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Court : Karnataka

Decided On : Nov-30-1949

Reported in : AIR1950Kant11; AIR1950Mys11

Judge : Mallappa, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 330 - Order 41, Rule 5

Appeal No. : Appeal No. 64 of 1949-50

Appellant : A.A. Khan and ors.

Respondent : Ameer Khan and ors.

Advocate for Def. : L.S. Raju, Adv.

Advocate for Pet/Ap. : A.V. Shankara Rao, Adv.

Judgement :

ORDER

1. This is an application under Order 41, Rule 5, Civil P.C. The point for consideration is whether pending R.A. 64 of 49-50, the execution of the decree of the lower Court has to be stayed on appellants furnishing security.

2. The lower Court has passed a decree for payment of Rs. 12,000 claimed to have been contributed by the plaintiffs towards their share of capital of a partnership concern for the dissolution of which the suit was filed and has passed

also a preliminary decree for dissolution of partnership with a direction that accounts should be taken for ascertaining the income of the partnership concern. It is contended on behalf of the appellants that even if the plaintiffs have contributed Rs. 12,000 towards capital to the partnership concern there can be no decree for any amount at this stage, i.e. before accounts are taken. What is due to the plaintiffs or by them can only be ascertained after going through the accounts and in case there was a loss as contended by appellants, their share of the loss has to be adjusted out of the capital contributed by them. Form No. 22 of Appendix D of Schedule I, Civil P.C., supports the contention of appellants that it is possible in a suit for partnership, for a decree being drawn up directing payment of money by a plaintiff to a defendant if on taking of accounts any money is found to be due to the latter by the former. It is also contended that defendants 2 and 3 are minors and they cannot be partners of a firm. It is not desirable to express any opinion on these matters and it is sufficient to say that the points raised by the appellants are not frivolous and they deserve consideration. It is urged that out of the three appellants two are minors and that payment of a heavy sum is difficult in these days of financial difficulties and that if the decree is allowed to be executed, the appellants including the minors will suffer substantially and there is no harm in staying execution on substantive security being furnished.

3. The point that was seriously urged by the respondents on the authority of 9 Mys. L.J. 484, is that no stay can be ordered in the case of a money decree unless the appellants deposit the decree amount in Court for payment to them on their furnishing security for restitution in case of the decree is reserved in appeal. According to the head-note is in the above case:

'Where a decree directs payment of money and an appeal is lodged against that decree by the party directed to pay, the execution of the decree should be stayed so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted.'

4. In spite of this decision, the practice in this Court is to order stay of execution in proper cases irrespective of the question whether the decree is one for payment of money or for possession of immoveable property, and not to insist on deposit of decree amount in a case of money decree as a condition precedent. I feel no doubt that it is not correct to make any such distinction, as is not recognized by Order 41, Rule 5, Civil P.C., or to lay down a condition not contemplated by it. I was at first inclined to refer the matter to a bench under the impression that the head-note contained the unqualified opinion of Doraswamy Iyer C.J. who decided that case. The head-note contained the unqualified opinion of Doraswamy Iyer C.J. who decided that case. The head-note is however misleading inasmuch as it leaves an impression that the opinion expressed in it is that of our High Court, though it is a quotation from *Dhunjibhoy v. Lisboa*, 13 Bom. 241. The learned Chief Justice appears to be clear on the point that the above rule laid down in *Dhunjibhoy v. Lisboa*, 13 Bom. 241 may generally be followed; but it has not been laid down by him that it has to be followed invariably.

5. The decision in 9 Mys. L.J. 484 has to be distinguished on the ground that it does not lay down a rule that has to be followed in all cases. The rule laid down in *Dhunjibhoy v. Lisboa*, 13 Bom. 241, is recommended as a useful guide. It is not stated to be obligatory. If unless decree amount is deposited, execution of a money decree cannot be stayed, it would be unnecessary in a case where no such amount is deposited to find out whether appellant has made out that he would suffer substantial loss if the decree is not stayed. It is found in that decision itself that the rule referred to did not preclude the learned Chief Justice from considering whether the appellant would suffer substantial loss in case execution was not stayed. Looking from another aspect of the matter, it was not necessary in that case to consider on what condition the money decree could be ordered to be stayed as it was, as found by the learned Chief Justice, a case in which there was not sufficient material for holding that the appellant would suffer substantial loss in case execution of the decree was not ordered to be stayed.

