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Gouse Bi Vs. Salima Bi

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Court : Chennai

Decided On : Sep-07-1973

Reported in : AIR1974Mad220

Judge : Venkataraman and ;Maharajan, JJ.

Acts : Limitation Act, 1908 - Sections 5 - Schedule - Article 182

Appeal No. : C.M.P. 8236 of 1973 in C.M.P. 719 of 1972 in Appeal S.R. 81649 of 1970

Appellant : Gouse Bi

Respondent : Salima Bi

Judgement :

1. The petitioner herein, Gouse Bi, was the 1st defendant in O. S. 703 of 1964 on the file of the City Civil Court, Madras. It was a suit for partition. A decree was passed on 8-9-1969, overruling a contention of hers that some property belonged to her absolutely as Mahar. She filed a memorandum of appeal to this court, but, since, it was out of time, she filed a petition, CMP No. 719 of 1972, under Section 5 of the Limitation Act, to excuse the delay in filing the appeal. Pending disposal of CMP No. 719 of 1972, she has filed CMP No. 8236 of 1973 for stay of further proceedings in O. S. 703 of 1964 on the file of the City Civil Court, Madras.

2. So far as we are aware, till recently, the uniform practice of this court has been to grant interim stay, if the court felt that it would be expedient to grant stay, and

notice would be ordered of the interim stay along with the notice in the application under Section 5 of the Limitation Act. But in a recent decision in C. M. P. No. 6420 of 1973, Paul, J., has decided that till the delay is excused under Section 5 of the Limitation Act, the court cannot be said to cannot pass any interlocutory orders. The office therefore returned the petition C. M. P. 8236 of 1973, drawing the attention of the petitioner to the said decision of Paul, J., and asking her how in view of that decision the present petition is maintainable. The point has been argued before us by the petitioner's learned Counsel Mr. Hariharan. He contends that the decision of Paul, J., is wrong and that this court has jurisdiction to grant stay if it thinks fit to do so on merits.

3. As we observed, so far as we are aware, it had been the uniform practice of this court, till the decision of Paul, J., to grant interim stay, if the court thought fit to do so. However, since Paul, J., has decided otherwise, it is necessary to go into the matter fully.

Paul, J., has relied on the decision of the Travancore High Court in Ramayyan v. Ashtamoorthi Namboodri, 1962 Ker LT 500 = (1962 Ker LJ 681), which is cited in Mulla's C.P. Code, under Order XLI, Rule 1, as authority for the following commentary--

"It has been held that when an appeal is presented out of time and a petition is filed for excusing the delay, no interlocutory orders can be passed until the petition is order and the appeal taken on life".

Paul, J., was not able to get at the decision. We have, however been able to get the decision. It is decision of T. C. Ragavan, J., in that case, the suit of the plaintiff was dismissed for default. An application for restoration was dismissed. The plaintiff filed a civil miscellaneous appeal against that and he also filed a regular appeal against the dismissal of the suit. Along with the regular appeal he filed an application to excuse the delay in filing the appeal, and he also filed an application for injunction. The District Judge granted the injunction. The District Judge granted the injunction. The defendant appealed to the High Court. The learned Judge set aside the decision of the District Judge, pointing out that the District Judge had overlooked the provisions of sub-rule (3) of Order XLI, Rule 1, which was in force

in Travancore from June 1959. That provision had been inserted in Madras even in 1921 vide Fort St. George Gazette, dated 15-2-1921, Part II, page 362. It is necessary to quote it in full--

"When an appeal is presented after the period of limitation prescribed therefore, it shall be accompanied by a petition 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, and the court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under Rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reason for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the court acting under the provisions of Section 5 of Act IX of 1908 have been heard. T. C. Raghavan, J., says that, if the court does not dismiss the appeal under Order XLI, Rule 11, or on the ground that there is no ground for excusing the delay, it cannot deal with the appeal in any manner till after notice has been given to the respondent of the application under Section 5 of the Limitation Act and his objections thereon have been heard. On such reasoning Raghavan, J., has held that the court has no power to issue any interlocutory order till the petition under Section 5 of the Limitation Act is allowed. He has sought support for this view from the decision of Madhavan Nair, J., in Bayya Reddi v. Gopalarao, AIR 1934 Mad 303. In that case, the plaintiff obtained a decree in the court of the District Munsif in 1923. It was confirmed in appeal by the District Court on 20-4-1925. The judgment-debtor preferred an appeal to the High Court, out of time. His application to excuse the delay was dismissed on 5-3-1926. On that day the second appeal sought to be preferred was also dismissed in consequence. The decree-holder then filed an execution petition on 6-9-1928. The judgment-debtor contended that the execution petition was out of time. The relevant statutory provision was Article 182 of the First schedule to the Limitation Act, 1908, which provided a period of three years as follows--

