
(1996) 02 AHC CK 0044
In the Allahabad High Court
Case No : First Appeal No. 1125 of 1993

New Okhla Industrial Development Authority	APPELLANT
Vs	
Mahendra Singh and others	RESPONDENT

Date of Decision : 15-02-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(3), Order 41 Rule 11, Order 41 Rule 5, Order 41 Rule 5(1), Order 41 Rule 5(4)
Land Acquisition Act, 1894 — Section 23, 4
Limitation Act, 1963 — Section 1, 5

Citation : AIR 1997 All 38

Hon'ble Judges : N.B. Asthana, J; Binod Kumar Roy, J

Bench : Division Bench

Advocate : U.S. Awasthi, for the Appellant;

Final Decision : Dismissed

Judgement

1. This order disposes of appellant's application under "Order 41 Rule 5 of the Code of Civil Procedure" (hereinafter referred to as the Code), filed on 6-9-1995, by which prayer has been made (o stay execution of the judgment and award dated 6-4-93 passed by the District Judge, Ghaziabad in L.A.R. No. 58 of 1991 during pendency of this appeal.
2. For the purposes of development of the industrial town of NOIDA the relevant notification seeking acquisition of about three acres of lands of the Respondent Nos. 1 to 3 was made on 8-8-88 the possession of which was also taken by the State of U.P. on 4-10-1989. The S.L.A.O. awarded compensation of the acquired lands at the rate of Rs. 31.50 per sq. yard. Respondents 1 to 3, however, claimed compensation at the rate of Rs. 250/- per sq. yard. Both sides adduced evidence. By the impugned judgment and award compensation was awarded at the rate of Rs. 93.75 per sq. yard which is under challenge in this appeal.
3. The appellant in its application has come up with an allegation that the enhancement is absolutely arbitrary and illegal and necessary ingredients which

are required to be taken into consideration for determining the compensation were failed to be considered and thus the judgment is in teeth of Sections 23 and 4 of the Land Acquisition Act; that the appellant has no funds to meet with the arbitrary and huge financial liability; that in the execution proceedings the accounts of the appellant have been attached resulting in serious difficulties in its day-to-day functioning as also carrying on other developmental projects undertaken by the appellant in public interest; and it would be in the interest of justice that pending disposal of this appeal execution of the judgment and decree may remain stayed so that justice be done between the parties.

4. In the affidavit, sworn by the Assistant Law Officer of the appellant accompanying this application, it has been stated, inter alia, to the following effect:-- (i) huge additional financial liability was imposed, and no funds were allocated for the said purpose (ii) The appeal was filed by paying a court fee of Rs. 5/- as huge amount of court fee was to be paid first, even for which no funds were available; (iii) The attachment of the accounts of the appellant was erroneously made by the District Judge; (iv) There will be imminent danger in realisation of the amount in execution, and in case it is done, the appellant will suffer an irreparable injury and loss as it will not be able to realise the amount from the persons whose locations and whereabouts are not as certainable; (v) It has no separate funds to bear the additional financial burden imposed by the impugned judgment and order of enhancement of compensation and (vi) In somewhat similar facts and circumstances this Court has been pleased to grant full order of stay of execution of the judgment enhancing the compensation in First Appeal No. 849 of 1993, UPSIDC v. Tek Ram.

5. In support of the prayer Mr. Mishra, the learned counsel for the appellant contended as follows (i) This appeal contains very good grounds and there is every likelihood of setting aside of the impugned judgment and award and against the same judgment appeals have been preferred before this Court which have already been admitted in which similar prayers have already been allowed. Accordingly, following the doctrine of precedent we should pass similar orders staying, execution of the impugned judgment and award (ii) Alternatively, interim order be passed by directing the appellants to deposit the enhanced amount in appeal within a reasonable time, to be fixed by us, as contemplated in sub-rule (5) as amended by Allahabad of Order XLI Rule 5 of the Code which should not be allowed to be withdrawn by Respondent Nos. 1 to 3 as there is every chance that after the withdrawal of the decretal amount they may not be traced at all. The appellants are prepared to file paper books so that the hearing of the appeal be expedited. To support his contentions Mr. Mishra placed considerable reliance on the provisions of Order XLI Rule 5(1) (3), (4) & (5) of the Code of Civil Procedure, apart from placing reliance on following decisions; (i) Prabhakar Deshmukh Vs. Vinayakrao Kaushal, ; (ii) Nirmal Chaudhary Vs. Bishambar Lal, ; (iii) J. Lakshmikantham Vs. Uppala Rajamma and Others, ; (iv) State of Andhra Pradesh v. Mahmud Hasan Khan Mahraj Kumar of Mahmoodabad. AIR 1983 AP 2277; (v) Tata Chemicals Ltd. v. Sadhu Singh 1994(2) All WC 982

and (vi)M/s. Kisan Rice Mills; Tanda v. Bank of India (1980) 2 UPLBEC 858.

