

Ramasamy Moopnar Vs. Ramasamy Moopnar

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Court : Chennai

Decided On : Sep-17-1990

Reported in : (1991)283MLJ1

Appellant : Ramasamy Moopnar

Respondent : Ramasamy Moopnar

Judgement :

ORDER

Srinivasan, J.

1. This revision petition is against the order of the executing Court directing the petitioner to deposit a sum of Rs. 15,000 within 15 days from the date of order, failing which the petition shall stand dismissed.

2. The facts which led to the order of the Court below are as follows: The petitioner suffered a decree in O.S. No. 51 of 1985 on the file of the Subordinate Judge's Court, Virudhachalam. The petitioner filed A.S. No. 1205 of 1986 on the file of this Court and prayed for stay in C.M.P. No. 11179 of 1989. This Court granted stay on condition that the petitioner should deposit a sum of Rs. 15,000 in the trial Court within 8 weeks from the date of order, namely, 22.9.1989. The petitioner failed to make the deposit and the stay stood vacated automatically.

3. Thereafter, the petitioner filed E.A. No. 35 of 1990 under Order 41, Rule 6(2) of the Code of Civil Procedure for stay of sale to be held in execution proceedings. That was opposed by the respondent-decree holder. The court below after referring to the order of this Court in C.M.P. No. 11179 of 1989 directed the petitioner to pay a sum of Rs. 15,000 directly to the petitioner-decreeholder as a condition for stay. The Court below also stated that the petition would stand dismissed, if the amount has not been paid.

4. Not complying with the said order, the petitioner preferred this revision petition challenging the direction given by the Court below. The contention raised by the petitioner is that the Court had no jurisdiction to direct payment to the decreeholder directly and it had only jurisdiction to direct furnishing of security by the judgment-debtor.

5. The provisions of Order 41, Rule 6 are as follows:

Security in case of order for execution of decree appealed from-

(1) where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Rule 6 contemplates an order for security as well as order with suitable terms. In this case, the Court below has thought fit, in the circumstances of the case, that the petitioner should be directed to pay the respondent decreeholder directly a

sum of Rs. 15,000, as the petitioner had defaulted in complying with the order of this Court made during the pendency of the first appeal. No exception can be taken to the said order. There is no doubt that the executing Court had jurisdiction to pass an order of this type.

6. The matter is not res integra. A Division Bench of this Court has in *Thirumalai v. Town Bank, Pollachi* : AIR1934 Mad709 , held that a Court can order not only furnishing of security, but also deposit of the decree amount in case as a condition for stay of sale under Order 41, Rule 6, C.P.C. Hence, the contention of the petitioner is wholly without substance.

7. Learned Counsel for the petitioner submits that pursuant to the interim order of this Court, a sum of Rs. 10,000 has been deposited by the petitioner in the Court below and the petitioner should be permitted to deposit the balance of Rs. 5,000 by granting some time therefor. I am of the view that the request of the petitioner's counsel should not be granted in this case. The reason is as follows.

8. I take the view that the application filed by the petitioner under Rule 6 of Order 41, Code of Civil Procedure, before the Court below is itself not maintainable. The Rule no doubt refers to the pendency of an appeal against the decree and enables the executing Court to pass an order for stay on terms. Under Rule 5 of Order 45, Code of Civil Procedure, an appeal shall not operate as stay of proceedings, but the appellate Court may, for sufficient cause, order stay of execution of such decree. Rules 5 and 6 together would only show that where the appellate Court has not been called upon to exercise its powers of granting stay during the pendency of the appeal, the executing Court would be in a position to pass an order under Rule 6. If the appellate Court has exercised its powers under Rule 5 of Order 41 of the Code of Civil Procedure, then the party who fails to comply with the conditions imposed by the appellate Court cannot approach the executing Court to function under Order 41, Rule 6, Code of Civil Procedure. Learned Counsel contends that Rule 6 is independent of Rule 5 and whether an application under Rule 5 filed before the appellate Court has been granted or dismissed, it will be open to the executing Court to exercise its powers under Rule 6. If that construction is applied, it will lead to an absurd and incongruous situation that

when a higher Court has refused to grant stay of execution of the decree, the lower Court can exercise its powers and grant stay of execution. That will only put the lower Court on a higher pedestal than the appellate Court. Such a situation could never have been contemplated by the Legislature.

9. Further, such a construction will lead to an inconsistency between Rule 5 and Rule 6. Under Rule 5, the Legislature has categorically stated that an appeal shall not operate as a stay. The matter of stay is left to the discretion of the appellate Court. But, the language used in Rule 6 is mandatory and if it is construed that the Court which passed the decree shall grant stay whether or not the appellate powers had been invoked, it would mean that a party would be automatically entitled to stay at the hands of the trial Court if only he files an appeal in the appellate Court. That will be directly contrary to Rule 5. Any construction which would result in inconsistency or conflict should be avoided.