Period of Limitation Time from which period begins to run

Three years 1. The date of the decree or order, or

2. (where there has been an appeal) the date of the final decree or order of the appellate Court or the withdrawal of the appeal.

The contention of the judgment-debtor was that the appeal which was relevant was the appeal to the District Court, that the decree holder had to file the execution petition within three years from 20-4-1925 and that consequently the execution petition was out of time. The decree-holder, however, contended that he was entitled to take as the starting point 5-3-1926. The question therefore before the learned Judge was whether there had been an appeal to the High Court. The learned Judge answered it in the negative. His main reason was that, whatever might have been the position before sub-rule (3) was added as a result of the decision of the Privy Council inKrishnasami Pani Kondar v. Ramaswami Chettiar, ILR 41 Mad 412 = (AIR 1917 PC 179) the position after the rule was enacted was clear that there could not be said to be any appeal at all till the delay in filing the appeal was excused.

4. In the case before the Privy Council, which went up from this Court, a single judge of this court had, in accordance with the existing practice, excused the delay exparte. Notice went thereafter of the appeal and at the hearing of the appeal was out of time. This Court held that the appeal was out of time and dismissed the appeal. Their Lordships of the Privy Council observed:--

"The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances, their Lordships hold that the Division Bench had jurisdiction to reconsider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But, while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the court comes to decide on the question of delay. Their Lordships therefore desire to impress on the courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

It was as a result of the above decision that sub-rule (3) was introduced in Madras, and a similar rule was introduced in Kerala in 1959, Madhavan Nair, J., took the view that in view of sub-rule (3) the appeal could not be admitted without the delay being excused and that, if the appeal was not admitted, there could be said to be no appeal within the meaning of Article 182 (2) of the Limitation Act, 1908.

5. Before proceeding further, it is necessary to quote Order XLI Rule 5:

"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 and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of such final decree, if already made.

(2) Where an application is made for stay of execution of an appellate decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(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.

(4) Notwithstanding anything contained in sub-rule (3), the court may make an ex parte order for stay of execution pending the hearing of the application".

6. Now taken Order XLI, Rule 5 by itself, it is prima facie clear that the appellate court may order stay of execution of the decree sought to be appealed from and

may make an ex parte order of stay. There is no doubt that this is the appellate court in this case. Two questions therefore arise: (i) Whether it can be said that there has been no appeal at all, according to the view of Madhavan Nair J. and Paul, J., till the application for excusing the delay under Section 5 of the Limitation Act is allowed: and (ii) even if there could be said to be an appeal the moment a memorandum of appeal is filed irrespective of the fact that the appeal has been filed out of time, does order XLI, Rule 1(3) preclude the appellate court from making an ex parte order of stay of execution of the decree sought to be appealed from. to put it differently, can it be said that, in making an ex parte order of stay, the appellate court is dealing with the appeal in any way otherwise than by dismissing it under Order XLI, Rule 11 or on the ground that it is not satisfied as to the sufficiency of the reason for extending the period of limitation.

