

Lakshmi Narayan Kasera Vs. Dhirendra Kumar Jain and ors.

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SooperKanoon Citation : sooperkanoon.com/517901

Court : Jharkhand

Decided On : May-13-2005

Reported in : [2005(4)JCR46(Jhr)]

Judge : N.N. Tiwari, J.

Acts : Limitation Act - Sections 5; Code of Civil Procedure (CPC) (Amendment) Act, 1976 - Order 41, Rules 3A, 3A(3), 11, 11(1) and 13; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rules 1(1) and (3)

Appeal No. : S.A. No. 599 of 2004 and I.A. Nos. 820 and 1291 of 2005

Appellant : Lakshmi Narayan Kasera

Respondent : Dhirendra Kumar Jain and ors.

Advocate for Def. : None

Advocate for Pet/Ap. : Pradip Modi, Adv.

Disposition : Application dismissed

Judgement :

ORDER

N.N. Tiwari, J.

1. In this application, the appellant has prayed for an order of stay of the proceeding of Execution Case No. 5 of 2004 pending in the Court of Munsif at Hazaribagh. It has been stated that the respondents have filed the said Execution Case No. 5 of 2004 praying for execution of the impugned decree and for delivery of possession of the suit premises in their favour. A petition was filed before the executing Court praying for stay of the execution of the decree till disposal of this appeal, but the Executing Court by its order dated 8.3.2005 rejected the petition and directed the respondents to take steps for process of delivery of possession. The appellant apprehends that the Executing Court will issue writ delivery of possession if the further proceeding of the execution case is not stayed by this Court. It has been stated that the appellant is the tenant of the suit premises for last more than 30 years where he has been running a shop for earning livelihood. If the appellant is evicted from the suit premises in execution of the decree, the appeal shall become infructuous.

2. Mr. Pradip Modi, learned counsel appearing on behalf of the appellant submitted that the appeal was filed after expiry of the limitation period and an application under Section 5 of the Limitation Act for condoning the delay of more than two years three months has been filed. Mr. Modi submitted that the stay matter can be heard and disposed of in a time barred appeal against the decree, even before an order of condonation of delay is passed. Learned counsel, therefore, insisted for passing an order on this application at this stage itself. Learned counsel, in support of his submissions, relied on a decision of Madras High Court in Gouse Bi v. Salima Bi reported in : AIR1974 Mad220 .

3. From the record, it appears that by order dated 29.3.2005 passed in LA. No. 2724 of 2004, on the petition under Section 5 of the Limitation Act, this Court has issued notice to the respondents. The respondents have not appeared till date, neither there is any declaration that the notices have been served on them in the limitation matter.

4. It is relevant to notice here that Rule 3A has been inserted in Order XLI of Code of Civil Procedure by the amending Act, 1976 whereby a procedure has been prescribed for securing the final determination of the question as to limitation even

at the stage of the admission of the appeal. The said Order XLI, Rule 3A of the Code of Civil Procedure runs thus :-

'3-A. Application for condonation of delay.-(I) When an appeal is presented after the expiry of the period of limitation specified therefore, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

(3) Where an application has been made under Sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not after hearing under Rule 11, decide to hear the appeal.'

5. From the bare reading of Order XLI, Rule 3A(3) of the Code of Civil Procedure makes it absolutely clear that until the delay is condoned, there could be no stay of the execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal.

6. In view of the said statutory bar, the execution of the decree cannot be stayed until the appeal is heard under Rule 11 and this Court decides to hear the appeal further. The decision in *Gouse Bi (supra)*, which has been cited by the learned counsel was rendered in a different situation under the provisions of Code of Civil Procedure, 1908 read with Order XLI Rule 1(1),(3) (Madras Edition), i.e., before the said Rule 3A of Order XLI was brought on the statute book the said decision is of no help in the facts situation of the instant case.

7. In view of the said position of law, the execution of the impugned decree, as prayed for by the appellant, cannot be stayed at this stage. These interlocutory applications are, accordingly, dismissed.

