

(1944) 10 AHC CK 0006

In the Allahabad High Court

Case No : Execution of Decree Appeal No. 32 of 1943

Jitendra Mohan Singh

APPELLANT

Vs

Thakurain Bindbasni Kunwar

RESPONDENT

Date of Decision : 02-10-1944

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5(2), 151

Citation : (1944) 10 AHC CK 0006

Hon'ble Judges : Madeley, J;Bennett, J

Bench : Division Bench

Advocate : Faiyaz Ali, for the Appellant; H.H. Zaidi, Siraj Husain and Ali Zaheer, for the Respondent

Final Decision : Dismissed

Judgement

Bennett and Madeley, JJ.—This is an appeal against an order u/s 47 Code of Civil Procedure

2. The facts of the case are that Babu Narendra Bahadur Singh, the husband of the decree-holder was the owner of the immoveable in question as Taluqdar of Hanswar estate. On his death on the 4th February, 1936, there were three claimants to his estate which included much other property besides the property now in dispute. The decree holder claimed the entire property as his widow. The Defendant judgment-debtor, who is the nephew of the deceased, claimed to be his sole heir under the Oudh Estates Act. Deceased brother claimed the property on the ground that he and the deceased were members of an undivided Hindu family. He also set up a custom. All the three claimants made separate applications for mutation. During the pendency of these proceedings the decree-holder and the judgment-debtor entered into a family settlement by way of compromise. The decree-holder admitted that the judgment debtor was the sole owner of the estate and the judgment-debtor agreed to pay to the decree-holder Rs. 12,000 per annum during her life-time. She was not to receive this in cash, but the judgment-debtor promised to put her into possession of the property in

question in these proceedings as yielding profits amounting to Rs. 12,000 per annum. The decree-holder thereupon applied for mutation but this was opposed by the judgment-debtor and the application was dismissed. Thereupon she filed a civil suit for possession. The suit was contested by the judgment-debtor. On the 5th November, 1941, she obtained a decree for possession. On this date the judgment-debtor made an application for stay of execution. This was ordered to be put up on the 6th, and on that date it was ordered that the question of stay should not be decided until an application for execution was made. On the 10th November, 1941, the decree holder made an application for execution, and on the same date the application of the judgment debtor for stay was dismissed on the merits under Order 41, Rule 5(2), CPC. On the 11th November, 1941, the judgment-debtor made an application that he had filed an appeal in the Chief Court on the 10th November, 1941, with an application for stay, but as the memorandum of appeal was not accompanied by a copy of the decree, (the copy not yet being ready) he had been ordered to file a copy of the decree before any action was taken on the application for stay. This application was allowed and the judgment-debtor was given time till the 18th November, 1941, to secure the order of stay, and as the decree holder stated that the warrants for "dakhaldhani" had already been taken by the Nazir for execution, it was ordered that the warrants, if they had not already been executed, or such of them as had not already been executed, should not be executed until further orders of the Court. On the 14th November, 1941, the Nazir returned all the warrants after execution with reports on them that they had been executed.

3. On the 18th November, 1941, the Counsel for the judgment debtor brought an order dated the 17th November, 1941, from the Chief Court staying proceedings pending further orders. On the same date another subsequent order dated the 17th November, 1941, was brought from the Chief Court to the effect that if possession had already been given, the stay order already issued would naturally be inoperative and it would merely stay future proceedings. On the 18th November, 1944, Counsel for the judgment-debtor made an application u/s 47/151, Code of Civil Procedure, that the "dakhaldhani", if any, was illegal and ineffectual and it should therefore be proclaimed on the spot that the "dakhaldhani" is void, as proceedings had been stayed by the Chief Court. Then on the 21st November, 1941, the order of the Chief Court dated the 20th November, 1941, reached the Additional Civil Judge calling for a report on the facts of the "dakhaldhani". Evidence was taken, and in the report the gist of this evidence is given, but there is no finding about the actual delivery of possession. This report is dated the 10th January, 1942. This Chief Court therefore left the matter over for decision by the Additional Civil Judge of the application filed by the judgment-debtor on the 18th November, 1941, u/s 47/151, Code of Civil Procedure

4. The learned Civil Judge, who heard this application, states that it is agreed between the parties that the order of the Additional Civil Judge dated the, 11th November, 1941, was passed at 4-15 p.m. On that date delivery of possession

over seven villages was given. It appears from arguments before us to be certain that delivery of possession over five of these was given before the order was passed. The other two are doubtful. Delivery of possession over the other 46 villages was given on the next day, that is, the 12th November.

