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Court : Himachal Pradesh

Decided On : May-13-1975

Reported in : AIR1976HP19

Judge : R.S. Pathak, C.J. and; Chet Ram Thakur, J.

Acts : [Constitution of India](#) - Article 226; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 151

Appeal No. : C.M.P. No. 246 of 1974 in L.P.A. No. 5 of 1974

Appellant : Devinder Singh and ors.

Respondent : The State of H.P. Through the Secretary Election Dept. Govt. of H.P. and ors.

Advocate for Def. : B. Sita Ram, Adv. General and; H.S. Thakur, Adv.

Advocate for Pet/Ap. : Chhabil Dass, Adv.

Judgement :

R.S. Pathak, C.J.

1. The following question has been referred for the opinion of this Bench:--

'Whether this Court which has passed the judgment which is challenged in the L. P. A. by the affected respondents is competent to entertain and hear the stay application against its own orders ?'

2. A writ petition was decided by my brother Thakur as a single Judge. He allowed the petition and directed the State and the Chief Electoral Officer to treat the petitioners as regular employees of the Election Department and not to revert them. Against his order a Letters Patent Appeal has been filed in this Court, and in that appeal the present application has been made for staying the operation of the order allowing the writ petition. The Letters Patent Appeal came on for admission before myself and D.B. Lal. J. The latter declared that he would not like to be a member of the Bench hearing the appeal, and accordingly an order was made that the case be listed before a Bench of which he was not a member.

This Court, as presently constituted consists of the Chief Justice and two Judges only and it is not possible in the circumstances that the appeal be listed before a differently constituted Bench. In the circumstances, the appellants prayed that the stay application be listed before my brother Thakur as the single Judge who had disposed of the writ petition. Doubting whether he had jurisdiction to entertain and dispose of the stay application my learned brother has referred the point to a larger Bench. And that is how this matter is before us.

3. I think it to be beyond dispute that the High Court has inherent jurisdiction to pass appropriate orders in the matter of petitions under Article 226 of the Constitution. The Principles on which it will exercise its inherent powers are well settled. They cannot be exercised where it would be inconsistent with or opposed to provisions of the statutory law of procedure or relate to matters on which such statutory law can be said to be exhaustive. They may be exercised wherever justice equity and good conscience require a Court to act. The Courts in India are not only Courts of Law but also Courts of Equity. Every Court administers justice in accordance with law. but wherever the law is silent a Court will act ex-debito institute in consummation of the purpose for which it exists. Some of the cases in which it has been recognised that the Court has inherent power are set out in *Hukum Chand v. Kamalanand*. (1906) ILR 33 Cal 927 and further instances are

mentioned in *Nand Kishore v. Ram Golam*. (1913) ILR 40 Cal 955.

4. Counsel for the respondents contends that the learned Single Judge having disposed of the writ petition is not seized of any case in which an application for interim relief can be entertained, and on that ground he is not competent to pass any orders on the present stay application. It is difficult to accept the contention. My learned brother is certainly seized of a proceeding related to the writ petition disposed of by him. It is an application concerned with the consequences of the relief granted by him on the writ petition. It bears direct nexus to the jurisdiction already exercised by him. In my opinion subject to any limitations imposed by the statute law a Court is entitled to pass all incidental and ancillary orders in relation to a case already disposed of by the Court, and the inherent power extends, as I shall presently attempt to show, to making an order in appropriate cases staying the execution, or suspending the operation, of an order disposing of the writ petition.

So long as the inherent power is exercised subject to the well accepted limitations already mentioned, no objection can be taken. It has been said that when the Court disposes of a case it becomes *functus officio*. Subject to what has been said above, there can be no dispute with that proposition. Truly applied, however, what that proposition implies is that the Court cannot re-open the case and dispose it of afresh, save in conditions expressly provided for or necessarily implied for review.

5. In England, the question arose before the Court of Appeal in *Polini v. Gray. Sturla v. Freccia*. (1879) 12 Oh D 438 whether it was open to that Court at the instance of a party, who had failed in the Court of first instance and in the Court of Appeal on a claim to be entitled to a share in a certain estate, and who was now prosecuting an appeal to the House of Lords, to grant an order restraining the distribution of the fund meanwhile. Cotton L. J. observed that for determining whether a Court had Jurisdiction to make a stay order after it had disposed of an action it was immaterial whether the plaintiff had succeeded or failed in the action. He declared that the Court, pending an appeal to the House of Lords, could suspend what it had declared to be the right of one of the litigant parties. And the principle on which it did so was :

'that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end and that being so if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory that is to say would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who. so far as the litigation has gone, has established his rights.'