7. On the first question, it is relevant to note that Order XLI, Rule 1(1) starts by saying 'Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader', and sub-rule (3) itself opens by saying, "When an appeal is presented after the period of limitation prescribed therefor". These provisions thus make it clear that, merely because a memorandum of appeal is presented after the period of limitation prescribed therefore, it does not cease to be an appeal. In fact, sub-rule (3) itself recognises that it is an appeal, because it is on this footing it says "and the court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it)". Thus it is clear from the provisions of Order XLI, Rule 1 itself that the moment a memorandum of appeal has been presented, though out of time, there is an appeal. This position has also been made clear by the decision of the Privy Council in Narendranath Dey v. Sureshchander Dey, ILR 60 Cal 1 = (AIR 1932 PC 165). In that case, there was a mortgage suit in which the learned Subordinate Judge delivered judgment on 24-6-1920. The decree was drawn up on 2-8-1920, but properly dated as 24th June. On 27th August, 1920, the decree-holder, Madan Mohan, presented an application to the High Court purporting to be an appeal from the 'order' of the Subordinate Judge of 24th June, 1920, and alleging, what was clearly untrue, that on decree had been drawn up. The appeal, though irregular in form as not being an appeal against the decree of the Subordinate Judge and being insufficiently stamped for that purpose, was admitted and heard in due course by the Bench. The appeal

was eventually dismissed on the ground of irregularity and upon merits. The dismissal was embodied in a decree of the High Court dated 24-8-1922. An execution petition was presented by the parties entitled under the decree for execution sale of the mortgaged properties. it was opposed by some of the judgment-debtors on the ground of limitation. The question was whether there was an appeal to the high Court, within the meaning of Article 182 of the Limitation Act. The Subordinate Judge held that the petition was not time-barred. But the High Court took the opposite view and gave three reasons, the first of which was that 'Madan Mohan's application of 27-8-1920 was by reason of its irregularity, not an appeal at all. Their Lordship of the Privy Council, differing from the High Court, held--

"In their Lordships' opinion there is no force in the first of these contentions. There is no definition of appeal in the C.P. Code, but their Lordships have no doubt that any application by a part to an appellate court, asking it to set aside or revise a decision of a Subordinate Court is an appeal within the ordinary acceptation of the term, an that it is no less an appeal because it is irregular or incompetent. The 1920 appeal was admitted and was heard in due course, and a decree was made upon it".

8. In the same way, in our opinion, particularly having regard to the wording of Order XLI, Rule 1, as pointed out already there is an appeal to this court, even though it has not been presented in time and it might even turn out eventually that the application for excusing the delay is no allowed. Madhavan Nair, J., expressed the view that the decision of the Privy Council did not apply to the facts of the case before him. With respect, we differ.

9. Now we come to the second question, whether Order XLI, Rule 1(3) forbids us to pass an ex parte order of stay. In answering the question we must remember at the outset how in some cases the very purpose of the appeal may be frustrated and injustice may result if such an ex parte order is not passed. Quite often, particularly, in these days, when it is difficult to get accommodation in trains or even in buses and there is even strike in the railways and bus transports, a party may not be able to come to Madras and file an appeal in time and the chances are

that the application for excusing the delay would be allowed. But, in the meantime, if the appellant's house is pulled down as a result of the lower court's decree, irreparable harm would be caused to him and it would be no consolation to him to be told that he would be given restitution in money, if his appeal is eventually allowed. It is easy to imagine other such instances of substantial loss within the meaning of Order XLI, Rule 5 irreparable harm to the appellant. Yet, on the reasoning of Paul, J., the court would be powerless to pass any order and prevent such substantial loss or irreparable harm. It is no use saying that hard cases make bad law, because such instances of substantial loss or irreparable harm are quite common and likely to happen often if the decree is not stayed. Further, that maxim would have application only if the law is unequivocal, but where, as in this case, Order XLI, Rule 5 enables the court to pass an ex parte order of stay, and the interests of justice do require it, we should not construe Order XLI, Rule 1(3) so as to make the provisions of Order XLI, Rule (5) a dead letter, and so as to result in injustice. It is possible to give an interpretation which would reconcile both Order XLI, Rule 1(3) and Order XLI, Rule 5, namely, that when the court passes an ex parte order of stay, it does not deal with the appeal in any manner, but is merely maintaining the status quo. It must be remembered that the reason for the introduction of Order XLI, Rule 1(3) was the decision of the Privy Council in ILR 41 Mad 412 = (AIR 1917 PC 179), which again shows that the reason why their Lordships suggested that the question of excusing the delay should be disposed of first was only to prevent needless expenditure of printing records or typing voluminous records and engaging counsel paying heavy fees, which would be unnecessary if the delay were not to be excused. This being the object underlying the introduction of the rule, we need not extend it so as to throttle the exercise of the power of the appellate court under Order XLI rule 5.

