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Court : Allahabad

Decided On : Feb-12-1941

Reported in : AIR1941All224

Appellant : Ram Kishore

Respondent : Yashpal Kunwar

Judgement :

Mohammad Ismail, J.

1. The two connected appeals arise out of two orders of the Court below holding that no appeal lay to the District Judge from the orders of the execution Court staying the execution proceedings. It appears that the appellant obtained a decree on 16th April 1937 against the respondent on the basis of two pronotes, one dated 10th August 1936 and the other dated 11th January 1937. The decree-holder proceeded -with the execution of the decrees. Before the decrees were passed, the judgment-debtor had made an application under Section 4, Encumbered Estates Act. An order under Section 6 was passed by the Collector on 30th October forwarding the application to the Special Judge. The judgment-debtor made an application to the execution Court praying for the stay of execution proceedings under Section 7, Sub-clause (2), Encumbered Estates Act. The decree-holder objected and contended that for certain reasons Section 7(2) was not applicable, and that the judgment-debtor was not entitled to have the execution

proceedings stayed. The application was granted. Upon appeal by the decree-holder, the learned District Judge considered himself bound by a ruling of this Court in *Husain Bhai v. Beltu Shah* ('24) 11 A.I.R. 1924 All. 808, which held that no appeal lay from an order staying execution. There was some conflict of judicial opinion on this point at one time. The matter has however been set at rest by a Full Bench of this Court in *Har Narain v. Mathura Pd* : AIR1940 All326 . In that case an application for stay of execution proceedings was made under Section 3, Temporary Postponement of Execution of Decrees Act, Act 10 of 1937. The Civil Judge allowed the application and stayed the execution of the decree. The decree-holder appealed against the order of stay and the question for determination was whether an appeal lay. The learned Chief Justice in delivering the judgment of the Bench made the following observation:

The test to be applied in determining whether an order is appealable or not may be stated thus - does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree? Now, in the present instance, there was a controversy between the parties as to the judgment-debtor's right to have the execution of the decree postponed during the operation of the Temporary Postponement of Execution of Decrees Act.... There therefore was in the present instance a conclusive determination of a question arising between the parties and which related to the execution, discharge or satisfaction of a decree. The order therefore in our judgment was appealable.

2. Applying this test to the present case, it would appear that the order staying execution proceedings was appealable because a controversy between the parties had arisen which was conclusively determined. The judgment-debtor claimed that he was entitled to have the execution proceedings stayed by virtue of Section 7 of the Act. The contention of the decree-holder was that that section did not apply to the facts of the case and the judgment-debtor's application was not tenable. If Section 7 did apply the Court was bound to stay the proceedings. It had no discretion in the matter and the order of stay would not be in the exercise of a discretion vested in the Court. On the other hand, if Section 7 for any reason was inapplicable, the Court would be at liberty to proceed with the execution

proceedings. That being so, in my opinion, the Full Bench case fully applies to the present case and the order of the execution Court was appealable to the learned District Judge. The case cited by the learned District Judge and several other cases where similar view has been taken, are distinguishable because in all those cases the execution Court had the discretion to stay the execution proceedings temporarily and the order of stay was passed in the exercise of that discretion. Section 7, Encumbered Estates Act, is mandatory and gives no discretion to the executing Court. In these circumstances, I hold that the order of the Court below was erroneous. I would therefore allow the appeal, set aside the order of the Court below and remand the case to the learned District Judge with the direction that the appeal be registered under its original number and be decided according to law. Costs here and hitherto will abide the result. The court-fee shall be refunded.

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