

A STUDY OF CIVIL JUSTICE SYSTEM WITH SPECIAL REFERENCE TO MODE OF EXECUTION OF DECREE

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ABSTRACT

Court is often known as temple of justice. The primary object of Justice delivery system is to the help the litigants and not to harass them. If the litigants have to visit the court for a number of years to get their rights enforced, it is economic loss to them both in terms of time and money. Enforcement task is like a day dream. In the Indian democratic system justice can be obtained by fair trial and following the rule of law. Common people have lost their confidence over the judicial system because of delay in the effective implementation of decree. Hence, they resort to private justice and adopt illegal means for the settlement of their claims. This has led to hike in criminal litigation. Through this study, Researcher wants to bring forth the problems faced by the decree holder at the grassroot level to get his right enforced. It will also throw light on the procedural lacuna in the execution of decree. The party who has already fought the long battle for its right is forced to fight one more legal battle just for the purpose of getting the decree executed already existing in his favor. The main concern of this research is, thereof to show the existing enforcement system with its merits and demerits. The researcher then tries to find out whether the existing laws of India are being rendered effectively to the general accepted principal or not. Researcher has made effort to suggest certain recommendations to deal with the problem and to make the justice reality different from paper justice as it is well said that justice should not be done but it must appear to have been done.

KEYWORDS: *Civil Justice System, Execution of Decree*

INTRODUCTION

In a given legal system of a country there are two types of justice systems namely civil justice system and criminal justice system to administer justice. The main purpose of civil justice system is to determine and uphold the various rights of the people while the main purpose of the criminal justice is to maintain peace and tranquility in the society by bringing the offenders before courts of law and sentencing the convicts by sending jail in the name of imprisonment. What is the goal of courts and judges in civil matters in contemporary world? What is the goal of civil justice? The two main goals of civil justice may be in the broadest sense defined as: Resolution of individual disputes by the system of states courts; and Implementation of social goals, functions and policies.¹

Civil procedural law is pervasive in the sense that it is ubiquitous and inevitably enters into every other branch of law, except criminal law. It provides the appropriate machinery for access to the courts in order to obtain the appropriate relief or remedy and to sustain and uphold the rules of substantive law. All legal relations, transactions, happenings and

¹Alan Uzelac, IUSGENTIUM, *Comparative Perspectives on Law and justice*, Springer International Publishing, Switzerland, 2014, pg 4.

events may ultimately have to be determined or adjudicated upon by the appropriate courts or tribunals according to the applicable rules of law, and methods and machinery for securing this determination or adjudication are regulated by civil procedural law.² In various doctrinal works, these goals have different names. For the first, the conflict-resolution (dispute-resolution, conflict-solving) goal is often spoken of. The second, the policy-implementation goal, is more difficult to denote uniformly, as the social policies and functions that civil justice should have may be rather diverse and serve different political or social ideologies or paradigms. Civil procedure code provides a means for the citizens to enforce and determine their rights and obligations. Consequently, enforcement of individual rights forms one of the main goals of civil justice. At the same time, the existence of an effective enforcement mechanism affect the level of compliance with legal norms in society at large. Rather, protection and enforcement of individual rights and implementation of the legal order form two side of the same coin.³

The fundamental principle of the Code of Civil Procedure is to consolidate and amend the laws relating to the procedure of the courts of civil jurisdiction. The Code of Civil Procedure is deemed to be one of the primary procedural laws in India which is involved neither in taking away rights nor in engendering them, it is solely involved in regulating court procedure. it is designed to facilitate justice and further its ends. The Code has been divided into two parts, viz., (1) substantive law from section 1 to section 158, and (2) procedural law in 51 orders. The first part contains provisions of a substantive nature that lay down the general principles and create jurisdiction, while the second part contains provisions that relate to procedure and indicate the mode in which jurisdiction created by the body of the Code has to be exercised. The first part is fundamental and it cannot be altered except by Parliament, whereas the high Courts are empowered to annul, alter or add to all or any of the said rules embodied in the second part, provided such annulment, alteration or addition is not inconsistent with the provisions of the first part.

