

(1973) 09 MAD CK 0008

In the Madras High Court

Case No : C.M.P. 8236 of 1973 in C.M.P. 719 of 1972 in Appeal S.R. 81649 of 1970

Gouse Bi

APPELLANT

Vs

Salima Bi

RESPONDENT

Date of Decision : 07-09-1973

Acts Referred:

Limitation Act, 1908 — Article 182, 5

Citation : AIR 1974 Mad 220 : (1973) ILR (Mad) 83 : (1978) 87 LW 171

Hon'ble Judges : Venkataraman, J;Maharajan, J

Bench : Division Bench

Judgement

Venkataraman, J.—The petitioner herein, Gouse Bi, was the 1st defendant in O. S. 703 of 1964 on the file of the City Civil Court, Madras.

It was a suit for partition. A decree was passed on 8-9-1969, overruling a contention of hers that some property belonged to her absolutely as

Mahar. She filed a memorandum of appeal to this court, but, since, it was out of time, she filed a petition, CMP No. 719 of 1972, u/s 5 of the

Limitation Act, to excuse the delay in filing the appeal. Pending disposal of CMP No. 719 of 1972, she has filed CMP No. 8236 of 1973 for stay

of further proceedings in O. S. 703 of 1964 on the file of the City Civil Court, Madras.

2. So far as we are aware, till recently, the uniform practice of this court has been to grant interim stay, if the court felt that it would be expedient to

grant stay, and notice would be ordered of the interim stay along with the notice in the application u/s 5 of the Limitation Act. But in a recent

decision in C. M. P. No. 6420 of 1973, Paul, J., has decided that till the delay is excused u/s 5 of the Limitation Act, the court cannot be said to

cannot pass any interlocutory orders. The office therefore returned the petition C. M. P. 8236 of 1973, drawing the attention of the petitioner to

the said decision of Paul, J., and asking her how in view of that decision the present petition is maintainable. The point has been argued before us

by the petitioner's learned Counsel Mr. Hariharan. He contends that the decision of Paul, J., is wrong and that this court has jurisdiction to grant

stay if it thinks fit to do so on merits.

3. As we observed, so far as we are aware, it had been the uniform practice of this court, till the decision of Paul, J., to grant interim stay, if the

court thought fit to do so. However, since Paul, J., has decided otherwise, it is necessary to go into the matter fully.

Paul, J., has relied on the decision of the Travancore High Court in Ramayyan v. Ashtamoorthi Namboodri, 1962 KLT 500 = 1962 KLJ 681,

which is cited in Mulla's C.P. Code, under Order XLI, Rule 1, as authority for the following commentary--

It has been held that when an appeal is presented out of time and a petition is filed for excusing the delay, no interlocutory orders can be passed

until the petition is order and the appeal taken on life"".

Paul, J., was not able to get at the decision. We have, however been able to get the decision. It is decision of T. C. Ragavan, J., in that case, the

suit of the plaintiff was dismissed for default. An application for restoration was dismissed. The plaintiff filed a civil miscellaneous appeal against that

and he also filed a regular appeal against the dismissal of the suit. Along with the regular appeal he filed an application to excuse the delay in filing

the appeal, and he also filed an application for injunction. The District Judge granted the injunction. The District Judge granted the injunction. The

defendant appealed to the High Court. The learned Judge set aside the decision of the District Judge, pointing out that the District Judge had

overlooked the provisions of sub-rule (3) of Order XLI, Rule 1, which was in force in Travancore from June 1959. That provision had been

inserted in Madras even in 1921 vide Fort St. George Gazette, dated 15-2-1921, Part II, page 362. It is necessary to quote it in full--

