

Ram Raj and ors. Vs. the State and ors.

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Court : Allahabad

Decided On : Dec-05-1962

Reported in : AIR1963All588; 1963CriLJ597

Judge : N.U. Beg and ;S.N. Dwivedi, JJ.

Acts : Uttar Pradesh Panchayat Act, 1947 - Sections 85, 85(1) and 85(2); Code of Civil Procedure (CPC) - Order 41, Rule 5

Appeal No. : Appln. No. 2 of 1958

Appellant : Ram Raj and ors.

Respondent : The State and ors.

Advocate for Def. : Standing Counsel for Opposite Parties (1 and 2), ;Brijesh Kumar and ;Saghir Ahmed, Advs. for Opposite Party No. 3

Advocate for Pet/Ap. : H.D. Srivastava and ;Umesh Chandra, Advs.

Disposition : Application dismissed

Judgement :

N.U. Beg, J.

1. This application under Article 227 of the Constitution of India has been made by three persons, viz., Ram Raj, Ram Prasad and Jot Narain. The three applicants

were arrayed as accused persons in a complaint filed by one Smt. Jagdei under Sections 323, 447 and 506 of the Indian Penal Code before the Nyaya Panchayat, Naubasta, district Gonda. During the pendency of this complaint before the Nyaya Panchayat the three applicants made an application under Section 85 of the U. P. Panchayat Raj Act before the Sub-Divisional Magistrate, Gonda, for the transfer of the case from the said Panchayat. On the 3rd of June, 1957, the Sub-Divisional Magistrate, Gonda passed a stay order directing that proceedings in the Nyaya Panchayat should be stayed. The stay order has not been filed by any of the parties in these proceedings. It is, however, agreed before us that such a stay order was passed by the Sub-Divisional Magistrate, Gonda.

The petitioner's case is that on the same date i. e., the 3rd of June, 1957, they sent a copy of this order to the Nyaya Panchayat, Naubasta, by registered post. This intimation was received by the Nyaya Panchayat on the 7th of June, 1957. One day previous to the receipt of this intimation, i. e., on the 6th of June, 1957, however, the Nyaya Panchayat had already passed judgment in the case convicting the three applicants under Sections 323, 447 and 506 of the Indian Penal Code and sentencing them to pay a fine of Rs. 20/- each on the first two counts and Rs. 10/- on the third count.

The applicants filed a revision petition against the said order before the Sub-Divisional Magistrate, Tarabganj, Gonda, under Section 89 of the U. P. Panchayat Raj Act. The order of the Nyaya Panchayat was modified by the revisional authority. The conviction of the applicants under Sections 447 and 506 of the Indian Penal Code was set aside in revision, but their convictions under Section 423 of I. P. C. and the fine imposed on them thereunder was maintained. Thereafter the three applicants filed the present application under Article 227 of the Constitution of India praying that the order passed in the case by the Nyaya Panchayat on the 6th of June, 1957, and that passed in revision by the Sub-Divisional Magistrate on the 19th of November, 1957, might be quashed.

2. Before us the sole contention advanced by the learned Counsel for the applicants is that as soon as the Sub-Divisional Magistrate had passed an order of stay in the case on the 3rd of June, 1957, the Nyaya Panchayat lost all jurisdiction

to proceed with the case and that consequently the final order convicting the applicants passed by the Nyaya Panchayat on the 6th of June, 1957, was bad in law and void. On the other hand, on behalf of the opposite parties it is argued that the order of stay had not been communicated to the Nyaya Panchayat till the 7th of June, 1957 and that as the Nyaya Panchayat was not aware of the stay order on the 6th of June, 1957, it cannot be said that the order passed by it on that date was ultra vires, null and void.

3. This matter was heard by a single Judge of this Court. It, was, however, referred to a Division Bench, as there appeared to be a conflict of decisions on this point.

4. On behalf of the applicants the learned Counsel has relied on a single Judge decision of this Court reported in *Ram Samujh v. State* : AIR1962 All80 . In this case it was held as follows : -

'A stay order should be deemed to take effect as soon as it is passed, quite irrespective of whether it is communicated or not. Injunctions, which are addressed to individual litigants, require to be communicated to the persons concerned before they can operate, for it would obviously be unfair to expect a person to obey an order of which he is unaware. But stay orders are meant for the Court, not for the litigants, and no unfairness is involved in their being treated as immediately effective, without communication to the Court concerned. If the Court proceeds with the case in ignorance of the stay order, it will not render itself liable to any kind of penalty the only result will be that whatever proceedings are taken after stay has been granted will be deemed to be without jurisdiction and a nullity.'

This case related to a stay order passed under the Code of Criminal Procedure and not a stay order passed under the U. P. Panchayat Raj Act, Further, reliance in this case was placed on two previous single Judge decisions of this Court in *Mardan v. Rex* : AIR1950 All478 and *Pahla v. Makhdoom* : AIR1952 All28 . Both these cases relate to orders of transfer.

