

(1920) 11 PAT CK 0006
In the Patna High Court

Nena Ojha and Others

APPELLANT

Vs

Sarbhoo Dutt Ojha and Others

RESPONDENT

Date of Decision : 15-11-1920

Acts Referred:

Citation : AIR 1921 Patna 328 : 59 Ind. Cas. 883

Hon'ble Judges : Das, J;Adami, J

Bench : Division Bench

Judgement

1. This is an appeal from the order of the Registrar of this Court disposing of an application under Order XLI Rule 5 of the Code. It is unnecessary to deal with the facts of the case, but it will be useful to remember that the appeal has arisen out of a suit for partition between two brothers, and that the main question between the parties is, whether they are entitled to the joint family properties in equal shares, as the plaintiff asserts, or whether the defendant's share in the joint family properties is twelve annas, as the defendant asserts. The defendant relies upon an ekrarnamah executed by the plaintiff in his favour in support of his case, and there can be no doubt that, whether he succeeds or not, he has a case to present to this Court. The learned Subordinate Judge has found that they are entitled to equal shares in the joint family properties, and as each of them has been in separate possession of distinct portions of the joint family properties, he has directed mutual accounts to be taken as from the year 1313 on the footing that they are entitled to the joint family properties in equal shares. The defendant has appealed, and he applied before the Registrar for stay of proceedings pending the disposal of the appeal.

2. We ought to state at once that the Registrar had no jurisdiction to deal with an application for stay of proceedings. No doubt, the appellant purported to make the application under Order XLI, Rule 5, and described his application as an application for stay of execution of the decree and of further proceedings in the suit. But it is obvious that, until the final decree is passed in the action, there is no decree to execute and that the proceedings held in pursuance of a preliminary

decree are proceedings in the suit and not in execution. Under the rules of this Court, the Registrar has power, amongst other things, "to receive and dispose of an application under Order XLI, Rules 5, 6 and 10" (Chapter II, Rule 13, Sub-rule 9). No doubt, Order XLI, Rule 5 is headed Stay of proceedings and of execution;" but that is inevitable, because in the first paragraph of the rule, the Legislature is laying down the broad proposition that "an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order." It will be noticed that, not only is express power given in the first paragraph of the rule to the Appellate Court for sufficient cause to order stay of execution of a decree, but the limits of the power are clearly recognized and carefully guarded in the third paragraph of the rule. But the rule, though it recognizes and preserves the inherent power of the Appellate Court to order stay of proceedings, has not given an express power to the Appellate Court to order stay of proceedings under a decree. The only application contemplated by Order XLI, Rule 5 is an application for stay of execution and the only order contemplated by Order XLI, Rule 5, is an order for stay of execution. The Court has, of course, complete jurisdiction to order stay of proceedings pending the disposal of an appeal, but it does so, not by virtue of statutory power under Order XLI, Rule 5, but in the exercise of its inherent power for the ends of justice. As the exercise of this power has not been delegated to the Registrar, I am of opinion that the Registrar had no jurisdiction to deal with this application.

3. As, however, the question has been argued before us, and all the materials are, in the record to enable us to form our opinion, we think it right to deal with the application as an original application made to this Court. And the first question is, ought the proceedings under the decree to be stayed pending the disposal of the appeal? The policy of the Legislature, as expressed in Order XLI, Rule 5, is, that the proceedings under a decree ought not to be stayed, but the same rule recognizes the inherent power of the Appellate Court to order stay of proceedings. Now, what are the limits of the exercise of the discretion vested in the Appellate Court? Now, it seems to me that if no object is to be gained by stay of proceedings, the proceedings ought not to be stayed, even though the decree may be reversed on appeal. But if the proceedings are bound to be protracted, and the expense involved in the taking of accounts is likely to be great, the Appellate Court will exercise a proper discretion in staying proceedings; otherwise, in the event of the decree being reversed on appeal, such expense would be wholly thrown away. If the proceedings, however, are not likely to be of any length, as, for instance, proceedings to ascertain the market-value of certain stocks and shares there is no object to be gained by stay of proceedings, and the Appellate Court will refuse to stay proceedings. The question which the Appellate Court must put to itself in each case is, are the proceedings likely to be protracted and the expense great? If the answer is in the affirmative, there ought to be stay of proceedings; if, in the negative, there ought not to be. I may refer to *Shaw v. Holland* (1900) 2 Ch. 305: 69 L.J. Ch. 621 : 82L.T. 782 : 7 Man 409 : 48 W.R. 681 as authority for the principle which I have enunciated, upon

which the English Courts invariably act.

4. In the case before us the defendant has been directed to render accounts of the twelve-anna share of the joint family properties of which he has admittedly been in possession as from 1313. His case is that there was a private partition between the plaintiff on the one hand and the defendant and his two deceased brothers on the other hand, as a result of which, four-annas share of the properties went to the plaintiff, and twelve-annas share of the properties went to the defendant and his two deceased brothers jointly, and that the shares to which his deceased brothers would be entitled have devolved on him by survivorship on the death of these brothers. It is obvious that the proceedings in taking the accounts from 1313 are bound to be protracted, and much expense would be unnecessarily thrown away if the decree is reversed by this Court. Acting on the principle which I have ventured to deduce from the English cases, I think that the proceedings ought to be stayed in this case, and we order accordingly.

5. Next comes the question of the terms which we ought to impose on the appellants as a condition for stay. One inevitable result of the stay order will be that no final decree can be passed until the appeal pending in this Court is disposed of, and that there will be no decree to execute for a long time to come. Meanwhile, the appellant will continue to enjoy the rents, issues and profits of the twelve-annas share of the joint family properties, although under the decree he has only eight annas share therein. It is obvious that the interest of the respondents under the decree ought to be protected in some way.

6. I am of opinion that the learned Registrar erred in calling upon the appellant to furnish security for the value of his share. It seems to us that land is its own security and that the appellant ought not to be called upon to give security for the value of the land. He ought, however, to be called upon to give security for the income of the disputed share that is likely to come into his hand from the date of the decree to the date of the disposal of the appeal by this Court. Now, the disputed share in this case is four-annas, for, as to the remaining eight-annas his title has been declared. As to the period from the date of the decree up to the date of the disposal of the appeal, I think that, as a matter of practice, we ought to fix it at two years, leaving it open to the decree holder to move this Court, if the appeal is not disposed of within two years.

7. The order which we make in this case is that, upon the applicant giving security to the satisfaction of the lower Court for two years' income for four-annas out of twelve-annas share of the joint family properties in his hands and for the full value of the moveable properties in his hands, there will be an order for stay of proceedings in this case.

8. Let this order be brought to the notice of the learned Registrar.