

(1998) 04 CAL CK 0035

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction Appeal No. 209 of 1994 C. Suit No. 2928 of 1954 T. No. 455 of 1998

Manmal Kothari and Others

APPELLANT

Vs

Shree Sree Radha Raman Jew and Others

RESPONDENT

Date of Decision : 24-04-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1, Order 41 Rule 5, Order 45 Rule 13, Order 45 Rule 3, 151

Citation : (1998) 2 CALLT 373

Hon'ble Judges : Shyamal Kumar Sen, J; Nure Alam Chowdhury, J

Bench : Division Bench

Judgement

S.K. Sen, J.—The contention of the petitioners in the instant application is that the appeal of the petitioners was dismissed on 16th January, 1998. The petitioners applied for certified copy of the judgment on 6th February, 1998. It may be noted that for several days in the first week and third week of February, 1998, this court was closed. The appellant has not yet received the certified copy.

2. The case of the appellant is that on 16th January, 1998, when the Judgment was delivered by the Division Bench, the appeal of the petitioners was not listed. A cause list of 16th January, 1998 of the said Division Bench has been produced before us. It cannot be disputed from the said list that the petitioners' matter did not appear in the cause list on that date. It is quite true that several appeals came up before the Division Bench against the said order of the learned single Judge, but these appeals were heard one after another. The Division Bench, however, on the basis of a common Judgment, disposed of the matter of the petitioners, although the petitioners' matter did not appear in the list on that day. It is also the submission of the petitioners that the petitioners have made out a different case from that of the other appellants.

3. Be that as it may, we are not going into that controversy. The question remains that the petitioner could not avail the opportunity to appear on that day,

that is, on 16th January, 1998, to be present, when the said Judgment was delivered by the Division Bench.

4. It is the contention of the petitioners that they could not have any idea that since the matter was not listed on that day, the Judgment will be delivered in their case. According to the petitioners, they came to know that the Judgment was also delivered in their case on 6th February, 1998, since the appellant in whose case the Judgment was listed, informed the petitioners that their matter was also disposed of on 16th January, 1998, and, immediately on that day, the Advocate-on-Record of the petitioners applied for certified copy. Unfortunately, however, after waiting for the certified copy, since the petitioners could not get the certified copy, the petitioners without certified copy approached the Hon'ble Supreme Court on 15th April, 1998.

5. Mr. Ghose, learned Advocate for the petitioners, has contended before us that after waiting for sometime finding (sic) that it will take further time to obtain certified copy, the petitioners filed a SLP prior to 15th April, 1998, as he was informed by his Advocate-on-Record in the Supreme Court by a letter dated 15th April, 1998. He has also been informed by his Advocate-on-Record in the Supreme Court that he is taking steps so that the SLP may be listed any day in the Supreme Court.

6. Mr. Ghose has further submitted before us that since the appeal of the petitioners for judgment was not listed on 16th January, 1998, he had no opportunity to pray for any stay and since the petitioners were unaware of the said matter until 6th February, 1998, they could not apply for certified copy also earlier. The contention of Mr. Ghose is that, under such circumstances, this court has the power to grant stay on terms. In support of his contention, he has relied upon the judgment of the Division Bench of this court in the case of Wand Kishore Singh & Ors. v. Ram Golam Sahu & Ors. reported in 16 CLJ page 508. Mr. Ghose has submitted that stay may be granted for a limited period on terms to be imposed by court. In the aforesaid decision. Sir Ashutosh Mukherjee. J., (as he then was) while speaking for the Division Bench of this court held that the court has inherent power to stay the proceedings pursuant to its own order and in view of an intended appeal, even though there is no express statutory provision in that behalf. The Division Bench also held that 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, stay, however, can be granted only for a limited time and on terms.

