
(1968) 03 GUJ CK 0002
In the Gujarat High Court
Case No : A.F.O.D. No. 35 of 1968

Lalmiya Sulamhusen and Others

APPELLANT

Vs

Ahmed Shaikh Dawood and Others

RESPONDENT

Date of Decision : 20-03-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, Order 41 Rule 5(1), Order 41 Rule 5(3), Order 41 Rule 6, Order 41 Rule 6(2)

Citation : AIR 1969 Guj 166 : (1969) GLR 496

Hon'ble Judges : V.R. Shah, J

Bench : Single Bench

Advocate : J.M. Thakore, General for B.R. Shah, for the Appellant; B.J. Shelat, for the Respondent

Final Decision : Allowed

Judgement

V.R. Shah, J.—The appellants in this appeal are original defendants-judgment-debtors and the respondents are original plaintiffs-decree-holders. The plaintiffs obtained a decree for an amount of Rs. 2,33,000/- and odd against the defendants and they have filed Regular Darkhast No. 74 of 1965 to execute that decree by attachment and sale of the Immovable properties belonging to the judgment-debtors. The judgment-debtors have preferred an appeal being First Appeal No. 236 of 1965 and therein they applied for stay of execution of the decree. This Court imposed certain conditions on which the stay was granted, but the conditions have not been fulfilled and the ultimate result is that stay has been refused. In the execution proceedings before the trial Court a stage has been reached where sale of immovable properties has been ordered and a proclamation of sale is already issued. At this stage, the judgment-debtors preferred an application under Order 41. Rule 6 of the CPC praying that the sale may be stayed. The ground mentioned in the application was that the properties are of considerable value and the interest of the decree-holders would be sufficiently safeguarded if they are taken in security of the decretal amount. The learned trial Judge having heard the parties made an order rejecting the

application. It is against this order of rejection of the application for stay of the sale of the properties attached, that an appeal has been brought which is numbered as First Appeal No. 35 of 1968. Thereafter a Civil Application No. 87 of 1968 has been filed for an interim order staying the execution of the decree. This Civil Application was fixed for hearing on 18th March, 1968 when, with the consent of the parties, it was decided that the Appeal No. 35 of 1968 itself should be heard and decided. That is why this appeal was taken up for hearing yesterday.

2. The short point for consideration in this appeal is whether when an application is made by a judgment-debtor for stay of sale of immovable properties in execution of the decree against which an appeal is pending, the executing Court has a discretion to reject that application and refuse to stay the sale. The learned trial Judge began with noting that the decree is for a large amount of Rs. 2,33,000/- and odd. He then notes the fact that an application to stay the execution of the decree was made to the High Court, but the judgment-debtors did not comply with the conditions imposed by the High Court and therefore the execution of the decree has not been stayed by the High Court. He then goes on to note that the decree has been obtained in January, 1968. Then, the learned trial Judge notes that there is no good ground for staying the execution of the decree. He also notes that the decree-holders have spent an amount of Rs. 800/- in connection with the sale proclamation. Having noted these facts, he passed an order that the application is rejected. Having rejected the application, the learned trial Judge made an order giving an opportunity to the judgment-debtors to apply for stay afresh on depositing Rs. 25,000/- and on depositing the amount of cost incurred by the judgment-debtor. He further went on to say that if the conditions imposed by the Court for making a fresh application are complied with by the judgment-debtors, that application will be considered on merits.

3. Order 41, Rule 6 of the CPC is part of group of rules scheme beginning with Rule 5 and ending with Rule 8. These Rules 5 to 8 relate to stay of proceedings and of execution of decree. Rule 6 lays down that an appellate Court may order stay of execution of a decree for sufficient cause. It also enables the trial Court, that is, the Court which passed the decree, to order stay of execution of a decree on sufficient cause being shown if the application is made before the expiration of the time allowed for appealing from the decree. Rule 5(3) thereafter lays down certain conditions on fulfilment of which only the order for stay of execution can be made. Rule 5 would apply not only to stay of execution of decree but for the stay of further proceedings under a decree. Rule 5 will come into play even when there is no actual application for execution pending in any Court. Rule 6 thereafter applies to these cases where an application for execution of a decree, which appealed against is actually pending in the Court. If during the pendency of such an appeal, an order is made for the execution of a decree, the execution would be stayed under Sub-rule (1), on sufficient cause being shown, on requiring security for restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and

for the due performance of the decree or order of the appellate Court. Then follows Sub-rule (2) which reads as follows:

"Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of."