6. Order XLI Rule 5 of the Code of Civil Procedure, as it stands after Allahabad Amendment of sub-rule (5), reads thus:

"5. Stay by Appellate Court -- (1) 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, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(Explanation -- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance) () Stay by Court which passed the decree -- where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied.

(a) that substantial loss may result to the party applying for stay of execution unless the order is made:

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules where the appeal is against a decree for payment of money, the Appellate Court shall not make an order staying the execution of the decree, unless the appellant, shall within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Appellate Court may think fit."

7. A bare perusal of the aforementioned provisions show that a discretionary jurisdiction has been conferred on this court and stay may be granted if "sufficient cause" is made out and the party invoking them satisfies the court that it will sustain "substantial loss." Further riders have also been provided by the Allahabad amendment of sub-rule (5).

8. More than 13 years ago the Privy Council in *Nawab Sidhee Nuzur Ally Khan v. Oojoodhyaram Khan (Ragah)* (10) IA 3222 has considered somewhat similar provisions then existing, and has observed thus:--

"any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application; first, that a serious injury will be the result to the party applying unless the stay of proceedings is granted and secondly, that the party has come promptly to make the application....." Even though this appeal was filed on 13-10-1993 this stay application was filed on 26-9-1995 and pressed yesterday.

9. When one of the High Courts of our country granted stay of money decree by asking the judgment debtor to deposit only part of the decretal amount" the order granting stay was challenged before the Apex Court. Nullifying that order the Apex Court, in *M/s Mehta Teja Singh & Co. v. Grindlays Bank Ltd.* (1982) 2 SCC 199 (sic), through-three Judges Division Bench observed thus:--

"It is true that the appeal is directed against an order passed by the High Court, which is of an interlocutory nature. We, however, find it somewhat difficult to appreciate that the High Court should have granted Stay of a money decree.

After making the aforesaid observations the Apex Court directed the Bank to deposit the decretal amount within 4 weeks in the High Court with liberty to the appellant to withdraw the decretal amount on furnishing Bank Guarantee.

Mr. Mishra made, endeavours to distinguish this decision/order of the Supreme Court but we do not find any merit in his attempt. We are of the view that really this was the course suggested to by the Apex Court which the High Court was required to follow.

10. In *Central Bank of India v. State of Gujarat* AIR 1987 SC 23220 a two Judges Division Bench of the Apex Court, when the Bank obtained a money decree against the State; which went up in First Appeal and moved an application for stay of execution of operation of the decree, after considering the provisions of Order XLI Rule 5 of the CPC directed payment of amount to the decree holder subject to the condition that in the event of the decree of trial court being reversed the Bank would redeposit the amount in the executing court within 2 weeks of the date of reversal along with 18 percent interest on the amount from the date the money is withdrawn till the date of deposit, observing thus : --

".....the High Court could in its discretion either direct payment of the amount to the decree-holder subject to terms safeguarding the interest of the judgment-debtor in the eventuality of reversal of the decree or direct the amount to be deposited or invested on terms of interest so that on the disposal of the First Appeal appropriate direction could be given."

This was also done as a guideline to be followed by the Court in Appeals arising out of money decrees.

11. In *Mulraj Vs. Murti Raghonathji Maharaj*, it was laid down by the Apex Court that "In effect a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction-is generally issued to a party and it is forbidden from doing certain acts." In this context it is also relevant to remember what was held by the Apex Court vide *Hazrat Surat Shah Urdu Educations Society v. Abdul Saheb* 1988 (5) Serv LR 768: (1988) 4 JT (SC) 2232 that "No temporary injunction should be issued unless the three ingredients are made out namely, (i) prima facie case, (ii) balance of convenience, (iii) irreparable injury which could not be compensated in terms of money. If a party fails to make out any of the three ingredients he would not be entitled to the injunction and the Court will be justified in declining to issue injunction." Thus, the real question is whether we should restrain Respondent Nos. 1 to 3 from utilising the usufructs of his money decree?