6. Though Doraswamy Iyer C.J. thinks 'that generally the rule laid down in *Dhunjibhoy v. Lisboa*, 13 Bom. 241, may with advantage be followed in such cases', it is correct to say that what has been laid down in the Bombay case was

intended to be applied to all cases, 'where a decree orders payment of money'. What is laid down in the Bombay case appears to apply to cases where the appellant applies for stay of execution so far as it directs payment of decree amount deposited by him, inspite of the fact that the decree-holder is prepared to pay security for the repayment of the money in the event of the decree being reversed. It may however be taken, as contended from the actual order which appears to have been passed in the Bombay cases, that according to it, no money decree should be stayed unless the decree amount is deposited in Court for payment to decree-holder on his furnishing security for restitution in case the decree is reversed in appeal. A distinction, it is urged, is evidently made between decrees for money and decrees involving immoveable properties and the rule laid down makes it difficult for appellants to obtain orders of stay of execution of money decrees. I am inclined to think that more hardship is caused in refusing to stay execution of money decrees appeals against than in refusing stay of execution of decrees for possession of immoveable properties, as in the event of a reversal of money-decrees it might be found that in execution of the decree strangers have purchased properties of the appellants. The inconvenience of a decree-holder in not being allowed to execute a decree pending an appeal cannot be worth serious consideration provided that substantial security is taken. There was, therefore, more reason in the practice that prevailed in Calcutta High Court invariably allowing stay of execution in all cases of decrees for money whether sufficient cause was shown or not, than in the rule laid down in *Dhunjibhoy v. Lisboa*, 13 Bom 241, Good cause was required to be shown only for stay of execution of immoveable property even on security being furnished. It was evidently so as even if the decree for possession of immoveable property is executed it would be easy, in case the decree is reversed in appeal, to put the defendant in possession of the property without affecting the right of a third party. The practice of the Calcutta High Court was based on the following observation found in *In the matter of Rani Ismai Kooer*, 9 W.R. 448 : (Beng. LR. Sup. Vol. 1007).

'The principle laid down by the Court regarding the staying of the execution of decrees appears to be this. When the decree is for land or other immoveable property, the decree-holder is allowed to execute his decree, unless goods and sufficient cause for staying it be shown. When the decree is for money, the Court,

in the exercise of its discretion under Section 330, allows the debtor to stay execution on giving good and valid security, and we think that course should be followed in the present case.'

7. The distinction made, however, with reference to nature of decree is not justified by the wording of Order 41, Rule 5, Civil P.C. The question was, therefore, referred to a Full Bench. Peacock C.J. who delivered the judgment of the Full Bench case pointed out the hardships that are caused to decree-holders by ordering stay without sufficient cause on security being furnished and then observed as follows:

'The foregoing remarks apply to money decrees but the rule above laid down is equally applicable to decrees for immovable property and to other decrees.'

Again as observed in *Dheramal v. Haidar Shah*, 2 Lah. 61: (A.I.R. (8) 1921 Lah. 24):

'Under Order 41, Rule 5, Civil P.C., no order of stay of execution during pendency of an appeal can be made unless the Court is satisfied that substantial loss any result to the applicant and this rule applied to immoveable equally with moveable property.'

8. 9 Mys. L.J. 484 does not lay down any rule prohibiting stay of execution of money decrees on such security as the Court deems fit being ordered in proper cases in which sufficient cause for a stay as laid down in Order 41, Rule 5, Civil P.C., is made out. To direct in all cases of money-decrees that the decree amount should be deposited in Court before stay, pending appeal, is ordered, is to defeat the very purpose for which Order 41, Rule 5 is intended, though in suitable cases nothing comes in the way of laying down such a condition. The circumstances in which an application for stay of execution has been prayed for has been referred to already and I think sufficient cause has been shown for ordering execution to be stayed pending disposal of the appeal, on security being furnished within one month's time to the satisfaction of the lower Court. It is ordered accordingly.

9. Petition allowed.