5. In the morning of the 12th November, 1941, the judgment-debtor's men approached the Nazir with an application, saying that an order of stay had been passed but the Nazir refused to stop the proceedings as he was not shown a certified copy of the order. The judgment-debtor's Counsel relied on *Ramanathan Chetty v. Arunachellam Chetty* (1915) 38 Mad. 702 and *Raj Bahadur Singh v. Pirthipal Singh* 1941 O.A. 742 : O.W.N. 1044 which lay down that the order passed by a higher Court takes effect from the moment it is passed and any proceedings after the passing of the order are a nullity. In the present case the order of stay passed by the Chief Court was subsequent to the delivery of possession. In AIR 1930 17 (Lahore) it was held that an order passed by the same Court must be communicated before it takes effect. Relying upon this decision; the learned lower Court held that the delivery of possession made by the Nazir was not null and void as the Nazir was not deprived of jurisdiction passed. The other two are doubtful. Delivery of by the passing of the order of stay by the same Court on the 11th November, 1941.

6. The learned lower Court after an of the evidence has also decided that of possession by the Nazir was not fictitious.

7. On the other hand the learned lower Court agreed with the judgment-debtor in his contention that the order of stay passed by the Additional Civil Judge on the 11th November, 1941, was not "ultra vires" and void. It held that the order passed was not under Order 41 Rule 5 at all but u/s 161, Code of Civil Procedure

8. A peculiar feature in this appeal is that the memo of appeal contains a prayer, which was not contained in the application before the lower Court, viz., a prayer for re-delivery of possession.

9. It has been argued that it was impossible for the Nazir to have delivered possession in so short a time as he alleges and that in fact what he did was to assemble villagers without going to all the villages and make out the warrants in one or more places with bogus witnesses of what was stated in the endorsements on the warrants. This does not on the face of it seem probable. The Nazir was in a car, and we think it would have taken longer for him to assemble the witnesses than to go from place to place in the car. Behari Singh, Headmaster of the Middle School in Raja Sultanpur, is the first witness of this. He says that 5 or 6 persons came in a car and set down on cots close to the School and wrote down something. Jhakri Kahar, a servant of the School, made his thumb impression and told him that he had done it on a warrant of "dakhaldihani" of a village, the name of which is illegible in the original, but Jhakri is a witness to the "dakhaldihani" of that village. Witness says that Jakhri cannot leave for home without his permission. But he also admits that this village

is only a few furlongs from the School. The Assistant Master, who is the next witness, supports this statement and says that 10 or 12 persons made their thumb impressions there. The next witness says he saw possession being given on the road of two other villages. Ram Jas Singh used to take the zamindar's son to the School. He says he was asked to be a witness, but on-hearing that "dakhldihani" related to neighbourly villages, he refused. The next witness relates to the transactions of the previous day. Jai Sri the next witness deposes about the taking of witnesses's signatures on several warrants at the same time. The next two witnesses give the same kind of evidence. On the other side the Nazir was examined. He was cross-examined at great length by the judgment debtor's learned Counsel, and the learned Judge, who heard this evidence, believed him but did not believe the judgment-debtor's witnesses. As the learned Judge remarks, the judgment-debtor is an influential person and could easily procure witnesses. The mistakes in the warrants are easily explained and have been satisfactorily dealt with by the lower Court. They are such mistakes as would naturally arise when the "dakhldihani" was being done in haste as it certainly was. Had the Nazir just sat down at a few places and written out the warrants there and taken thumb impressions on them at his leisure, probably no such mistakes would have arisen. These slips do not support the case for the judgment-debtor. Furthermore if the whole proceedings had been bogus as argued, it seems improbable that the judgment-debtor would have allowed the decree-holder to take actual rent collecting possession on the basis of the symbolic delivery.

10. It is next argued that owing to a formal defect in the delivery of possession it does not amount to delivery of possession at all. Warrants were not attached in any permanent place in the villages. Possession was given by beat of drum and proclamation only. As to this the learned lower Court says that it is clear that although warrants were issued under Order 21 Rule 35 possession was actually delivered under Order 21 Rule 36. As the property was in the possession of tenants, the lower Court thinks that possession could only be delivered under Rule 36 and not Rule 35. We may note that since the possession so delivered was of shares in the villages, the delivery would seem to fall either under Rule 35(2) or Rule 36 and the method of delivery is practically the same. Hardeo Singh v. Hira Singh 1937 O.W.N. 58 is referred to. In this case the headnote does not seem to represent the real meaning of the Hon'ble Chief Court who delivered the judgment, and we do not think that the effect of the decision is to declare that non-affixation of a warrant necessarily invalidates the proceedings whether the judgment-debtor has acquiesced or not. The case directly in point cited by the learned Counsel for the Appellant to Kahan Chand v. Mst. Jawandi (1917) 41 I.C. 752

"Where the provisions of Rule 36 of Order 21, Code of Civil Procedure, have not been complied with and the property is in possession of the tenants, the possession is not legally transferred."