We are of the opinion that the principle applicable to orders of transfer would not apply to an interim order of stay of proceedings passed under Section 85 of the U. P. Panchayat Raj Act. The effect of an order of withdrawal or transfer of a case is

that the inferior Court automatically loses all jurisdiction to proceed with the case and becomes functus officio. An order of this nature need not be communicated to the Court concerned. Such orders are passed under the express provisions of law entitling a higher Court to withdraw a case or to transfer it to another Court. Interim orders of stay passed by higher Courts, however, stand on a different footing. They do not have the effect of ousting the jurisdiction of the inferior Court. The case which was pending in the subordinate Court remains pending there. As the Court continues to have seisin over the case, it continues to retain jurisdiction over it. This is not so in the case of an order of transfer or withdrawal. An order of transfer or withdrawal divests the subordinate Court of all jurisdiction making it functus officio in the case which was pending before it. An order of transfer is, therefore, in the nature of a self-executory order and has instantaneous effect. On the other hand, a stay order is, in our view, in the nature of an injunction, and therefore takes effect only from the time of its communication to the person against whom it is issued. The only effect of such an order is to restrain temporarily the subordinate ^ Court from exercising certain powers in cases which ^ are pending before them and over which they continue to possess jurisdiction.

5. Reliance on behalf of the opposite parties is placed on a Full Bench decision of the Allahabad High Court in *Parsotam Saran v. Barhma Nand* : AIR1927 All401 . This Full Bench case related to a stay order passed under Order XLI Rule 5 of the Code of Civil Procedure. In this case it was held that a stay order passed by the High Court does not have the effect of nullifying a sale held before the stay order could be communicated either to the Court below or to the officer conducting the sale where the purchaser is not the decree-holder. While taking this view the Full Bench of the Allahabad High Court followed the view taken by a Full Bench of the Madras High Court in *K. Venkatachelapati Rao v. M. Kameshwaramma alias Kamakshamma*, ILR 41 Mad 151 : (AIR 1918 Mad 391 (FB)).

6. The view taken in the above Full Bench case was also followed by a Division Bench of this Court in the case of *Jagdish Pratap Sahi v. Collector and Deputy Commissioner*, 1960 All LJ 542. In this case also the principle laid down by the Division Bench was that a stay order passed by the higher Court does not have the effect of ousting the jurisdiction already possessed by the subordinate Court

over the case pending before it. Any proceedings taken in the subordinate Court to ignorance of the stay order cannot, therefore, be said to be null and void.

7. On behalf of the applicants reliance was also sought to be placed on two other cases. One of them is a single Judge decision of the erstwhile Chief Court of Oudh in *Raj Bahadur Singh v. Pirthvipal Singh*, AIR 1942 Oudh 24. The other is a Full Bench decision of the Lahore High Court in *Karam Ali v. Raja*, AIR 1949 Lah 108 (FB). In both these cases it was held that a stay order under Order XLI Rule's of the Code of Civil Procedure made by the High Court operates from the time that such stay order is made, and not from the time when it is communicated to the executing Court. There is no doubt a conflict of views on this particular point between the Full Bench case of the Allahabad High Court and the view taken in these two cases.

8. We may, however, observe that even the line of reasoning adopted in the Full Bench case of the Lahore High Court would not apply to a case under Section 85 of the U. P. Panchayat Raj Act. The view taken in the Full Bench case of the Lahore High Court was that a stay order passed under Order XLI Rule 5 of the Code of Civil Procedure has the effect of restricting the jurisdiction of the subordinate Court, at any rate, temporarily, in respect of the matters to which the order relates. Such an order is passed under an express power given to the Court under Order XLI Rule 5 of the Code of Civil Procedure. An order of stay passed under Order XLI Rule 5 of the Code of Civil Procedure is therefore, passed under an express provision of law entitling the higher Court to pass such an order. Where such an express power is given to the higher Court the power of the inferior Court is superseded in that regard by the power exercised by the higher Court. It is to be noted that this reasoning will not be applicable to a case under Section 85 of the U. P. Panchayat Raj Act, the relevant portion of which runs as follows: -

'85. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard or on his own motion without such notice the Sub-Divisional Magistrate, the Munsif or the Sub-Divisional Officer, according as the case pending before a Nyaya Panchayat is a criminal, civil or revenue case, may at any stage, withdraw the same and -

(i) try to dispose of the same, or

(ii) transfer it to another Bench of the Nyaya Panchayat, or

(iii) transfer the same for trial or disposal to any other Magistrate, Munsif or Assistant Collector, competent to try or dispose of the case, (2) Where any criminal case, civil case or revenue case has been withdrawn under Sub-section (1) the Court or officer who thereafter tries such criminal case, civil case or revenue case may either re-try it or proceed from the point at which it was withdrawn.(3)

9. It may be noted that under Sub-section (i) of Section 85 quoted above a transfer order involves an instantaneous withdrawal of the case to the higher Court and then its transfer to another Court or officer. Sub-section (2) of Section 85 further indicates that it is open to a transferee Court to treat proceedings that have already taken place before the Nyaya Panchayat upto the date of the order of withdrawal as valid proceedings, and to proceed to try the case from that stage. This would mean that the Act contemplates that in spite of the application for transfer, proceedings may go on before the Nyaya Panchayat, and such proceedings may be treated as proper and valid proceedings by the transferee Court.