12. It is true that the appellant has come up with a claim that it will suffer irreparable loss and injury and will not be able to realise the amount from the persons whose locations and whereabouts are not ascertainable. It is not the specific case of the appellant that the Respondent do not own and possess sufficient property and in the event of the appeal being allowed by this Court the Respondents will be not in a position to comply with the order of restitution. The allegations in regard to locations and whereabouts of Respondents 1 to 3 is-somewhat surprising and baffling to us. The appellant has described Respondents 1 to 3 by giving their specific address mentioned in the memorandum of appeal. The decree also gives their address. The Respondents 1 to 3 had filed their claim after their appearance in the Court below. Thus, their address and locations are well known to the appellant. We, thus do not find any merit in the allegations of the appellant.

13. These apart, on its own case there is no fund available with the appellant. Further the appellant look considerable lime to manage the required court fee in absence of funds and its deposit. To crown all by its own inaction it has adopted such a conduct that its account has been attached by the executing court. It is not understandable thus, how it can be said that the balance of convenience is in favour of the appellant against whom the decree stands. The Respondents are entitled to usufructs of their decree. Thus on the contrary, we find that the balance of convenience is in favour of the Respondents as the Rupee is loosing its value and they can more profitably use the decretal amount. Further the appellant will either lease/settle/or sale the lands in question at a higher price than the compensation amount and thus there is no question of any substantial loss to it.

14. Now we come to the decisions relied upon by Sri Mishra. Paragraphs 5 and 6 of *Tata Chemicals Ltd. v. Sadhu Singh* 1994 All WC 983 runs as follows;--

"5. Before entering into the merits of the appeal, some preliminary points raised by Sri J. C. Bhardwaj learned counsel for the Respondents may be disposed of. Along with the appeal, a stay application was filed by the appellant in which an

interim order was passed on 21-10-1989 staying the execution of the award on the condition that the appellant should deposit half of the enhanced amount. By the order dated 5-4-1994 the respondents were permitted to withdraw the amount so deposited without furnishing security. Learned counsel has submitted that the appellant has not complied with the terms of the stay order and further that as the award of the learned Addl. District Judge is in the nature of a money-decree, the appeal was not competent and could not be heard on merits unless the appellant deposited the amount disputed in the appeal in view of Order 41 Rule 1 (3) CPC. In support of his submission reliance was placed upon State v. Roshan Lal 1992 AWC 412, wherein a learned Single Judge has held that in an appeal preferred against the money decree the entire decretal amount had to be deposited by the appellant and if the entire amount was not so deposited, the interim stay-order would stand automatically vacated and the stay application would stand rejected. It may be noticed here that against the order dated 25-4-1991 by which the stay order had been modified, the appellant preferred Civil Appeal Nos. 3758 to 3796 of 1991 in the Supreme Court passed the following order:

"The execution of the impugned award shall remain stayed subject to the condition that the appellant deposits half of the enhanced amount awarded by the 1st Addl. District Judge, Badaun within a period of two months from today, on such deposit, the Respondents-claimants are permitted to withdraw half of the amount so deposited without furnishing any security and the balance on furnishing proper security to the satisfaction of the said I Addl. District Judge, Badaun.

The order quoted above would show that the Supreme Court has stayed the execution of the award on the condition that the appellant deposits half of the enhanced amount. Therefore, there was no question of the appellant being required to deposit the entire amount awarded by the Addl. District Judge. In case the condition imposed in the stay order dated 23-9-1991 had not been complied with, it was open to the claimant-respondents to execute the award but that would not render the appeal incompetent nor would debar appeal on merits.

6. Regarding the second condition of the learned counsel for the respondents that as the appellant has not deposited the amount disputed in appeal, the same was incompetent and could not be heard in view of Order 44 Rule 1 (3) CFC, in my opinion the said provision has relevance at the state when the court is making an order staying the execution of the decree and it has no bearing at all on the competency of the appeal, itself. In Union Bank of India and Another Vs. Jagan Natb Radhey Shyam and Co. and Another, Yogeshwar Dayal, J. (as his Lordship then was) has considered the true scope of sub-rule (3) of Rule 1 of Order 41 of the Code of Civil Procedure. After referring to the CPC (Amendment) Bill, 1974 and the report of the Joint-Committee it was held that the intention of the Parliament was not to make the deposit of the decretal amount or the furnishing of the security before filing of appeal against money decree as

condition precedent for valid representation of the appeal. It was further ruled that reading sub-rule (3) of Rule I of Order 41 along with sub-rule (5) of Rule 5 all that can be said is that so long as the decretal amount is not deposited or security is not furnished the Court may not make an order staying the execution of the decree. The same view has been taken in *Prabhakar Deshmukh Vs. Vinayakrao Kaushal*, , I am, therefore, clearly of the opinion that the deposit of the amount disputed in the appeal is not a condition precedent for the maintainability of the appeal and the appeal cannot be held to be incompetent."