11. This case related to a house and there is nothing to show that the symbolical possession delivered by the Nazir was followed by any act of possession on the part of the decree-holder. The possession of zamindari land involves more than mere constructive possession by receipt of the rent from the tenants. It involves possession of abadi and waste land, and of any buildings which there may be for the convenience of the agents who enter upon the land to manage the property and look after the interests of the owner. It is admitted that the Respondent has had such possession without opposition other than the objection before the Additional Civil Judge and the appeal in this Court for the last three years. We cannot see how a formal defect in the delivery of possession can alter these facts. If there were in fact such a defect the possession of the Respondent for the last three years has certainly destroyed any effect which it could possibly have on her present possession. In AIR 1929 545 (Lahore) it was held that where a party to the suit has symbolical possession given against him by methods informal, the said symbolical possession does not avail to stop adverse possession. If therefore the Appellant were still in possession, he might be able to plead adverse possession. But so far from his being in possession the Respondent has been in exclusive possession for three years. In AIR 1935 612 (Lahore) , it was held,

"Symbolical possession" is sufficient to dispossess a person, who is a party to the execution proceedings. and when a person is put in symbolical possession of property by an officer of the Court, when actual possession would have been delivered, the form in which execution is given is immaterial and as between the parties to the proceedings such formal possession is as effectual as a complete transfer of possession from one party to another, even though there may be some formal defect in effecting the symbolical possession."

12. In our opinion each case has to be decided on its own circumstances and the question is whether there has been any substantial injustice or prejudice to the interests of the judgment-debtor. In the present case it cannot possibly be said that possession has not been delivered. Whatever defect may or may not have existed in the delivery of possession the solid fact is that possession has become effective and subsisted for three years.

13. Lastly we come to the argument that since an order of stay had been passed by the execution Court on the 11th November, 1911, the Nazir was divested of jurisdiction to give possession and the delivery of possession was null and void. Therefore possession should be re-delivered to the judgment-debtor or at least the decree-holder should be compelled to give security for the mesne profits which have come and which are likely to come to her hand while she remains in possession.

14. We shall first deal shortly with the equities of the case as they appear to us at the present stage and without in any way prejudicing the result of the appeal now pending before the Chief Court. It appears that the mutation Courts refused mutation to the decree-holder because the judgment-debtor was in possession.

Mutation Courts cannot grant mutation to a person not found to be in actual possession unless the question of possession is doubtful, in which case they can take title into consideration. It does not appear that these Courts cast any doubt on the validity of the family settlement come to between the decree-holder and the judgment-debtor but not acted upon the judgment-debtor. The Civil Court has upheld the family settlement. The decree-holder had for some years been kept out of possession and denied her maintenance by the judgment-debtor until she obtained possession under this decree.

15. Coming now to the purely legal point the lower Court has made a distinction between cases in which a superior Court has ordered stay and those in which stay has been ordered by the execution Court itself. In *Raj Bahadur Singh v. Pirthipal Singh* 1941 O.A. 742 : O.W.N. 1044 a single Judge of this Court held

"A stay order passed by a Higher Court takes effect from the date on which it is pronounced and not on the date on which it is communicated. A sale held despite the passing of such a stay order, even though the same is not communicated, is "ultra vires"."

16. No doubt there have been differences of opinion on this point, but we see no reason to disagree with the learned single Judge of this Court who decided this case after considering rulings of other High Courts. We therefore accept this position. The relation between the High Court and a subordinate Court is, however, very different from that between the execution Court and the executing officer.

17. In *Mian Jan v. Man Singh* (1880) 2 All 686, the headnote is,

"On the day fixed for the sale of certain immovable property in the execution of a decree the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale, passed an order confirming it. Subsequently an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. Held that, the sanction to the sale originally given having been with rawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid, and in reviewing its first order and in setting aside the sale as illegal the Court executing the decree had not acted "ultra vires" and its action was not otherwise illegal".

18. This supports the contention of the Appellant that the Nazir had no jurisdiction to sell the property. In *Sant Lal v. Um-rao-un-nissa* (1890) 19 All. 96 the same view was taken.