When an appeal is presented after the period of limitation prescribed therefore, it shall be accompanied by a petition supported by affidavit setting

forth the facts on which the appellant relies to satisfy the court that he had

sufficient cause for not preferring the appeal within such period, and the court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under Rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reason for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the court acting under the provisions of Section 5 of Act IX of 1908 have been heard. T. C. Raghavan, J., says that, if the court does not dismiss the appeal under Order XLI, Rule 11, or on the ground that there is no ground for excusing the delay, it cannot deal with the appeal in any manner till after notice has been given to the respondent of the application u/s 5 of the Limitation Act and his objections thereon have been heard. On such reasoning Raghavan, J., has held that the court has no power to issue any interlocutory order till the petition u/s 5 of the Limitation Act is allowed. He has sought support for this view from the decision of Madhavan Nair, J., in Byya Reddi Vs. T.S. Gopala Rao, . In that case, the plaintiff obtained a decree in the court of the District Munsif in 1923. It was confirmed in appeal by the District Court on 20-4-1925. The judgment-debtor preferred an appeal to the High Court, out of time. His application to excuse the delay was dismissed on 5-3-1926. On that day the second appeal sought to be preferred was also dismissed in consequence. The decree-holder then filed an execution petition on 6-9-1928. The judgment-debtor contended that the execution petition was out of time. The relevant statutory provision was Article 182 of the First schedule to the Limitation Act, 1908, which provided a period of three years as follows--

Period of Limitation Time from which period begins to run

Three years 1. The date of the decree or order, or

2. (where there has been an appeal) the date of the final decree or order of the appellate Court or the withdrawal of the appeal.

The contention of the judgment-debtor was that the appeal which was relevant was the appeal to the District Court, that the decree holder had to file the execution petition within three years from 20-4-1925 and that consequently the execution petition was out of time. The decree-holder, however, contended that he was entitled to take as the starting point 5-3-1926. The question therefore before the learned Judge was whether there had been an appeal to the High Court. The learned Judge answered it in

the negative. His main reason was that, whatever might have been

the position before sub-rule (3) was added as a result of the decision of the Privy Council in *Krishnasami Pani Kondar v. Ramaswami Chettiar*,

ILR (1917) Mad 412 = AIR 1917 PC 179 the position after the rule was enacted was clear that there could not be said to be any appeal at all till

the delay in filing the appeal was excused.

4. In the case before the Privy Council, which went up from this Court, a single judge of this court had, in accordance with the existing practice,

excused the delay *ex parte*. Notice went thereafter of the appeal and at the hearing of the appeal was out of time. This Court held that the appeal

was out of time and dismissed the appeal. Their Lordships of the Privy Council observed:--

The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances, their Lordships hold that the Division Bench

had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But, while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to needless

expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the court comes to decide

on the question of delay. Their Lordships therefore desire to impress on the courts in India the urgent expediency of adopting in place of this

practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation

affecting the competence of the appeal.

It was as a result of the above decision that sub-rule (3) was introduced in Madras, and a similar rule was introduced in Kerala in 1959,

Madhavan Nair, J., took the view that in view of sub-rule (3) the appeal could not be admitted without the delay being excused and that, if the

appeal was not admitted, there could be said to be no appeal within the meaning of Article 182 (2) of the Limitation Act, 1908.

5. Before proceeding further, it is necessary to quote Order XLI Rule 5:

5(1) 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 and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of such final decree, if already made.

(2) Where an application is made for stay of execution of an appellate 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.

(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.

(4) Notwithstanding anything contained in sub-rule (3), the court may make an ex parte order for stay of execution pending the hearing of the application"".

6. Now taken Order XLI, Rule 5 by itself, it is prima facie clear that the appellate court may order stay of execution of the decree sought to be

appealed from and may make an ex parte order of stay. There is no doubt that this is the appellate court in this case. Two questions therefore

arise: (i) Whether it can be said that there has been no appeal at all, according to the view of Madhavan Nair J. and Paul, J., till the application for

excusing the delay u/s 5 of the Limitation Act is allowed: and (ii) even if there could be said to be an appeal the moment a memorandum of appeal

is filed irrespective of the fact that the appeal has been filed out of time, does order XLI, Rule 1(3) preclude the appellate court from making an ex

parte order of stay of execution of the decree sought to be appealed from. to put it differently, can it be said that, in making an ex parte order of

stay, the appellate court is dealing with the appeal in any way otherwise than by dismissing it under Order XLI, Rule 11 or on the ground that it is

not satisfied as to the sufficiency of the reason for extending the period of limitation.