No doubt we find reference of an order passed by the Apex Court in Civil Appeal No. 3758 of 3796 of 1991 staying execution of award on certain terms and conditions but we are not aware in what special backdrop the said order was passed. There is no ratio to be followed up by us. It appears that the order was passed under Article 42 of the Constitution at the time of hearing of the appeal. Further a question arose about the maintainability of appeal on account of non-deposit of the entire compensation amount. In *State of Andhra Pradesh v. Mahmud Hasan Khan Maharaj Kumar of Mahamoodabad* 1983 Andhra Pradesh 277; *Union Bank of India and Another Vs. Jagan Natb Radhey Shyam and Co. and Another*, . *Prabhakar Deshmukh Vs. Vinayakrao Kaushal*, , *J. Lakshmikantham Vs. Uppala Rajamma and Others*, and *M/s Kisan Rice Mills, Tanda v. Bank of India* (1980) 22 UPLBEC 858 decided by a learned Single Judge of our court none of the decisions referred to by us have been considered which are also not binding on us.

15. Now we come to the order dated 13-7-1994 passed in E.A. No. 849 of 1983, which was strongly relied upon by Mr. Mishra and is required to be followed by us. This order reads thus:--

"Heard learned Standing Counsel, Shri Shitla Prasad, learned counsel for U.P. State Industrial Development Corporation Ltd. and Shri Vino Sinha for the claimant. It is true that some of the appeals are barred by limitation for which petitions u/s 5 of the Limitation Act have been filed. It is brought to our notice by Shri Shitla Prasad that there are 132 appeals arising out of the same notification u/s (1) of the Act. After hearing for some time we find that the question involved to be decided in the appeal is very shot and the appeal can be disposed of finally subject to disposal of the petitioner for limitation on their own merits. In these circumstances when we requested Shri Shitla Prasad that he would be essentially interested in the disposal of the appeals, and: therefore, he should furnish paper book in one appeal including all documents those have been referred to and those documents which would be relevant for the purpose of the disposal of the appeals. He accepted our proposal and agreed that granted two weeks time he will be able to furnish paper book. In view of this acceptance of Shri Shitla Prasad all parties agreed that the record of the lower court need not be called for. In case, there would be any mistake in the paper book learned counsel shall get it corrected in this court itself.

List all 132 appeals (which list shall be supplied by Shri Shitla Prasad to the

Bench Secretary) in the month of August, 1994 after the paper book is filed and supplied to the learned Standing Counsel and Shri Vinod Sinha learned counsel for the claimants. In some appeals other counsel entered appearance. Shri Shitla Prasad agrees that the paper book shall be supplied to them also. In view of the fact that we are going to dispose J 32 appeals within one month, interim stay of execution of the award till 20-3-1994.

Certified copy of the order, if applied for, may be furnished within two days to the learned counsel for the parties."

A perusal of this order shows that stay was granted even if some appeals were barred by limitation in view of the fact that the appeal was to be disposed of within 1 month. We have not been made aware that this order was passed on the same facts and circumstances as stated by us. A bare perusal of this order, as also of one more order shown to us, shows that the provisions and the decisions referred to by us were also not considered. This apart it is only the ratio decided which is binding on us. As laid down by the Apex Court in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, precedent is an authority only for it actually decides and not for what may remotely or logically flow from it. In Union of India Vs. Annam Ramalingam and Others, it was also laid down that in absence parity of situation and circumstances reasoning of one decision cannot be affected on another. Judicial discipline forbears us in stating beyond what we have already stated.

16. For the reasons aforementioned we do not find sufficient reasons to exercise our discretion in favour of the appellant. This stay application is accordingly rejected.

17. However, it will be open for the appellant to move the Executing Court itself at the time when the Respondents 1 to 3. proceed to withdraw the compensation amount awarded by the decree under appeal and a request to permit withdrawal after having sufficient security from Respondents 1 to 3, and if such a prayer is made by the appellant, the same shall be considered objectively.

18. Even though only stay petition has been listed before us since we are vested with jurisdiction to hear appeals for hearing under Order XLI Rule 11 of the Code by the Hon"ble Chief Justice and being satisfied that this appeal raise triable issues, we admit this appeal. Issue notice by registered post as well as ordinary mode to Respondents 1 to 3, for which necessary requisites etc. must be filed within two weeks from today, failing which this appeal shall stand dismissed without further reference to a Bench.

19. Liberty is granted to the appellant to move the Hon"ble Chief Justice for an early hearing after notices are served and paper books are filed by the appellant.

20. Petition dismissed.