

Hardayal Vs. Surja Ram

Hardayal Vs. Surja Ram

SooperKanoon Citation : sooperkanoon.com/611890

Court : Punjab and Haryana

Decided On : Nov-02-1976

Reported in : AIR1977P& H259

Judge : R.S. Narula, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 41, Rule 5 and 5(3)

Appeal No. : Civil Revn. No. 1323 of 1976

Appellant : Hardayal

Respondent : Surja Ram

Advocate for Def. : C.B. Goel and; P.S. Jain, Advs.

Advocate for Pet/Ap. : G.C. Mittal, Adv.

Judgement :

ORDER

R.S. Narula, C.J.

1. In a suit for recovery of Rs. 6,381.95 Paise on account of arrears of rent and interest up to June 10, 1973, and for ejectment, a decree for ejectment and for recovery of Rs. 6,082.10 Paise was granted by the trial Court. In the tenant's first appeal against the decree of the trial Court, an application was moved by him

under Order 41, R. 5 of the Civil P. C. (hereinafter referred to as the Code) for staying of execution. The final order by which that application was disposed of was passed by Mr. Shiv Dass Tyagi, Additional District Judge, Hissar, on June 7, 1976. This is what he said in that order:--

'Counsel for the respondent submits that the appellant be called upon to pay the decretal amount before the continuance of the stay is extended. Appellant's counsel submits that out of the money decree, appeal filed by him extends to Rs. 3,452/-. The trial Judge had granted decree with interest amounting to Rs. 596/-. Considering all the circumstances, the appellant is directed to deposit within two months from today Rs. 3,000/- in the trial Court, which will be paid to the decree holder. The decree holder would have the right to execute his decree for the amount for which appeal has not been filed. In view of the circumstance that the appellant has been directed to deposit Rs. 3,000/- so in the event of the deposit, the execution of the decree remains stayed. In the event of default in deposit of the amount by the time given above, the stay of the execution of the decree would stand vacated.'

2. Mr. G.C. Mittal, learned counsel for the petitioner, who has forcefully assailed the order of the lower appellate Court, has submitted that the order under revision neither discloses any finding of a sufficient cause for staying the execution of the decree which is a condition precedent for the exercise of jurisdiction under Sub-rule (1) of Rule 5 of Order 41' of the Code nor conforms to the mandatory requirements of Clause (c) of Sub-rule (3) of Rule 5 of Order 41 of the Code. Sub-rule (1) and Sub-rule (3) of Rule 5 of Order 41 of the Code read as below:--

'5 (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.'

* * * * *

'5 (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.'

I have no hesitation in agreeing with Mr. G.C. Mittal that after merely quoting the amount for which the decree has been granted by the trial Court and taking into consideration the fact that the appeal has been preferred only against a part of the decree, if an appellate Court straightway passes the final order under Order 41, Rule 5 of the Code by saying that it is doing so after 'considering all the circumstances' such an order does not disclose an application of mind and does not show that the Court has been satisfied of any 'sufficient cause' for staying the execution of the decree. The rule is that mere preferring of an appeal against a decree, does not operate as stay. Nor can stay be granted merely because an appeal has been preferred. The exception to the rule is the grant of specific order of stay if sufficient grounds for adopting that course are established. A further statutory safeguard has been provided in Clause (c) of Sub-rule (3) of Rule 5 of Order 41 of the Code that no order for stay of execution shall be made even if there is sufficient cause for doing so unless security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. The lower appellate Court completely failed to pass any order in that respect. It granted stay merely because an appeal had been filed. The lower appellate Court has no jurisdiction to pass an order under Order 41, Rule 5 of the Code which does not satisfy the mandatory requirements of that rule and appears to have been passed in complete ignorance of its statutory requirements. There is thus apparent jurisdictional error in the order, in the sense that the order suffers from patent and material illegalities in the exercise of the jurisdiction of the lower appellate Court under Rule 5 of Order 41 of the Code.

3. Mr. P.S. Jain, learned counsel for the defendant-respondent, has submitted' that in view of the authoritative pronouncement of their Lordships of the Supreme Court

in M/s. D.L.F. Housing and Construction Co. (Pvt.) Ltd. v. Sarup Singh, AIR 1971 SC 2324, this Court has no jurisdiction to interfere with the order of the lower Appellate Court merely because it is wrong either in law or on facts. But, their Lordships have made it clear that the Court can interfere with an order of the Court below in exercise of this very Court's jurisdiction under Section 115 of the Code if it suffers from material illegalities or irregularities in the exercise of the lower Court's jurisdiction. I have given clear finding to that effect in an earlier part of this judgment. The order of the lower appellate Court, dated June 7, 1976, cannot, therefore, possibly be upheld. The learned Additional District Judge does not appear to have been aware of the fact that he was granting stay of execution of a decree for ejectment in a case where adjudication had been made for arrears of rent for the period ending June 10, 1973, only and subsequent rent or damages amounting to thousands of rupees had become due. I am saying this because it is usual in cases of granting stay against decrees for ejectment where sufficient cause for stay is made out to impose the condition of deposit of subsequent rent by way of security under Order 41, Rule 5 (3) (c) of the Code. Even otherwise the order appears to be contradictory. In one portion of the judgment, he has required the judgment-debtor to deposit Rs. 3,000/-. It is not clear whether that is intended to cover the admitted amount of the claim plus Rs. 370/- on account of costs etc. or that relates to substantial part of the disputed amount because out of the decretal amount of Rs. 6,082,10 Paise (which has been referred to as Rs. 596 only in the order), the defendant-respondent had not preferred any appeal against the decree for Rupees 2,630/- and had questioned the money decree to the extent of Rs. 3,452/- only. If the amount directed to be deposited is expected to represent part of the disputed claim, then the direction for the stay of the execution of the whole decree in case of deposit of that amount again would not appear to be sustainable if some one sits in appeal against that order. If the amount is intended to cover the admitted claim, then the order does not provide for any kind of security to any extent so far as the claim under appeal was concerned. Nor can an order for stay of execution be passed at all in respect of the part of the decree against which no appeal has been preferred. From whatever angle, therefore, the matter is looked at, the order of the lower appellate Court has to be set aside.

4. The question then arises as to what order should be passed in its place. That is not my function in exercise of the revisional jurisdiction of this Court. All that I can do is to set aside the order under revision and direct the lower appellate Court to pass an appropriate order in accordance with law on the application for stay moved by the defendant-respondent after hearing both the sides. Since the execution of the decree appears to have been stayed by some ex parte order prior to the passing of the order under revision, that order will naturally hold the field, as I have not set aside that ex parte order, till an appropriate order is passed on the application for stay. If no earlier date has been fixed by the lower appellate Court for the hearing of the appeal, the parties shall appear before the Additional District Judge, Hissar, on November 24, 1976, when they will make their additional submissions, if any, in connection with the application, after hearing of which the Court shall pass an appropriate order. Costs to abide the decision of the appeal in the lower appellate Court.