The Code of Civil Procedure acknowledges the powers of, along with the limitations on, the courts, but there are some powers that are vested in the courts but not prescribed in the Code, and they are the inherent powers. The inherent powers of the court are in addition to the powers specifically conferred by the Code on the court. They are complimentary to those powers. The court is free to exercise them for the ends of justice or to prevent the abuse of the processes of the court. The reason is obvious. The powers of the court are not comprehensively set down for the simple reason that the legislature is incapable of contemplating all the possible situations that might arise in future litigations. inherent powers come to the rescue in such unforeseen circumstances. They can be exercised *ex debitojustitiae* in the absence of provisions in the Code. But they need to be exercised with due care and not arbitrarily.⁴

The forms of action govern the pleadings under the Code of Civil Procedure. The different forms of action include recovery of debt, deciding cases of contract and matrimonial disputes, among others. a litigant can sue for money due on an account, make a demand for a certain sum of money or demand a specific item of personal property. The action of trespass is common because a form allowing the claim that force had been wrongfully used could cover a wide variety of injuries. similarly, every decree for payment of money may be executed even by ordering detention in civil prison of the judgment debtor or by the attachment and sale of his property, or by both. it may also be executed by arrest and detention in prison,

²Lord Mackay Of Clashfern, *Halsbury's Law of England*, Butterworths Lexis Nexis, New Delhi pg 9

³C. Koller, *Goal of civil justice from an Austrian- German Perspective*, IUS Gentium Comparative Perspective on law and justice, springer publication, 2014, pg 37

⁴BRICS LAW JOURNAL Volume III (2016) Issue 4 78

not exceeding the period of three months, of civil imprisonment in cases where the sum of money exceeds rs.5,000. Where a decree is for the payment of a sum of money exceeding rs.2,000, but not exceeding rs.5,000, the period for civil imprisonment will not exceed six weeks. in cases where the decree is for specific movable property, it may be executed by seizure of that property and delivery thereof to the party to whom it has been adjudged or by civil imprisonment of the judgment debtor or by the attachment of his property for a period of three months, or by both. The enforcement of restitution of conjugal rights can be made only by the attachment of property of the judgment debtor, where the debtor refused to obey the decree. another form of action is injunction, where the party is prohibited from performing an act and if the party disobeys the injunction, the remedy for the plaintiff is the detention of the defendant in civil prison, or by attachment of his property, or by both. Fundamental rights are given to citizens under Part iii of the Constitution; arts. 32 and 226 provide the right to constitutional remedy. The enforceability of rights depends on capacity, jurisdiction and defences available, including immunities.

Access to Justice: Journey Fair Trial to Expedition Justice

In the 19th century the goal of civil action was as to the resolution of civil law dispute by application of rule of law. judge was bound to follow the law with minimum discretionary power. The procedure established by law had to be followed. But now the new goal that has replaced 'the just resolution of legal dispute' - in accordance with the requirement of fair process contained in article 6 of the European Convention on Human Right- 'is to ensure the impartial resolution of legal dispute'. According to new perception, instead of the revelation of truth, the code of civil procedure code is to guarantee the justice of process itself.⁵

There were the thoughts that our procedural law, which was based on the English system, are not suited to the genius of our people. The alternative to the English system are 1).the indigenous system and 2). the continental system which was rejected by the law commission in the 14th report. They said that it would be disastrous and entirely destructive of our future growth to think of a radical change at this stage of the development of our economy. They thought that on merits the English system is to be preferred, because it ensure fair trial.If the rule of law is to be maintained, if a democratic social order is our political objective and if justice must be done in a way which will satisfy the mind of the public that it is not only being done but obviously and clearly being done. So for this purpose procedure law must be just, reasonable and fair.

The essence of the English system is a fair trial. A fair trial means that each party must know the case of the other party, that each party must disclose to the other party all documents which are relevant to the subject matters of the dispute between them, that the court should determine the points of difference between the parties, that each parties should be permitted to lead evidence in support of its case and finally each party should be heard before judgment is delivered. An ideal code is one which strikes a just balance between a fair trial and expedition. Subject to the necessary safeguard to ensure a fair trial the procedure should be so simple that it is easier to decide a case than to invent reasons for not deciding it.⁶In 1908 when code was made its main purpose just to resolve of dispute between the parties but it move to access to justice to all- cheap –and now the main purpose justice should be speedy

