
(1971) 10 KAR CK 0018
In the Karnataka High Court
Case No : Ex. Second Appeal No. 60 of 1970

Narayan Bhikaji Pauskar

APPELLANT

Vs

Mangesh M. Tergaonkar and Others

RESPONDENT

Date of Decision : 22-10-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 41 Rule 6 (2)

Citation : AIR 1972 Kar 206

Hon'ble Judges : H.B. Datar, J

Bench : Single Bench

Advocate : Suresh S. Joshi, for the Appellant; W.K. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

H.B. Datar, J.—The short question that arises in this appeal is as to whether the appellant is entitled to claim the benefit of the provisions of Order 41, Rule 6 (2) of the Code of Civil Procedure. It arises in this way:

Regular Suit No. 339 of 1965 was filed by the Respondents-Plaintiffs for recovery of certain sum of money against defendants 1 to 6. The trial Court by its judgment decreed the plaintiff's suit, directing that the Government shall pay a sum of Rs. 300/- as compensation to the plaintiffs with interest at 6 per cent per annum from the date of auction sale held on 22-12-1960 on Rs. 3,000/- with proportionate costs; defendant No. 6 also is jointly and severally liable to pay the suit claim to the plaintiff with costs. The correctness of this judgment and decree passed by the trial Court is pending adjudication in appeal before the court of the Civil Judge. An application for stay was made in that appeal, and though the stay was granted for the execution of the entire decree, it was later vacated in so far as the present appellant-judgment-debtor or defendant No. 6 is concerned. The court was of the view that defendants having not filed appeal, stay has to be vacated so far as he was concerned. Thereafter, after obtaining a certificate for transfer of the decree for execution proceedings No. 101/68 was instituted in the court of the Munsiff at Dharwar for recovery of the amount from the present

appellant. In that proceeding, an application was filed for stay under the provisions of Order 41, Rule 6 (2), Civil P. C. The learned Munsiff, Dharwar, dismissed that application. The correctness of that order was challenged before the court of the Civil Judge, Dharwar, in Execution Appeal No. 6/19C9. The learned Appellate Judge has confirmed the order of the trial court. It is the correctness of this judgment that is challenged in the present appeal.

2. The principal submission made by the learned counsel appearing for the appellant is that under the provisions of Order 41, Rule 6 (2), Civil P. C., the appellant is entitled to make an application, inasmuch as, the condition laid down under that Section is satisfied in this case, when an appeal is pending from such decree. It was also stated that having regard to the provisions of Order 41, Rule 33, Civil P. C. even though the appellant has not preferred an appeal, it is open to the appellate Court to Pass an order in his favour, as he has been impleaded as a respondent. It was therefore submitted that even though he might not have preferred an appeal, he may. (sic) if other appellants succeed, is (sic) entitled to the benefit of Order 41, Rule 33, Civil P. C., and therefore, the provisions of Order 41, Rule 6 (2) have been properly invoked, and the view taken by the court below is erroneous. It was also mentioned that if an order for stay is not granted to the sale of the property, then there is likelihood of inconsistent orders being passed, and, therefore, it was necessary to pass an order staying further proceedings in the execution proceedings. In my view, none of these contentions can be accepted. Even though Order 41, Rule 6 (2), Civil P. C. merely states that "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, in my view, it refers only to the case of a judgment-debtor, who has preferred an appeal. Even under the provisions of Order 41, Rule 5, Civil P. C. it is not stated that the person who is entitled to make an application for stay under that provision, must have preferred an appeal. In my view, the entire provisions of Order 41 which deal with regard to appeals from original decrees, relates to persons who have invoked the jurisdiction of the appellate court, and it is because they have invoked the jurisdiction of the appellate court, they are entitled to make a prayer for an order of stay of sale as provided under the provisions of Order 41, Rule 6 (2), Civil P. C.

The learned Author Mulla, in the CPC Volume II has stated that "The application contemplated by Sub-rule (1) is an application by the judgment-debtor (who has appealed from the decree)." In my view, it is only that judgment-debtor who has preferred an appeal is entitled to invoke the provisions of Order 41, Rule 6 (2), Civil P. C. The learned counsel for the appellant was asked to show as to what are the inconsistent orders that would be passed and he was not able to point out the inconsistent orders that are likely to be passed between the orders that may be passed by the executing court and by the appellate court. Having regard to the provisions of Order 41, Rule 33. Civil P. C. it is open to the appellate court

to set aside the decree of the trial court not only in favour of the appellant, but also against the other defendant who is a respondent before the appellate court. It is further open to the appellate court also not to modify that decree in favour of the appellant in this appeal, who is a respondent before the appellate court. If the appellate court, however sets aside the entire decree it, is hardly necessary to state that the appellant in this appeal will be entitled to an order for restitution u/s 144 of the Code of Civil Procedure. Further, it is not a matter upon which it is necessary for this court to state anything more at this stage. In that view, the appellant is not entitled to any relief prayed for. This appeal, therefore, fails and the same is dismissed. No costs.