7. In the aforesaid case before the Division Bench, the petitioners prayed for stay of execution on the ground that they have transmitted the papers and costs to their solicitor in London. The application was opposed on the ground that there was no lis pending in this Hon'ble Court or elsewhere and therefore the court has no jurisdiction to grant such stay. The argument was repelled and it was held that the court has inherent power to stay proceeding in view of an intended

appeal. It also held that the inherent power of the court should be widened to aid the administration of Justice and not to cause endless hardship to litigant and possible failure of justice. Stay has to be granted for a limited time and on terms.

8. The other decision cited by Mr. Ghose is also a Division Bench judgment of this court in the case of *Sarat Kumar Roy Vs. Official Assignee of Calcutta and Others*, . In the aforesaid decision, an appeal was preferred to His Majesty-in-Council against the decision of the High Court setting aside an ex-parte decree in a mortgage suit and ordering the suit to be re-heard. The appellant applied to the High Court for stay of further proceedings in the suit pending hearing of his appeal. It was held that the High Court can grant such stay order provided the materials before it warrant such an order. In the aforesaid decision, the High Court considered the scope of Order 45 Rule 13 as also section 151 of the CPC and held that under appropriate circumstances, the High Court is entitled to pass such order.

9. The Division Bench Judgment in the case of *Jewan Ram Gangaram and Co. Vs. Commissioners for Port of Calcutta*, has also been relied upon by Mr. Ghose. In the said decision, decree was passed in the title suit and the appellant preferred an appeal and asked for stay of execution of the said decree which was refused. Against the said order, the appellant made an application for leave to appeal to the Privy Council which was rejected by the High Court. Thereafter, the appellant/ petitioner filed an application for SLP to the Privy Council and for stay of execution of the decree. The applicant received an intimation from London in December, 1939 that it was impossible to file the necessary application before the Privy Council before January, 1939. In the meantime, the decree-holders applied for execution of the decree before the trial court. In the circumstances, the petitioners made an application in this court for stay of execution of the decree until the petitioners have filed their petition before the Privy Council. The Division Bench of this court held that the court can exercise inherent power and stay the execution of the decree following the judgment reported in 16 CLJ 508. The court also held that if the execution of the decree was stayed for a short time, the decree-holder would not suffer irreparable loss nor any security was as such called for. The application was, accordingly, allowed and stay of execution of the decree was granted for a limited period. Mr. Das, learned advocate for the respondent has very seriously opposed this application on the ground that the appellant has been continuously harassed for several years since the decree was passed in 1964. Mr. Das submits that the appeal was filed by the judgment-debtor on 11th March, 1965 and the appeal was dismissed and he took steps to execute the decree in 1966. The respondent filed an application for execution which, however, was also dismissed. Thereafter on 4th August, 1976, the respondent deity made an application for execution of the decree with police help. On 28th February, 1977 the said execution application was dismissed and no order was passed and liberty was given to make a fresh application. It, therefore, appears that the respondents waited for 10 years to file another application after the first application was dismissed. On 28th February, 1977 the

respondent deity made a further application for execution. On 19th July, 1977 the said application was dismissed as barred by limitation. The respondent deity preferred an appeal against the said order of dismissal. On 16th May, 1986 the appellate court allowed the appeal as being not barred by limitation. The legal representative of the lessee preferred an appeal to the Supreme Court of India which was dismissed. On 15th July, 1987 the shebais of the respondent deity along with the Sheriffs officer went to execute the decree at premises No. 23/1 & 23/2 Darpanarayan Tagore Street, Calcutta and met with resistance from occupiers including the petitioners. On 5th August, 1987 Parameswar Singh, a tenant of 7, Ganpat Bagla Road filed a suit against the Respondent deity and obtained an ad-interim order of injunction restraining the Respondent from interfering with the possession and not to take any further step for execution of the decree against Parameswar Singh only against 7. Ganpat Bagla Road. On 15th July, 1993 Parameswar Singh and the Respondent-decree-holder compromised and by consent the interlocutory application was not pressed and interim order was vacated in Parameswar Singh's suit. On 20th July, 1993 the respondent-decree-holder made another application for police help on the basis of the resistance offered by the occupiers of premises being No. 23/1 and 23/2 D.N. Tagore Street in July/August, 1987. This application was made after six years.