10. We are finally of the opinion that Order XLI rule 5 itself enables us to pass an ex parte order of stay; but if necessary, we are prepared to say that we can exercise the power of stay by virtue of our inherent powers under Section 151 C.P.C. The principle in these cases has been enunciated in several cases, and it is sufficient to refer to some of them. In Nandakishore Singh v. Ramgolam Sahu, (1913) ILR 40 Cal 955, it was held by that eminent Judge, Mookerjee J. that the High Court, in exercise of its inherent powers, could make an order of stay of

proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council, though the case was not expressly covered by the rules. The learned Judge pointed out that, if the proposed application for special leave was granted by the Judicial Committee, the High Court would be competent to stay the proceedings under the authority of the decision of the Privy Council. He proceeded to observe--

"The Court, therefore, ought now to act in aid of possible order of stay that may hereafter have to be made. if the contrary view is taken, what is the result? Assume that the present application for stay is refused, and the decree-holder permitted to sell the mortgaged properties; the application for special leave is granted by the Judicial Committee and an application then made to this court by the judgment-debtors for stay of proceedings. Are we to say that our action has already been paralysed, that we are powerless to grant relief and that the application is infructuous? I am strongly of opinion, after most anxious consideration of the subject, that the court should not tolerate such a result, and, as I have shown, the position may be avoided by the recognition of sound judicial principles......... It is fairly obvious that, if the contention of the decree-holders were to prevail, the gravest injustice might be done to litigants. An application to the Judicial Committee for special leave to appeal to His Majesty in Council must necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of the utmost expedition, in the preparation and transmission of papers....... if meanwhile his properties are allowed to be sold up by the decree-holders on the theory that this court is powerless to interfere, not only may an application for stay after the grant of the special leave, as contemplated by the Judicial Committee in Nityamoni Dasi v. Madhusudan Sen, (1911) ILR 38 Cal 335 (PC), become infructuous, but the appeal admitted by special leave of their Lordships of the Judicial Committee may turn out to be wholly illusory and ineffectual. It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree or weakens its effect; the stay is granted on the principle that the parties should, if the circumstances justify the adoption of such a course, be retained in status quo till the validity of the decree has been tested in the court of ultimate appeal. The exercise of the inherent power of the court should

thus be widened to aid the administration of justice and not unduly restricted so as to cause needless hardship to litigants and a possible failure of justice".

Holmwood, J., was not prepared to differ on the general principles, though he stated that in that particular case the use of the inherent power would be an abuse of the process of the court.

11. As applied to the present case, the observations might be translated thus. If this court were to excuse the delay then it would become clothed with power to stay execution, if necessary on suitable terms. The grant of stay at this stage is only in aid of a possible order of stay that may hereafter have to be made. Another aspect is that, if such an order is not made, irreparable harm might be caused to the appellant.

12. The same principle was reiterated by another Bench of the Calcutta High Court in Ramendra Narayan Roy v. Bibhabati Debi, 45 Cal WN 1023 = (AIR 1942 Cal 488).

13. There is also a decision of Kuppuswami Ayyar, J., in Ankalureddi v. Chinna Ankalureddi, 1943-2 Mad LJ 557 = (AIR 1944 Mad 161), that the power of stay can be exercised under Section 151, irrespective of Order XLI, Rule 5. There was an exparte preliminary decree on a mortgage suit. The defendant's application under Order IX, Rule 13 to set aside the ex parte decree was dismissed. He filed an appeal against that order, and an application for interim stay of the passing of the final decree. Order XLI, rule 5 did not in terms apply, but the learned Judge held that he could exercise the powers under Section 151, Civil Procedure Code. We need hardly make it clear that by the exercise of such inherent powers under Section 151, Civil Procedure Code we are not in any way dealing with the appeal itself and are not thereof contravening in any way the specific provisions of Order XLI, Rule 1(3), Civil Procedure Code.

14. We therefore hold that we have jurisdiction to grant an ex parte order of stay under Order XLI, Rule 5, and, if necessary, under Section 151 of the Civil Procedure Code.

15. Petition allowed.

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