiction over the suit or appeal but for the overvaluation or undervaluation should be treated as a nullity,

8. AIR 1954 S.C. 340.

then of course, they would not be stopped from setting up want of jurisdiction in the court by the fact of their having themselves invoked it. That, however, is not the position under Section 11 of the Suits Valuation Act.”

The Supreme Court in **Harshad Chiman Lal Modi v. DLF Universal Ltd.**⁹ held that objection to pecuniary and territorial jurisdiction is to be taken at earliest possible opportunity. If it is not so raised, it cannot be allowed to be taken at subsequent stage. Further, it was held as under:-

“The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.”

In **Hasham Abbas Sayyad v Usman Abbas Sayyad**,¹⁰ it was held that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a court having no jurisdiction in regard to the subject-matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with. In **Mantoo Sarkar v. Oriental Insurance Co. Ltd.**¹¹ the above position of law was again reiterated by Apex Court adding “...in our opinion, the court should not have, in the absence of any finding of sufferance of any prejudice on the part of the first respondent, entertained the appeal.”

Where in a suit for partition of immovable properties situated at Ranchi and Varansi, an objection was raised by respondent/JD that the decree is non executable as Ranchi Court had no territorial jurisdiction to entertain the suit which objection was rejected by the executing Court holding that DH is entitled to fruits of decree and executing Court can't go behind the decree and where decree is passed by a Court having no inherent jurisdiction, an objection about its its validity can be raised in execution proceedings, if objections appear on face of record and further on an appeal filed against said order High Court restored the application raising objections for disposal by executing Court, apex Court while deciding Special Leave Petition filed against said order of the High Court *inter alia* held that Sub Section (1) of Section 21 postulates that no objection as to place of suing, no objection regarding competence of a Court concerning pecuniary limits of its jurisdiction and no objection as to competence of an executing Court with reference to the local limits of its jurisdiction shall be allowed by appellate court unless such an objection was taken in court of

9. (2005) 7 SCC 791.

10. (2007) 2 SCC 355.

11. (2009) 2 SCC 244.

first instance at earliest possible opportunity and unless there was a consequent failure of justice. Section 21(1) provides that before raising objection as to territorial jurisdiction before an appellate court, two conditions must be fulfilled:-

- i) The objection must be taken in the court of first instance at the earliest possible opportunity; and
- ii) There has been a consequent failure of justice.

Conclusion:

A subtle perusal of above detailed series of precedents would suggest that an objection for want of territorial jurisdiction does not travel to the root of action or to the inherent lack of jurisdiction of civil Court to entertain a suit. Hence, it is required to be raised at earliest opportunity before Court of first instance and in cases where issues are settled, such an objection must be raised before issues are settled. Where there is consequent failure of justice, such an objection can be entertained.¹² The objection as to pecuniary jurisdiction of Court also do no travel to root of action unless injustice is proved by a party raising such an objection at a later stage. Where the objection relates to inherent lack of jurisdiction of the Court to entertain it in respect of its subject matter, the same will travel to the root of the matter giving a liberty to the executing Court in going behind the decree.

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