⁵MiklosKengyal and Gergely, *Battle Between Individual Rights and Public interest*,Springer International Publishing Switzerland, 2014,pg 208-209

⁶ 27th Report of The Law Commission

Execution of Various Kinds of Decree

Depending upon the nature of the suits, the courts are passing different sort of decrees. To initiate the process of enforcement, there is requirement of filing the application by decree-holder against the judgment-debtor. In case of death of the judgment debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. Court can fix a reasonable time for said purpose and if no application in this regard is filed within a reasonable time, then execution petition can be dismissed for default. However, it cannot be abated in any case⁷. On filing of the application for enforcement of the decree, court are adopting different execution processes and these processes can be summarized as:

Execution in Case of Money Decrees

Money decree is a decree where decree is made for the payment of money. For instance decree passed in recovery suit like suit by banks for recovery of loan, suits based upon pronotes, cheque, hundie etc. Money decree it include a decree for payment of money as an alternative to some other relief as in case of money decree for damages passed in suits for specific performance. In case of death of the judgment debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. Court can fix a reasonable time for said purpose and if no application in this regard is filed within a reasonable time, then execution petition can be dismissed for default. However, it cannot be abated in any case⁸

On filing of execution petition, the first thing after notifying the judgment-debtor is to ensure that if he is ready to pay the decreed amount or not. In case he is ready to pay the decreed amount then as per Rule 1 and 2 of Order XXI CPC, then money can be paid to the decree-holder either inside or outside the court. Choice lies with the judgment-debtor to pay in the court in case decree-holder himself or his advocate is present in the court to receive the payment. Hon'ble Delhi High Court has held that presentation of receipt challan is sufficient compliance in itself⁹. Rule 1 to order XXI CPC directs three modes of payment i.e. by deposit in the court or through bank or to the decree-holder where payment is made by reducing in writing or otherwise as the court directs¹⁰. Besides, Rule 2 to Order XXI of code, 1908 provides that in case payment to decree-holder is made outside the court or decree is otherwise satisfied in whole or in part then decree-holder shall satisfy such payment or such satisfaction or adjustment to the court whose duty is to execute the decree and the court shall record the same accordingly. It is further provided under the Order XXI Rule 2 (2-A) (3) of the code that no such satisfaction is to be recorded at the instance of judgment-debtor unless payment is made as per Rule 1 to order XXI CPC or decree-holder has admitted such payment. The object of this rule is to ensure that the court executing the decree shall not be bothered with any dispute between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded.¹¹

⁷ Sir John woodrffe and Ameer Ali, "Law on execution of decree and orders", 4th edition, Delhi law house,2016,p. 524

⁸ Ibid

⁹ AIR 1973 Delhi 58, p.62.

¹⁰ Sir John woodrffe and Ameer Ali, "Law on execution of decree and orders", 4th edition, Delhi law house,2016,p. 524

¹¹ Order XXI rule 2 sub rule (2-A) and 3 of Code of Civil Procedure, 1908.

Problem arises when judgment-debtor refuses to pay the decreed amount.

To tackle such kind of situation, it is provided under Rule 30 to Order XXI CPC that money decree can be executed by following modes:

- Attachment and sale of property of judgment debtor or,
- Arrest and detention or,
- By both

If immediately on appearance judgment-debtor declines to make payment to the decree-holder. Then he has option to file the objections immediately on his appearance. After disposing off the objections, court proceed to take list of property of judgment-debtor from the decree-holder. On filing of list of property, its ownership is ascertained. After ascertaining ownership of judgment-debtor, warrant of sale is issued. Also, in case of a money decree the decree-holder can apply to the court to orally examine the judgment-debtor or officer or any other person, as to what means he has to satisfy the decree and also direct him to make an affidavit stating the particulars of his assets, if the debts have been unpaid for a period exceeding 30 days. In case of a decree for rent or mesne profits or any other matter which is to be determined subsequently, the property of the judgment-debtor can be attached before even ascertaining the amount as done in the case of ordinary money decrees.