This Sub-rule (2) would apply in cases where execution is taken out against immovable property and when an order for sale of that immovable property is already made by the Court. As the language of the rule itself clearly shows the sale shall, on the application of the judgment-debtor to the Court which has made the order for sale, be stayed and the executing Court is further given the discretion to impose such terms as to giving security or otherwise as the Court thinks fit. Then there is Rule 8 which makes the provisions of Rules 5 and 6 applicable when an appeal may be or has been preferred, not from the decree, but from the order made in execution of * decree,

4. The question is, as I stated above, whether when an application is made under the provisions of Sub-rule (2) of Rule 6, the Court which has ordered the sale of the immovable property is bound to stay that sale or not. Apart from any other authority, the language is clear and the Court does not appear to have any option not to stay the sale. The only option left to the Court is in imposing terms as to giving security or otherwise. The reason appears to be quite obvious, namely that a judgment-debtor whose immovable property is being sold should be given an opportunity to save his property from sale pending the decision "of the appeal preferred by him. The fact that an order for sale is made would indicate either that the property is attached or that it is under a mortgage or charge. In such a case the property cannot be dealt with by the judgment-debtor so as to defeat the right of the decree-holder to realise the monies due to him by the sale of that property. If the value of the property is in the opinion of the Court sufficient to cover the decretal amount and if there is nothing in the conduct of the judgment-debtor to indicate that he has made the application with a dishonest object or merely to harass the judgment-creditor the Court may, in its discretion, decide not to impose any condition for stay of sale. In the case of a dishonest judgment-debtor or a judgment-debtor who has not come with clean hands or where the circumstances of the case so require, the Court has a wide discretion, while staying the sale of the property to protect the judgment-creditor by imposing such terms both as regards giving security as well as otherwise as the circumstances of the case may require on fulfilment of which alone the stay of sale of immovable property can become operative. The use of the word "shall" instead of the word "may" is clearly indicative of the mandatory character of this provision. There are two decisions in support of this construction of Rule 6(2) of Order 41 of the Code. The first decision is of the Madras High Court in the case of Rukmani Ammal Vs. Subramania Sastrigal and Another, . In that case the High

Court has not only held that Sub-rule (2) of R. 6 of Order 41 makes it mandatory upon the executing Court to stay the sale of immovable property; but it has further held that if the Court does not stay the sale of the immovable property, but proceeds to sell the same, the Court commits what is more than an Irregularity and that such conduct of the Court amounts to an illegality. The second decision is contained in the case of Dhirendra Nath Roy Vs. Sailaj Kumar Bose, . The facts in that case were almost similar to the facts in our case. In that case also stay was prayed for under Order 41, Rule 5 from the appellate Court, but the conditions imposed by the appellate Court were not fulfilled by the judgment-debtor and in effect therefore, the stay was refused by the appellate Court. The judgment-debtor made an application for stay of the sale of immovable property under the provisions of Order 41, Rule 6(2) and the Court held that the stay of sale of immovable property ought to have been made by the executing Court on suitable terms.

5. Mr. Shelat, learned Advocate for the respondent-judgment-debtors sought to rely upon a decision of the Allahabad High Court in the case of Babu Harnarain Sahi Vs. Sadhu Govind Rai, . In that case the application which was under consideration of the Court was one under Order 41, Rule 5 and not one under Order 41, Rule 6. However, the Court went on to consider the provisions of Rule 6 also in order to decide what is the extent and content of the word "security" used in Rule 8 of the Code, On this point, the Court came to the conclusion that the provisions of Rule 6 must be held to be complementary to Rule 5 providing in fact an explanation of the word "security" which has been used in Clause (e) of Sub-rule (3) of Rule 5 of the Code. Having decided the point which was before that Court for decision, the learned Single Judge who delivered the judgment of the Court proceeds to observe as follows:

"I am not therefore of opinion that Clause 2, Rule 6 was intended to impose on the Court which ordered the sale an obligation to stay the sale merely because the property which is to be sold is immovable property."

Mr. Shelat interpreted this language to mean that the Court is not bound or obliged to stay the sale of immovable property under the provisions of sub-rule (2) of Rule 6. In my opinion, what the learned Judge has meant to convey is that merely because the property which was to be put up for sale was immovable property, there would be no obligation on the Court to stay the sale of it. It is true that only sale of immovable property can be stayed under Rule 6(2), sale of movable property cannot be stayed. But merely because it is immovable property which is sold, it cannot be said that sale ought to be stayed; other conditions necessary to bring Rule 6(2) into operation must also be proved. This is what, in my opinion, is laid down in this Allahabad case. In my opinion, the question whether Sub-rule (2) of Rule 6 is mandatory in its character or not did not arise for decision in this Allahabad case and the remarks of the learned Judge appear to be not necessary for the decision of the case. In any event this decision does not lay down that if the other conditions of Sub-rule (2) of Rule 6 are fulfilled,

the Court is not bound to stay the sale of the property. In my opinion the provisions of Sub-rule (2) of Rule 6 are mandatory in character and if the conditions set out in Sub-rule (2) are fulfilled the Court is bound to stay the further sale of the property, though the Court has a very wide discretion to impose conditions by way of security or otherwise as it may think fit before staying the sale of the immovable property. It is not open to the Court straightway to refuse to stay the sale of the property and reject the application. The Court's duty is to stay the sale of the immovable property and at the same time decide whether on the facts of the case before it, it is just and proper to impose any condition either by way of security or otherwise in order to protect the interest of the judgment-creditor.

6. In view of the conclusion to which I have arrived at, it is clear that the trial Court's order refusing to stay the sale of the immovable property and rejecting the application on the ground that no sufficient cause is made out, is not correct and will have to be set aside. The result is that the appeal succeeds. The trial Court's order rejecting the application for stay of the sale of immovable property is set aside. The trial Court will now re-hear that application and then proceed further in the Darkhast according to law. The appellant shall get costs of this appeal from the respondents who will bear their own. Rule issued in Civil Application No. 87 of 1968 discharged.