7. On the first question, it is relevant to note that Order XLI, Rule 1(1) starts by saying "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader", and sub-rule (3) itself opens by saying, ""When an appeal is presented after the period of limitation prescribed therefor"". These provisions thus make it clear that, merely because a memorandum of appeal is presented after the period of limitation prescribed therefore, it does not cease to be an appeal. In fact, sub-rule (3) itself recognises that it is an appeal, because it is on this footing it says ""and the court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it)"". Thus it is clear from the provisions of Order XLI, Rule 1 itself that the moment a memorandum of appeal has been presented, though out of time, there is an appeal. This position has also been made clear by the decision of the Privy Council in AIR 1932 165 (Privy Council) . In that case, there was a mortgage suit in which the learned Subordinate Judge delivered judgment on 24-6-1920. The decree was drawn up on 2-8-1920, but properly dated as 24th June. On 27th August, 1920, the decree-holder, Madan Mohan, presented an application to the High Court purporting to be an appeal from the "order" of the Subordinate Judge of 24th June, 1920, and alleging, what was clearly untrue, that on decree had been drawn up. The appeal, though irregular in form as not being an appeal against the decree of the Subordinate Judge and being insufficiently stamped for that purpose, was admitted and heard in due course by the Bench. The appeal was eventually dismissed on the ground of irregularity and upon merits. The dismissal was embodied in a decree of the High Court dated 24-8-1922. An execution petition was presented by the parties entitled under the decree for execution sale of the mortgaged properties. it was opposed by some of the judgment-debtors on the ground of limitation. The question was whether there was an appeal to the high Court, within the meaning of Article 182 of the Limitation Act. The Subordinate Judge held that the petition was not time-barred. But the High Court took the opposite view and gave three reasons, the first of which was that "Madan Mohan"s application of 27-8-1920 was by reason of its irregularity, not an appeal at all. Their Lordship of the Privy Council, differing from the High Court, held--

In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the C.P. Code, but their Lordships

have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of a Subordinate Court is an appeal

within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it".

8. In the same way, in our opinion, particularly having regard to the wording of Order XLI, Rule 1, as pointed out already there is an appeal to this

court, even though it has not been presented in time and it might even turn out eventually that the application for excusing the delay is not allowed.

Madhavan Nair, J., expressed the view that the decision of the Privy Council did not apply to the facts of the case before him. With respect, we differ.

9. Now we come to the second question, whether Order XLI, Rule 1(3) forbids us to pass an ex parte order of stay. In answering the question we

must remember at the outset how in some cases the very purpose of the appeal may be frustrated and injustice may result if such an ex parte order

is not passed. Quite often, particularly, in these days, when it is difficult to get accommodation in trains or even in buses and there is even strike in

the railways and bus transports, a party may not be able to come to Madras and file an appeal in time and the chances are that the application for

excusing the delay would be allowed. But, in the meantime, if the appellant's house is pulled down as a result of the lower court's decree,

irreparable harm would be caused to him and it would be no consolation to him to be told that he would be given restitution in money, if his appeal

is eventually allowed. It is easy to imagine other such instances of substantial loss within the meaning of Order XLI, Rule 5 irreparable harm to the

appellant. Yet, on the reasoning of Paul, J., the court would be powerless to pass any order and prevent such substantial loss or irreparable harm.

It is no use saying that hard cases make bad law, because such instances of substantial loss or irreparable harm are quite common and likely to

happen often if the decree is not stayed. Further, that maxim would have application only if the law is unequivocal, but where, as in this case, Order

XLI, Rule 5 enables the court to pass an ex parte order of stay, and the interests

of justice do require it, we should not construe Order XLI, Rule

1(3) so as to make the provisions of Order XLI, Rule (5) a dead letter, and so as to result in injustice. It is possible to give an interpretation which

would reconcile both Order XLI, Rule 1(3) and Order XLI, Rule 5, namely, that when the court passes an ex parte order of stay, it does not deal

with the appeal in any manner, but is merely maintaining the status quo. It must be remembered that the reason for the introduction of Order XLI,

Rule 1(3) was the decision of the Privy Council in ILR (1917) Mad 412 = AIR 1917 PC 179, which again shows that the reason why their

Lordships suggested that the question of excusing the delay should be disposed of first was only to prevent needless expenditure of printing

records or typing voluminous records and engaging counsel paying heavy fees, which would be unnecessary if the delay were not to be excused.