In the time between the **attachment of property** and actual sale by the auction, Order XXI Rule 66 CPC provides for issuance of a proclamation. The purpose behind this provision is to afford an opportunity to the person who wants to raise objections against such sale¹². In other words it afford security for fairness of public sales. Sale includes four stages: 1. Notice 2. Munadi/ proclamation 3. Sale 4. Report. For due execution of sale it is essential that all the four stages are completed. In case any stage remain incomplete then whole process is again repeated from beginning till end. Besides, it is also necessary that it is necessary to make mention of place and hour of sale and failure to do so is an irregularity which will afford an opportunity to judgment-debtor to get sale set-aside on ground of material prejudice¹³. Hon'ble Apex Court has viewed that it is the duty of the executing court to see that requisites of Order XXI Rule 66 CPC are fulfilled¹⁴. However, in case, Judgment- debtor is having no property to be proceeded against, then court is left with no option except adopting the mode of arrest and detention in civil prison. Sometimes in order to coerce JD arrest and detention is adopted along with attachment of property¹⁵. Before ordering the arrest of the judgment- debtor, executing court gives an opportunity to him show cause why he should not be committed to civil prison for not paying decreed amount to the decree-holder. In case judgment pays the requisite amount then he will be released. The period of detention not to exceed six weeks when decreetal amount is between two thousand to five thousand and it should not exceed three months in any case where decreetal amount exceeds Rs. 5000/-¹⁶. This is the least used mode and used in exceptional circumstances, when executing court is left with no other option to execute the decree.¹⁷ However, it is pertinent to mention that

¹²Dr. T.P. Tripathi, "The Code of Civil Procedure", Allahabad Law Agency, Allahabad p. 641.

¹³Ibid. 643

¹⁴AIR 1987 SC 2081.

¹⁵Dr. T.P. Tripathi, "The Code of Civil Procedure", Allahabad Law Agency, Allahabad p. 211.

¹⁶Section 58 of Code of Civil Procedure, 1908.

¹⁷Y.P. Bhagat, "Law of Execution Proceedings", 1st edition, 2016, Lexis Nexis, Gurgaon, Haryana, p. 411. s

undergoing the civil imprisonment does not absolve the judgment-debtor to make payment to the decree-holder. It is merely a coercive means to achieve the ends of the decree.

Execution of Decree Passed as to Moveable Property

A decree qua movable property is passed in cases like cases which are falling under the Sales of Goods Act. A decree for any specific moveable property may be implemented by delivery of property i.e. physical handing of the possession of the specific movable property. The decree for delivery of property may be executed by granting possession of that property to the decree holder.¹⁸ As per Order XXI Rule 31 of Code of Civil Procedure, 1908, a decree for any specific movable property or for share in such property may be executed by

- seizure of such property and its delivery to decree –holder, or
- By detention of the judgment-debtor in civil prison; or

For execution by **seizure and delivery of property**, court after deciding upon objections, if filed any, straightaway proceed with the issuance of warrant of possession for seizure of such property qua which decree is passed. This Warrant of possession is executed by Baliff. For due execution of warrant of possession, it is essential that Baliff must be accompanied by the decree-holder for taking the possession in presence of respectable. On report of Baliff qua same, execution petition is disposed of being satisfied. Further, in decree for delivery of movable property, the mode of **arrest and detention is** least used and is coercive mode to achieve due execution of decree.

Execution of Decree Passed as to Immoveable Property

In execution involving decree for possession (joint or exclusive) decree may be executed by following by issuing warrant of possession and if necessary by removing any person bound by the decree, who refuses to vacate the property. Removal of such person, if needed can be done through police help. If the property involved is enclosed property or building then after affording opportunity to purdah nashin women to withdraw from the building, then court through his officer (Baliff),after giving reasonable warning can remove any lock, open any door by breaking, or any other act necessary for putting the decree holder in possession. Here it is important to mention that at the time of taking possession decree holder will bring sapurdar with him to whom any article if any of Judgment debtor lying in disputed premises can be handed over for safe custody till these are not taken by judgment debtor. Police help can be taken for said purpose in case there are chances of altercation being taken place on the spot. In case Baliff apprehends any such altercation, he will report the same to court. Court after taking statement of Baliff and Decree-holder and further fulfilment of other requisites, court will proceed towards seeking police help through District and Sessions Judge. Besides, where decree is for joint possession, then possession shall be delivered by affixing (chaspangi) of warrant of possession in some conspicuous place on property and making munadi/ proclamation (proclamation by beat of drum or some other customary way)

