

‘Stay on Execution: When & How’

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Decade is a normal time period if one is to ask a plaintiff of a civil suit more particularly he who wants to get the possession of his own property either from the encroacher or from the tenants or from licensee or from persons to who he (or his ancestors) had given the property gratuitously.

A lucky plaintiff gets a decree of possession in respect of an immovable property. What are his options now? He is having the possession not of the real house but of certain papers with court approval. He has to act further to get the real house. He will then have to approach the court with a petition for execution of a decree. But at the same time the person in occupation would also be acting to somehow save his interest and to deny the rightful relief to the original owner (plaintiff) of the property.

2. A genius defendant of a decree will approach the situation in multiple ways. Some of them may be enlisted as under:

- i. He may file and appeal against the judgment & decree and pray for stay therein.
- ii. He may choose to wait for some period and delay the matter and then file an appeal with an application for condonation.
- iii. He may really choose not to file any appeal at all and may rely upon the tactics of objection which can be filed in execution proceedings.
- iv. He may even choose to introduce a third person in the entire scenario who will create obstruction in recovery of possession and may file objection in execution proceedings.

- v. He may choose to avoid the bailiff in such available manners which are in abundance in the real field.
- vi. He may appear in the court passing the decree and may pray for stay on one or the other grounds.

3. The present paper is however a humble attempt to search for the answer of last of the enlisted tactical acts of a genius defendant. The situation is that a defendant of a decree (herein after called JD) comes before the court and files an application for stay on one or the other grounds and relies upon certain provisions of CPC. What needs to be considered in such a scenario is the real issue.

4. There are certain provisions in the CPC which may be normally invoked by a genius JD for praying stay. These provisions are mentioned as under:

Order-21 Rule-26: “When Court may stay execution-(1) the Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.”

Order-21 Rule-29: “Stay of execution pending suit between decree-holder and judgment-debtor- Where a suit is pending

in **any Court** against the holder of a decree of **such Court** or of a decree which is being executed by **such Court**, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided: Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing”.

Order-41 Rule-5(1): “Stay by Appellate Court- An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance”.

Order-41 Rule-5(2): “Stay by Court which passed the decree - Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the

decree may on sufficient cause being shown order the execution to be stayed”.

Order-41 Rule-5(3): “No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied- (a) that substantial loss may result to the party applying for stay of execution unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him”.

Section-151: “Saving of inherent powers of Court— Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

5. We may deal with all of the above provisions one by one. **First**, we may consider **Order 21 Rule 26 CPC**. It appears that this Rule contemplates four courts. First, the court to which decree has been sent for execution, **Second**, the court which passed the decree, **Third**, the appellate court having jurisdiction over the decree and fourth the appellate court having jurisdiction over the execution. The reasonable time concept mentioned in the provision relates to the first court and not to the other courts. The provision only says that the said first court shall grant a stay of execution for reasonable time if sufficient cause is shown and the purpose for giving this reasonable time is that in such reasonable time a judgment debtor (JD) may obtain an order from either of rest of the three courts as the case may be.

6. The first mentioned court in the **Order 21 Rule 26 CPC** is clearly a court to

which decree was sent for execution. The present court is the decretal court and, therefore, it cannot be accepted that this court would fall within the ambit of the first court envisaged by the aforesaid provision. Concept of “sent” has been envisaged by **Section 38 CPC** and has been given effect to through **Section 39 CPC** along with **Order 21 Rule 5 CPC**. This clearly shows that there is difference between a court to which the decree has been sent for execution and a court which has passed the decree. Therefore, it is clear that the grant of reasonable time envisaged by Order 21 Rule 26 CPC applies only to the court to which the decree was sent for execution and not to the decretal court itself. One would therefore clearly say that if any JD places on this provision, the same would not be of any help.

7. The provision of **Order-21 Rule-26 CPC** does not indicate towards the powers of the rest of the three courts to grant stay. The power of appellate court to grant stay is available in Order 41 Rule 5(1) CPC and the power of decretal court to grant stay is available in **Order 41 Rule 5(2) CPC**.

8. **We may now deal with the power of decretal court to grant stay.** Order 41 Rule-5(2) provides that even a decretal court can grant stay. However, the per-condition is that the stay application must be preferred before the expiry of time to file appeal. This situation comes to an end not only when the time for appeal actually expires but also when an appeal is preferred. As such, in both the situations, a decretal court cannot grant stay if appeal has already been preferred or the time has expired. Such courts have very limited scope to grant stay.

Further, sufficient cause has to be shown for getting a stay. What may be the sufficient cause? Like, JD has filed an application for review of the judgment, JD has filed an application for setting aside Ex-parte decree or that JD due to his poor financial condition is unable to file immediate appeal but decree holder is pressing for immediate execution. These are illustrative only. It may also be noted that in terms of Rule-5(3), the necessary requirements thereof will also have to be satisfied before granting any

stay. Be that as it may, once an appeal is preferred or time for appeal expires, the decretal court would have no power to grant any stay.

9. We may now deal with the appellate court power to grant stay. Order 41 Rule-5(1) empowers an appellate court to grant stay on execution. For sufficient cause, an appellate court may grant stay. It may also be noted that in terms of Rule-5(3), the necessary requirements thereof will also have to be satisfied before granting any stay.

10. What is however interesting from the point of view of the decretal court is the fact that filing of appeal or pendency of appeal itself cannot be a ground to urge that the execution proceedings be stayed as Rule-5(1) specifically provides to the contrary.

11. Now, we may deal with the provision available in **Order-21 Rule-29 CPC**. It has several requirements. There must be a suit pending between JD and DH. The suit must be filed by the JD against the DH. Such suit must be pending either in the decretal court or in the court which is executing the decree. In such situation, the court may grant stay. It would be futile to argue that any kind of suit will serve the purpose. It is clear from the time for which stay can be granted. In terms of the provision, the stay can be granted until the pending suit is decided and therefore, it clearly indicates that the result of the suit would affect the execution proceeding itself.

So, it can be said that the prayer for stay and pendency of suit must have a correlation. Otherwise, requirement of the provision will not satisfy. Language of the provision also suggests that if decree is sent to another court for execution and suit is pending in the decretal court, then such decretal court cannot grant stay under this provision. Use of expression “any court” at one place and “such court” at two places are clear indication to this proposition. Clearly, this provision provides a very limited scope for stay.

12. Lastly, we may deal with the Section-151 CPC. It authorizes the court to pass

orders to meet the ends of justice or to prevent abuse of the process of law. As has been settled, this provision has no applicability at all where express provisions are provided in the CPC for doing an act. We have seen that there are several provisions which provide for stay. Therefore, Section-151 will have no applicability in the present situation.

13. Genius defendants need to be tackled with firm hands and therefore, clear understanding of law by the litigating lawyers and appreciative judges is necessary. We will discuss in some other paper the other tactical approaches as enlisted in initial paragraph.