19. On the other hand in AIR 1930 17 (Lahore) it was held that the order of stay did not take effect till communicated. The same Court, however, in AIR 1943 349 (Lahore) held that where the decree had been transferred to the Collector and the Court which had passed the decree stayed the sale u/s 25, Punjab Relief of

Indebtedness Act, the sale carried out after that order of stay had been passed was invalid. The circumstances were obviously very different from those of the present case, for the purposes of which we do not think that a decision of the knotty question whether a Court officer can be regarded as analogous to an agent so that the order does not take effect till it is communicated to him is necessary.

20. The Appellant strongly relies on *Nanda Kishore Singh v. Ram Golam Sahu* (1913) 40 Cal. 955 in which it was held that the High Court is competent to make an order for 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; such power was given by Section 151 Code of Civil Procedure

21. We may note that in none of the cases cited by the Appellant has the execution Court dismissed in a judicial order, under Order 41 Rule 5(2) the application of the judgment-debtor for stay and then afterwards passed an order for stay. It is argued by the Respondent that the Court was "functus officio" and had no jurisdiction to pass an order for stay on the 11th November, 1941, after its order refusing stay on the 10th November, 1941.

22. We have to see under what provisions of the CPC the Court was acting when it passed the order of the 11th November, 1941. No appeal had legally been filed at that time because a copy of decree was not filed along with the memo. of appeal. This is the reason why the Hon'ble Chief Judge, before whom the application for stay came, refused to pass any order upon it. The fact was stated in application of the 11th November, 1941, filed by the judgment-debtor, but it seems to have been over-looked by the learned Judge who stayed execution, because he thought an appeal had been filed. He was, however, still seized of the case and could have acted under Order 41 Rule 5(2) the express provision of the Code. But under that rule the Court has to come to the conclusion that substantial loss may result to the party applying for stay of execution unless the order is made. This it had already found against the applicant in its order of the 10th November, 1941. The only new factor was that it thought an appeal had been filed which was not correct. Legally speaking the appeal had not yet been filed. It had also to be satisfied that security had been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. No such security had been filed. The only exception to this rule is in Sub-rule (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."

23. This was not an ex parte order. It was argued strenuously on both sides as is admitted in this Court. This was the final hearing of this application. The provisions of Rule 5(3) were not therefore complied with and the Court had no power to pass this order under Rule 5(2). Had it then power to pass this order u/

s 151, Code of Civil Procedure? We think not. We have been referred to Suraj Kuer v. Sant Singh 1941 O.A. (Sup) 248 : A.W.R. (H.C.) 138 : O.W.N. 628, Sukhpal Dass v. Kedar Nath 1941 O.A. 478 : A.W.R. (C.C.) 183 : O.W.N. 718 Rao Bahadur Mothey Gangaraju Zamindar Garu v. Sree Raja Bommadevara Venkat rayulu Rao Bahadur Mothey Gangaraju Zamindar Garu of Ellore Vs. Sree Raja Bommadevara Venkatrayulu Naidu Bahadur Zamindar Garu of Pangidigudem, and Chowdhury Mohammad Manjural Haque and Others Vs. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bissesswar Banerjee, . The principle in all these decisions is the same and is well summed up in Chowdhury Mohammad Manjural Haque and Others Vs. Sebait of Sri Sri Iswar Lakshmi Narayan Jew Thakur, Sri Sri Iswari Saradia Durga Debi Thakurani and Sri Sri Iswari Jagadhatri Debi Thakurani, Bissesswar Banerjee, , "Inherent powers of the Court cannot be exercised in matters for which the statute has made express provision and in a manner calculated to defeat the statutory provision."

24. The statutory provision is contained in Order 41 Rule 5(3) and in passing the order the Court ignored this provision.

25. Even on the incorrect supposition that the appeal had already been filed we think that the order could not be a judicial order. If the appeal had been filed already, the appellate Court would have been seized of the case, including the application for stay, and the execution Court would have had no jurisdiction to pass a judicial order. To save the complications likely to result from the delivery of possession in execution after a stay order by the appellate Court had been passed, it might have passed an administrative order for the Nazir to delay his departure, but this would not, in our opinion, have been such an order as to make any action done by the Nazir null and void.

26. We hold therefore that if the order of the execution Court of the 11th November, 1941, staying execution be regarded as a judicial order, it was illegal. If it is regarded as merely an administrative order it is not sufficient to invalidate the delivery of possession by the Nazir.

27. We therefore see no reason to interfere in this case and we dismiss this appeal with costs.