

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Ex. No.25 of 2014

Date	Order with signature of Judge
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Presented: **Mr. Justice Salahuddin Panhwar.**

For orders on CMA No. 77 of 2016.

23.02. 2016

Mr. Ahmed Ali Hussain, Advocate for J/D.

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1. Urgency granted.

Through instant application CMA No.72 of 2016, applicant/JD seeks stay of execution while referring Order 21 Rule 26 CPC, enabling him to file petition before apex Court. The proviso *supra* is as under:

"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 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.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may pending the result of the application."

The term '*to which decree is sent for execution*' should not be confused with the term '*Court which passed a decree*' which per Section 37 of Civil Procedure Code, 1908 includes:-

(a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the first instance, and

(b) Where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

There needs no much debate to the legal position that an '*executing Court*' cannot go beyond the decree nor can question the *legality & validity of a legal decree* till satisfaction thereof if not *otherwise* barred by law itself.

Since, I am conscious of the legal position that a *decree holder* may apply to the Court (passing a decree) for sending it for *execution* to another Court even at *any time* if conditions, provided by Section 39 of Civil Procedure Code, 1908 Code *to satisfaction of Court*, are available thereof. An ex-parte decree is also equally enforceable. The object and purpose of Order XXI Rule 26(1) is meant nothing but to provide an opportunity (*enable him*) to apply the Court (Section 37) for :

i) stay execution, or for any 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;

This proviso is applicable in those cases where a decree is sent to another Court for *execution and order, even if passed*, shall only mean to apply to the Court (Section 37) for an order of stay of execution or for any other order relating to the **decree or execution**. Such object and purpose of Order XXI r 26 CPC shall stand clear from the Order XXI rule 28 CPC which is:

'28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.'

Now, I can conclude that the proviso of Order XXI Rule 26 of the Code shall have application only:

- i) *before the Court, other than the one, defined by Section 37 of the Code;*
- ii) *the order, if any, of stay of execution shall only mean to enable judgment debtor to approach the Court, defined by Section 37 of the Code;*
- iii) *the order, if any, shall not stand independently but application / efficacy thereof shall come to end the moment **judgment debtor** applies to the Court (Section 37) for stay of execution e.t.;*

It shall have no application :

- i) *before the Court, which passed the decree (Section 37 of the Code);*
- ii) *where **judgment debtor** has availed remedy of appeal or stay of execution before the Court, defined by Section 37 of the Code;*

Now, let's put the instant request on said touchstone (understanding). Admittedly, this Court has not received this execution by way of transfer from any other competent court but is a Court which passed the decree (Section 37 of the Code). Instant execution is emanating from Suit No. 365 of 1994, which was decreed by this Court, thereafter, applicant preferred appeal, same has been declined, hence, the request for stay of execution for enabling the applicant to file petition is misconceived and is not falling within the scope and objective of Order XXI r 26 CPC. Applicant was competent to file application before the appellate court for suspension of order referred provision is not applicable in the instant proceedings. Accordingly instant application is dismissed.

JUDGE