

(1931) 10 AHC CK 0002
In the Allahabad High Court

Lala Janki Dass and Another

APPELLANT

Vs

Rai Bahadur Lala Sheo Prasad and Another

RESPONDENT

Date of Decision : 23-10-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Civil Procedure Code, 1908 (CPC) — Section 151

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : 136 Ind. Cas. 75

Hon'ble Judges : Pullan, J; Niamat Ullah, J

Bench : Division Bench

Judgement

1. This is an application for stay of execution of a final decree passed in a suit based on a mortgage. A preliminary decree had been previously passed. The mortgagor preferred a first appeal to this Court impugning the correctness of the preliminary decree. In the meantime an application was made by the mortgagee to the Court of first instance for the preparation of a final decree. The mortgagor then made an application to this Court praying for stay of the proceedings in the Court of first instance for the preparation of the final decree. It was held by a learned Judge of this Court that proceedings for the preparation of a final decree could be taken pending an appeal from the preliminary decree. A final decree has since been passed by the Court of first instance, and the present application is for stay of execution of the final decree.

2. A preliminary objection has been taken by the learned Advocate for the mortgagee (opposite party) that this Court has no power to order the stay of the execution of the final decree, which is not itself under appeal. It is contended that, in so far as the appeal pending in this Court is from the preliminary decree, which is not itself capable of execution, no order for stay of execution can be passed under Order XLT of the Code of Civil Procedure. The contention is so far correct that an order for stay of execution of the final decree cannot be passed under Order XLI of the CPC : but the powers of this Court as regards stay of proceedings pending in the Court below are not exhaustively defined by O. XLI of

the CPC If, having regard to the ends of justice it is expedient that the execution of the final decree should be stayed pending the appeal from the preliminary decree, this Court has got ample power to stay u/s 151, CPC It cannot be denied that any interference with the preliminary decree in the appeal therefrom will have the effect of the final decree being vacated and that if execution of the final decree is allowed to proceed, rights may come into existence before the disposal of the appeal from the preliminary decree. In order to avoid possible complications, we think it is necessary in the ends of justice that the execution of the final decree be stayed pending the appeal from the preliminary decree. It may be, and generally is, expedient that proceedings for the preparation of the final decree should" not be stayed pending an appeal from the preliminary decree, because the mere passing of a final decree will not, in any way, affect the rights of the parties to the appeal from the preliminary decree. On the other hand, if the preliminary decree is affirmed on appeal, some further time will be needed for proceedings leading to the final decree.

3. We are clearly of opinion that this Court has power u/s 151 of the Civil Procedure Code, to order stay of execution of a final decree during the pendency of an appeal from the preliminary decree. We hold that the preliminary objection has no force, and is accordingly overruled.

4. As regards the merits, it is contended on behalf of the mortgagees (opposite parties) that the value of the mortgaged property is very much less than the decretal amount and that any delay in having the property sold is likely to raise the mortgage-money without any chance of its recovery in full from the mortgaged property. It is not disputed that the mortgagees' remedy under Order XXXIV, Rule 6, Civil Procedure Code, is barred. It is also admitted that the value of the property is less than the decretal amount. In these circumstances, it is obvious that the mortgagees are not likely to obtain satisfaction of the mortgage money from any property other than the mortgaged property. The applicants (mortgagors) should indemnify the mortgagees against possible loss which may be consequent on the order of stay. We are of opinion that the equitable course is to order the stay of execution of the final decree on the applicants (mortgagors) furnishing security to the extent of one year's interest on the decretal amount at the rate of interest laid down in the decree. Such interest comes to Rs. 8,000. Accordingly we allow this application on condition of the mortgagor-applicant's furnishing security for Rs. 8,000 to the satisfaction of the lower Court within three months. If security is not furnished within the aforesaid period, execution of the final decree shall proceed.