Lastly, it is to be noted that there is no express power given in the above provision of law to the higher Court to pass interim orders of stay of proceedings pending in the Nyaya Panchayat. Reference in this connection might also be made to Section 103 of the Panchayat Raj Act in which power to stay the proceedings is expressly given to the appellate authority in an appeal filed against an order of a Gaon Panchayat under Section 102 of the Act. This shows that where the Legislature intended to confer this power, it expressly made provision in that regard. Order XLI Rule 5 of the Code of Civil Procedure similarly makes an express provision empowering an appellate Court to stay proceedings in execution. On the other hand, such an express provision is conspicuous by its absence under Section 85 of the U. P. Panchayat Raj Act. In this respect, therefore, the provisions of Section 85 of the U. P. Panchayat Raj Act are different from the provisions of Order XLI Rule 5 of the Code of Civil Procedure, while passing an order of stay under

Section 85 of the U. P. Panchayat Raj Act therefore, the Court does not act under any express provision of law empowering the Court to stay proceedings in the lower Court.

10. On behalf of the applicants the learned Counsel argued that the source of this power is to be found in the principle laid down by their Lordships of the Supreme Court in *Matajog Dobey v. R. C. Bhari* : [1955]28ITR941(SC) . This principle is laid down in the above case in the following words: -

'Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercising of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution.'

The learned counsel argued that in order to enable a sub-Divisional Magistrate to exercise the power of transfer conferred on him under Section 85 of the U. P. Panchayat Raj Act, it is essential for him to also possess the power to pass an interim order of stay in proceedings pending before the Nyaya Panchayat. No doubt, it may be necessary in some cases, in which the date fixed is shortly after the date of the application under Section 85 of the Panchayat Raj Act, to pass Orders of stay in respect of proceedings pending before the Nyaya Panchayat. Even in such cases proceedings in the Nyaya Panchayat may be brought to a standstill if the revising authority immediately sends for the record of the case. If, however, the interval of time between the date of the presentation of the application for transfer and the date fixed for hearing of the case before the Nyaya Panchayat is sufficiently long, it may not be necessary for the Sub-Divisional Magistrate to pass an order of stay at all.

Another point to notice in this connection is that under Section 85 of the U. P. Panchayat Raj Act the Sub-Divisional Magistrate is it appears also empowered to transfer a case suo motu without notice to the parties. The result, therefore, is that if an emergent case were to be brought to the notice of the Sub-Divisional Magistrate, the law has given him the power to transfer it straightaway without passing any interim order of stay at all. It cannot, therefore, be said that it is

always necessary for the Sub-Divisional Magistrate to pass an order of stay in every case to enable him to effectively exercise the power of withdrawal and transfer vested in him under Section 85 of the U. P. Panchayat Raj Act. As laid down by their Lordships of the Supreme Court in the case of *Bidi, Bidi leaves and Tobacco Merchant's Association Gondia v. Bombay State* : (1961)IIILLJ663SC , the doctrine, of implied power can be invoked only in cases where it is impossible to perform the act in all cases without resorting to the said power. In the circumstances of the present case all that can be said is that such a power is a power the vesting of which in the Sub-Divisional Magistrate might be proper. In other words, the power may be a proper one but is not a necessary one.

11. Moreover, as already observed by us the power of stay exercised by the Sub-Divisional Magistrate in proceeding under Section 85 of the U. P. Panchayat Raj Act is not a power conferred by the express terms of the statute. The utmost that can be said is that such a power is an implied power. Therefore, any order passed by the Sub-Divisional Magistrate in exercise of such implied power can be more appropriately described as a direction to the Nyaya Panchayat rather than an order issued to it. Such a direction being made under the implied powers of the Court is more in the nature of an ordinary injunction than of a stay order passed under the express provisions of the statute.

12. For the above reasons, we are of opinion that whatever view be taken in respect of an order of stay passed under Order XLI Rule 5 of the Code of Civil Procedure, at any rate, so far as an order of stay passed in an application under Section 85 of the U. P. Panchayat Raj Act is concerned, the order passed thereunder cannot have the effect of ousting the jurisdiction of the Nyaya Panchayat in the case, pending before it so as to make all orders passed by it in ignorance of the stay order null and void. The final order of conviction passed in the present case in proceedings pending in the Nyaya Panchayat in ignorance of the order of stay cannot, therefore, be struck down as ultra vires, null and void. In this view of the matter the order passed in revision proceedings by the Sub-Divisional Magistrate has also to be sustained.

13. For the above reasons we are of opinion that this application has no force. We accordingly dismiss it with costs.

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