This being the object underlying the introduction of the rule, we need not extend it so as to throttle the exercise of the power of the appellate court

under Order XLI rule 5.

10. We are finally of the opinion that Order XLI rule 5 itself enables us to pass an ex parte order of stay; but if necessary, we are prepared to say

that we can exercise the power of stay by virtue of our inherent powers u/s 151 C.P.C. The principle in these cases has been enunciated in several

cases, and it is sufficient to refer to some of them. In Nandakishore Singh v. Ramgolam Sahu, ILR (1913) Cal 955, it was held by that eminent

Judge, Mookerjee J. that the High Court, in exercise of its inherent powers, could make an order of stay of proceedings in execution of its decree

in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council, though the case

was not expressly covered by the rules. The learned Judge pointed out that, if the proposed application for special leave was granted by the

Judicial Committee, the High Court would be competent to stay the proceedings under the authority of the decision of the Privy Council. He

proceeded to observe--

The Court, therefore, ought now to act in aid of possible order of stay that may hereafter have to be made. if the contrary view is taken, what is

the result? Assume that the present application for stay is refused, and the decree-holder permitted to sell the mortgaged properties; the application

for special leave is granted by the Judicial Committee and an application then made to this court by the judgment-debtors for stay of proceedings.

Are we to say that our action has already been paralysed, that we are powerless to grant relief and that the application is infructuous? I am strongly

of opinion, after most anxious consideration of the subject, that the court should not tolerate such a result, and, as I have shown, the position may

be avoided by the recognition of sound judicial principles..... It is fairly obvious that, if the contention of the decree-holders were to prevail, the

gravest injustice might be done to litigants. An application to the Judicial Committee for special leave to appeal to His Majesty in Council must

necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of the utmost expedition, in the preparation and

transmission of papers..... if meanwhile his properties are allowed to be sold up by the decree-holders on the theory that this court is powerless to

interfere, not only may an application for stay after the grant of the special leave, as contemplated by the Judicial Committee in *Nityamoni Dasi v.*

Madhusudan Sen, ILR (1911) Cal 335, become infructuous, but the appeal admitted by special leave of their Lordships of the Judicial Committee

may turn out to be wholly illusory and ineffectual. It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree

or weakens its effect; the stay is granted on the principle that the parties should, if the circumstances justify the adoption of such a course, be

retained in status quo till the validity of the decree has been tested in the court of ultimate appeal. The exercise of the inherent power of the court

should thus be widened to aid the administration of justice and not unduly restricted so as to cause needless hardship to litigants and a possible

failure of justice".

Holmwood, J., was not prepared to differ on the general principles, though he stated that in that particular case the use of the inherent power

would be an abuse of the process of the court.

11. As applied to the present case, the observations might be translated thus. If this court were to excuse the delay then it would become clothed

with power to stay execution, if necessary on suitable terms. The grant of stay at this stage is only in aid of a possible order of stay that may

hereafter have to be made. Another aspect is that, if such an order is not made,

irreparable harm might be caused to the appellant.

12. The same principle was reiterated by another Bench of the Calcutta High Court in Ramendra Narayan Roy and Another Vs. Smt. Bibhabati

Debi and Others, .

13. There is also a decision of Kuppaswami Ayyar, J., in Beeram Ankulu Reddi Vs. Beeram Chinna Ankulu Reddi, , that the power of stay can be

exercised u/s 151, irrespective of Order XLI, Rule 5. There was an ex parte preliminary decree on a mortgage suit. The defendant's application

under Order IX, Rule 13 to set aside the ex parte decree was dismissed. He filed an appeal against that order, and an application for interim stay

of the passing of the final decree. Order XLI, rule 5 did not in terms apply, but the learned Judge held that he could exercise the powers u/s 151,

Civil Procedure Code. We need hardly make it clear that by the exercise of such inherent powers u/s 151, CPC we are not in any way dealing

with the appeal itself and are not thereof contravening in any way the specific provisions of Order XLI, Rule 1(3), Civil Procedure Code.

14. We therefore hold that we have jurisdiction to grant an ex parte order of stay under Order XLI, Rule 5, and, if necessary, u/s 151 of the Civil

Procedure Code.

15. Petition allowed.