Execution in case of Eviction /Ejection Order in Rent Petitions

In execution petition for eviction of tenant from rented premises i.e. when immovable property is in possession of tenant (rent petition), enforcement is done by issuance of warrant of possession. By warrant of possession judgment debtor

¹⁸D.N Mathur, “The Code Of Civil Procedure,1908”, Central Law Publication, Allahabad,2009,pg 347

(tenant) is directed to deliver the possession to decree holder (landlord). Like the enforcement of decree for possession of immovable property, it is required that decree-holder must accompany the Baliff at the time of delivery of to give nishandehi (to help in finding the location of property). Decree holder will also bring along with him one sapurdar who is ready to take temporary custody of immovable property of any, if, lying in the disputed property. Report of Baliff as to due delivery of possession is sufficient to show satisfaction of the decree.

Execution for Possession of Immovable Property through Specific Performance

In cases of specific performance after deciding the objection, if any, the court will ask for draft sale deed (provided that decree holder has paid balanced sale consideration in the court) from the decree-holder. This should be in the terms of decree. Draft sale deed is kept for checking of the reader. Reader will report that if the draft sale deed is in terms of decree passed by the court. Finding the draft sale deed as per the decree, the court will call for sale deed on requisite stamp paper and will appoint court official as commissioner, who will visit the registrar office and will get sale deed executed through court on behalf of judgment debtor. Four dates are fixed. One is for notice, then for munadi, third is for getting the sale deed executed and fourth is for awaiting the report of commissioner. Once commissioner reports that sale deed is properly executed then execution petition stands disposed of fully satisfied.

Injunction

In injunction decree when there is breach of decree and interference is made then decree holder can move under order XXI Rule 32 CPC. Application filed under Order XXI Rule 32 CPC is basically contempt proceeding against the JD for violation of order of court is in the form of contempt petition. It is applicable in case of preventive as well as mandatory injunctions. Execution of an injunction decree is to be made in pursuance of Order XXI Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible.¹⁹ This petition if allowed can result in either arrest of contemnor or by attachment of his property or by both. A claim to enforce an injunction is normally brought before the court that allowed the injunction. Since injunctions are equitable remedies and the granting of equitable relief flows from the court's inherent jurisdiction. Non-compliance with an injunction is generally remedied by a contempt order.

Besides, injunction decrees, courts are also passing the interlocutory orders and contempt is also being filed for the disobedience of interlocutory orders. It may result in Stay of proceedings, dismissing the party's proceeding or striking out the party's defence or Making any other order that is just. Execution proceedings under order XXI of Code of Civil Procedure, does not apply to temporary injunction and relief for its disobedience is provided under order XXXIX rule 2-A of Civil Procedure Code. Such proceedings can take place only during the pendency of the suit and not after the passing of the final decree. However, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed finally and such disposal becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order XXI Rule 32 CPC and not by means of contempt proceedings

¹⁹Kanwar Singh Saini v. High Court of Delhi (2012) 4 SCC 307

Declaratory Judgments

Generally, judgments declaring rights are not entitled to enforcement, but can be entitled to recognition. Recognition can occur when an enforcing party wants to preclude litigation of a declaratory judgment that has been previously litigated. Then declaratory judgments are enforceable. Meaning thereby, where validity of already passed judgment is challenged. Declaratory judgment, which is a judicial statement clarifying, confirming or denying a legal right of the applicant, can be enforced either by:

- Operation of the declaration itself. : - In declaratory decrees. Declaration itself is enforcement of rights of parties. Like when declaration as to correction in name in some public document is sought, then declaring the “ name” itself is sufficient enforcement and does not require any separate execution proceedings as to its enforcement. This is so because right once declared by the court is final accept in appeal.
- Joining or appending consequential relief to the declaration:-Consequential relief sought with the declaration are enforceable. For e.g. If someone claims his right over the property along with possession. Though right in property is not needed to be enforced but right to possession can be enforced in the way as decree for possession. Thus consequential relief to declaration is enforceable and if relief of declaration is appended with the consequential relief then, consequential relief is to be enforced as per provisions of order XXI CPC.

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