10. The above interpretation had found acceptance at the hands of Andhra Pradesh High Court in *Satyanarayanamm'a v. Nageswara Rao* (1959) 2 A W.R. 439. The learned Judge observed thus:

The order of the learned Subordinate Judge directing stay of execution of the decree in favour of the appellant herein pending the appeal before this Court, when on merits this Court had refused to grant the stay, is clearly without jurisdiction and illegal. When an appeal is preferred, it is the appellate Court that becomes seized of the entire matter and it is the appellate Court that is competent to deal with all matters pertaining to the appeal including any incidental, interlocutory or ancillary matters such as stay of execution, pending disposal of the appeal etc. Order 41, Rule 5(1), Civil Procedure Code, makes the position very clear. Order 41, Rule 5(2) gives power to the Court which passed the decree to pass tentative orders before the expiration of the time allowed for appealing therefrom, and in the nature of things, the jurisdiction conferred under Clause (2) of Rule 5 vanishes the moment the appeal is filed. Similarly, power is given to the Court of the first instance to take security for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the

appellate Court. Similarly, Clause (2) of Rule 6 is an additional provision which provides that a Court which had made an order for the sale of immovable property in execution of a decree against which an appeal is pending should stay the sale on such terms as it deems fit pending the disposal of the appeal. Powers exercisable either by a Court which had passed the decree under Rule 6(1) or by a Court which had made an order of the sale of immovable property under Rule 6(2) could only be exercised provided the matter had not been considered earlier by the appellate Court, so that where an appellate Court had refused to order stay of execution of the decree against which an appeal is pending before it, pending disposal of that appeal, the Court which passed the decree as well as the Court which had made the order for the sale of immovable property in execution of that decree must in law be deemed to have become functus officio and could not exercise the powers contemplated by the two sub-rules of Rule 6. To hold otherwise would mean that while the appellate Court considers that there was no justification for stay of execution of the decree pending the disposal of the appeal, and that the decree-holder should have the full benefit of the decree by way of execution, notwithstanding the pendency of the appeal, the Subordinate Court could by making its own order nullify the effect of the order of the appellate Court and grant a relief to the judgment-debtor which had been expressly negated and refused by the appellate Court. It is an elementary rule of interpretation of statutes that they should not be interpreted in such a way as to result in conflict of jurisdictions and particularly a conflict between a superior Court and a subordinate Court.

11. I am entirely in agreement with the reasonings given by the Andhra Pradesh High Court and hold that the application before the executing Court filed by the petitioner herein was not maintainable.

12. Learned Counsel for the petitioner invites my attention to the judgment of a Division Bench of the Calcutta High Court in *Direndra Nath v. Sailaj Kumar* : AIR1940 Cal582 . In that case, there was no appeal at all against the original decree. An application was filed under Section 47, Code of Civil Procedure, in the executing Court. That was dismissed and an appeal against the said order was pending in the appellate Court. The conditions imposed by the appellate Court for

stay were not fulfilled. The Division Bench of the Calcutta High Court took the view that even the pendency of an appeal against the order under Section 47 would be an appeal contemplated by Rule 6 of Order 45 of the Code of Civil Procedure and the powers under the said rule could be exercised by the executing Court though the appellate Court refused stay. With respect. I wish to express my dissent and I do not agree with the view taken by the Calcutta Bench.

13. Learned Counsel for the petitioner places reliance on Jangir Singh v. Mst. Hiral Kaur . Mahajan, J. preferred to follow the ruling of the Calcutta Bench in Direndra Nath's case : AIR1940 Cal582 , as against the observations made by Andhra Judge. The learned Judge held that the observations found in the judgment of Andhra Pradesh High Court were obiter and accepted the reasoning of the Calcutta High Court. I do not agree with the Punjab High Court that the powers under Rule 6 of Order 41, Code of Civil Procedure, could be exercised even in cases where the appellate Court had already exercised jurisdiction under Order 41, Rule 5, Code of Civil Procedure.

14. There is no justification whatever to grant a third opportunity to the petitioner. Hence, I am not inclined to grant the request made by learned Counsel for the petitioner.

15. Further, I am not inclined to exercise my discretionary power under Section 115, Code of Civil Procedure, in favour of a person who failed to comply with the condition imposed by this Court for granting stay of execution in his favour.

16. This revision petition is dismissed. There will be no order as to costs.