10. It is the contention of Mr. Ghosh that the execution of the decree was barred by limitation. We are, however, not inclined to go into the said question since the appeal court has already decided the same in favour of the respondent. On 28th February, 1994 the Executing Court allowed the application for police help. On 15th March, 1994 the petitioners preferred an appeal being No. 209 of 1994 and obtained stay. It, therefore, appears that the appeal of petitioner is an independent appeal and the petitioners have filed appeal within time and it cannot be said that the petitioners have delayed proceedings. The contention of the respondent that because of the delay the respondent has suffered cannot over ride the fact that the SLP has been filed in due course by the petitioners and the petitioners are only seeking an opportunity to agitate their views before the Supreme Court. We have already noted that the petitioners could not make an application for stay earlier due to the fact that the application of the petitioners did not appear in the list at all although Judgment was delivered along with other appeals. We are of the view that the petitioners could avail themselves of the opportunity of praying for stay at the stage when the Judgment was delivered had the matter appeared in the cause list on that day when Judgment was delivered. The decisions cited before us clearly laid down the principle that on proper materials when the matter is pending before the apex court the High Court has Jurisdiction to grant stay for a limited period on certain terms. Mr. Das, however, has also submitted that since in this case the matter is pending in the Supreme Court the High Court should not exercise its jurisdiction and he has also referred to Order 21 of Rule 1 of the Rules of the Supreme Court of India which in our view is almost similar to Order 41 Rule 5 of the Code of Civil Procedure.

The Division Bench of this court in the case of Sarat Kumar Roy v. official Assignee of Calcutta & Ors. (supra) which has been referred to has taken note of the Order 41 Rule 5 as also of Order 45 Rule 13 and in the context of the said rules held that under appropriate circumstances the High Court's power is not taken away u/s 151 to exercise its inherent power to grant stay. The judgment and decision of the case of Smt. Nityamon Dasi v. Madhu Sudan Sen reported in 38 Indian Appeals. P. 74 has been relied upon by the learned advocate for the petitioners may be taken note of. In the aforesaid decision, the opinion of Lord Macnaghten to His Majesty may be specially considered.

The said opinion is set out hereinbelow :

"LORD MACNAGHTEN. Their Lordships are of opinion that the High Court has power to stay execution, notwithstanding that the appeal as in this case has been admitted by special leave of His Majesty in Council. Their Lordships venture to add that the learned Judges of the High Court are in a much better position than the members of this Board to determine whether execution ought to be stayed, and if so upon what terms and conditions and to what extent stay of execution ought to be granted.

Their Lordships will humbly advise His Majesty that execution in this case ought to be stayed upon such terms as the High Court may direct."

11. It may also be noted that Order 21 of Rule I of the Supreme Court of India, Rules does not specifically execute the power of the High Court under the circumstances as in this case. Considering all aspects of the matter, we are of the view that this is a proper case where stay should be granted for a very limited period i.e. till 4th May. 1998. This order is specifically restricted to the case of the petitioner and to the premises being at 23/1 and 23/2 Darpanarayan Tagore Street on condition that the petitioners will deposit occupation charges with the advocate-on-record for the petitioner amounting to Rs. 20,000/- (Twenty-thousand only) which will be kept in Fixed Deposit Account. For that purpose the petitioners will open a fixed Deposit on their own name with any Nationalised Bank within 27th April. 1998 and deposit the receipt thereof with the Registrar, O.S., of this court. In default, stay will stand vacated and also the application of the petitioners will stand dismissed with costs. The Registrar, Original Side of this court shall intimate the fact of such deposit to the advocate-on-record of the respondent.

12. All parties concerned including the Registrar, Original Side are to act on the signed copy of the minutes of the operative portion of this Judgment on the usual undertakings.

N.A. Chowdhury. J.--I agree.

13. Appeal disposed of