
(1998) 05 AHC CK 0108
In the Allahabad High Court
Case No : C.M.W.P. No. 18461 of 1998

Gendan Lal

APPELLANT

Vs

District and Sessions Judge, Kanpur Dehat and others

RESPONDENT

Date of Decision : 22-05-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 2, Order 41 Rule 5, Order 41 Rule 5, Order 41 Rule 5(1)

Citation : (1998) 3 AWC 2051

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : K.K. Tripathi, for the Appellant;

Final Decision : Disposed Of

Judgement

D.K. Seth, J.—The defendant-petitioner had preferred a second appeal against the decree for realisation of certain sums passed in Original Suit No. 150 of 1979, which was affirmed in first appeal. In the second appeal his application for stay of execution is pending. In the meantime the decree holder has put the decree for execution in Execution Case No. 6 of 1996. In the said execution proceeding the petitioner had applied for stay of the execution on the ground of pendency of appeal. The said application had been dismissed by order dated 19.12.1997. Against the said order he had preferred a revision being Revision No. Nit of 1998, which was also dismissed by order dated 22.4.1998. It is also submitted that he has filed another stay application which was also dismissed on 5th May, 1998. Sri K.K. Tripathi, learned counsel for the petitioner assails these orders in the present writ petition.

2. After having heard Sri K.K. Tripathi, learned counsel for the petitioner I find that the contention of Sri Tripathi cannot be sustained. Order XLI, Rule 5 of the Code prescribes for obtaining stay, when the appeal is preferred. Rule 5 of the Code specifically provides that mere filing of appeal would not operate as stay. Therefore, specific order of stay is to be obtained from the appeal court. It is the

discretion of the Court passing decree to grant stay. But after the decree is put into execution, the Court that had passed decree, cannot grant stay.

3. The jurisdiction of the Court , that had passed the decree, to grant stay is limited to the extent as circumscribed under Order XLI. Rule 5, sub-rule (2) of the Code of Civil Procedure. It can exercise such jurisdiction only when applied to it before the expiry of the period of limitation for preferring an appeal. Once the period of limitation for preferring appeal is expired the Court, that had passed the decree, ceases to have jurisdiction to grant stay. This is explicit from sub-rule (2) which runs as follows :

"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."

4. The above view finds support in the case of Ishan Chander v. Ashanoollah ILR 1984 Cal. 817 and Amir Hassan v. Ahmad Ali ILR 1987 All 36.

5. From the scheme of the provisions as available in Order XLI, Rules 5 and 6 relating to stay it appears that it is only appellate court which can pass an order of stay as soon an appeal is filed, since it is the appellate court which is seized of the matter.

6. This view is supported by the decision in the case of Purshottam v. Hargu AIR 1921 All 342 : ILR 1921 All 198.

7. Normally the Court that passes the decree, is the executing court. If the Court passing the decree is deprived of its jurisdiction to grant stay of execution, it cannot assume same jurisdiction while executing the decree. It would then be subversion of Order XLI, Rule 5, sub-rule (2) of the Code of Civil Procedure.

8. The executing court cannot pass stay simply on the ground that appeal is pending unless stay order is granted in the appeal. Sri Tripathi, has not been able to draw my attention to any of the provisions, which empowers the Court to grant stay simply on the ground of pendency of appeal on the face of Order XLI, Rule 5, sub-rule (1) of the Code which specifically provides that filing of appeal would not operate as stay.

9. My above view is supported by the Scheme of the procedure laid down for grant of stay when an appeal is about to be filed or has been filed as provided in Order XLI, Rules 5 and 6 respectively. Rule 5 empowers the Court, that passed the decree, before the expiry of limitation, and the appeal court, after an appeal is preferred, to grant stay. But it had omitted to refer to the executing court and to empower it with any such jurisdiction. The omission is deliberate and willful. The legislature had never intended the executing court to grant stay on account of pendency of the appeal. When the statute provides specific provision referring to the Court passing the decree and the appeal court omitting to refer to executing court which will execute the decree and empower it with such

jurisdiction and conferring such jurisdiction to the Court passing the decree and the appeal court specifically, while drawing a dividing line between the two by creating two different fields in two different contingency, interpreting the said rule a consistent meaning having regard to the intent of the legislation is to be given.

10. This view also finds support in Rule 6, sub-rule (2), Order XLI of the Code of Civil Procedure. Inasmuch as Rule 6 provides for two contingencies. Sub-rule (1) allows the Court , that passed the decree, to restore the property, when execution is ordered, upon security being taken, on sufficient cause shown, when the property may be or has been taken in execution. This power has also been made available to the Court that had passed the decree, on the direction of the appellate court. The appellate court also on like cause may direct the Court passing the decree to take such security.

11. Sub-rule (2) of Rule 6, Order XLI provides that the executing court can also grant stay. But such power is circumscribed within the ambit of sub-rule (2) which limits the power within the compass prescribed. It can grant stay of execution only when the following conditions are fulfilled. It can do so (i) when an order for sale of immovable property is made in execution of the decree pending an appeal (ii) and, an application by the judgment debtor is made to the executing court and (iii) that too on terms as to giving security or otherwise as the Court thinks fit.

12. Thus sub-rule (1) of Rule 6, Order XLI restricts the power of the Court that passed the decree only in respect of restitution of the property that may be or has taken in execution. It does not conceive of any other situation. Similarly sub rule (2) of Rule 6. Order XLI restricts the power of the executing court only in respect of an order made for sale of immovable property in execution pending appeal.

13. It is apparent that the legislature when dealing with the question of conferring jurisdiction with regard to stay pending appeal omitted executing court in Rule 5 and restricted the compass Rule 6. Thus legislature had intended to confer jurisdiction to stay pending appeal on the executing court only to the extent mentioned in Rule 6 and not otherwise.

14. The power given under Rule 6 (2) to the executing court is a power that can be executed independent of the appeal court and is not subjected to the power of the appellate court under Rule 5 (1). Therefore even if the appeal court declined stay of execution, the executing court is free to exercise its power under Rule 6 (2) within the restricted sphere specified therein. Such a view was taken by this Court in *Firm Shri Veer Glass Works Vs. Firm Sonpal Vidya Charan Glass Bangles Merchant and Others*, .

15. Thus the scheme of Order XLI, Rules 1 and 2 clearly indicates the scope of grant of stay of execution after the decree is passed. It has not left any discretion to the executing court. The discretion has been left for a limited period

to the Court passing the decree and to the appeal court and that too on conditions etc. as specified therein. Inasmuch as Order XLI, Rule 5 prescribes that:

"An appeal shall not operate as a stay for proceeding under a decree or order appealed from except so far as the appellate court may nor shall execution of a decree be stayed by reason only an appeal having been preferred from the decree : but the appellate court may for sufficient cause order stay of execution of such decree."

16. Therefore. I am unable to accept the contention of Sri Tripathi and to interfere with the said order. It is open to the client of Sri Tripathi to apply and obtain appropriate order in the appeal pending, on the application for stay, which is said to be pending.

17. Learned counsel for the petitioner then submits that he has already filed an application or objection u/s 47. C.P.C. in the execution proceeding. The said application is still pending and has not been decided. In prayer (b) it has been prayed that the said objection should be decided before executing the decree. Such prayer appears to be very modest. In that view of the matter learned executing court is expected to decide and dispose of the said application or objection u/s 47. C.P.C. of pending, as early as possible preferably within a period of three months. The application is thus disposed of. There will, however, be no order as to costs.

18. Let a copy of this order be given to the learned counsel for the parties on payment of usual charges within a week.