Polini v. Gray (1879) 12 Ch D 438 (supra) was considered in *Orion Property Trust Ltd. v. Du Cane Court Ltd.* (1962) 3 All ER 466 and *Pennycuik. J.* found it difficult to reconcile it with an earlier case *Wilson v. Church.* (1879) 11 Ch D 576. In that case. Fry. J. had dismissed an action absolutely, and an application was made to the Court of Appeal to restrain the successful party from parting with the property till the hearing of the appeal against the decision of Fry. J. Sir George Jessel M.R. with whom the other two Lord Justices concurred, declared:--

'The action having been absolutely dismissed by Fry. J. he had no jurisdiction to stay the proceedings pending an appeal, and this application for an injunction was properly made to the Court of Appeal.'

On a consideration of the apparently opposing views laid down in *Wilson v. Church* (supra) and *Polini v. Gray* (supra). *Pennycuik. J.* preferred to follow the proposition laid down in the latter case on the ground that 'the convenience and reason of the matter' appeared to be in accordance with that proposition.

6. It may be pointed out that on the basis of *Polini v. Gray* (1879) 12 Ch D 438 (supra) there is statement in Halsbury's Laws of England that the Court 'has an inherent jurisdiction over all judgments and orders which it has made under which it can stay execution in all cases either for a definite or unlimited period.' However, in a recent case. *London Permanent Building Society v. De Baer.* (1968) 1 All ER 372 Plowman J. in the Chancery Division, has observed that the proposition is too widely stated and having regard to what was said by Evershed. J. in *Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board.* (1945) KB 394 the power to grant the interim relief must be confined by reason of R. S. C. Order 42 Rule 17, to money judgments only and not to other

cases. Plowman, J. declined to exercise the power at the instance of a mortgagor who prayed for stay of execution of an order for possession made in favour of the mortgage. To bring the case law up-to-date reference may be made to *Erinford Properties Ltd. v. Cheshire County Council*. (1974) 2 All ER 448 where Meeary. J. has adhered to the principle adopted in *Polini v. Gray* (supra) and followed in *Orion Property Trust Ltd. v. Du Cane Court Ltd.* (1962) 3 All ER 466 (supra). Of those cases he observes:--

'All of these point to a Judge not being stripped of his jurisdiction as soon as he dismisses the proceedings before him.'

It may be mentioned, in passing, that *London Permanent Building Society v. De Baer*. (1968) 1 All ER 372 (supra) was apparently not brought to his notice, and no occasion arose for considering whether the principle should be restricted to money judgments only.

7. As regards the law in India, it appears to be the general view that a Court has jurisdiction to stay the execution of a decree or order made by it. There is a long series of cases in which that view has been taken. As long ago as *Nand Kishore v. Ram Golam*. (1913) ILR 40 Cal 955 (supra), it was held that an application for interim relief could be made even though no proceeding was pending before the Court to which that application could relate. The facts in that case were these: The Court of first instance had dismissed a mortgage suit on the merits. On appeal to the Calcutta High Court the decree was reversed and a mortgage decree was made. The defendants applied to the High Court for leave to appeal to His Majesty in Council, and the application was refused. Therefore, so far as the High Court was concerned the mortgage decree had become final. Thereafter, the defendants made an application for stay of proceedings in execution of the High Court decree stating that they had taken steps to apply to the Judicial Committee for special leave to appeal to His Majesty in Council.

The decree holders opposed the application on the ground that no appeal or application for leave to appeal was pending in the High Court or elsewhere, and the Court had no jurisdiction to grant a stay of proceedings. There being no statutory provision in that behalf the question, therefore, arose whether the High

Court was competent, in the exercise of its inherent powers, to stay proceedings. The learned Judges held that the Court was competent to do so. That eminent Judge. Sir Asutosh Mookerjee observed that it was open to a Court to stay proceedings pursuant to its own order in view of an intended appeal. He held that it was immaterial that no appeal or application for leave to appeal was pending before the Court or elsewhere at that time. The circumstance that Order 41. Rule 5(2) of Civil P. C. 1905 expressly recognises the position that an original Court may for a limited time, stay proceedings in execution of its own decree in view of a possible appeal to a superior Court was in his opinion, sufficient to support that conclusion.

The principle thus recognised by the Legislature in express terms appeared to him to furnish useful guidance in determining the question of how the inherent powers of the Court should be exercised in a matter of this description. The learned Judge referred to *Brij Coomaree v. Ramrick Dass*. (1901) 5 Cal WN 781 (2) in support of the proposition that the Court has inherent powers to stay proceeding pursuant to its own order in view of an intended appeal, even though there was no express statutory provision in that behalf. Repelling the contention that the Court had no power to act on the stay application, he observed:--

'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. The decree now under execution was made by this Court, and the Court has control over it so as to enable the Court to stay proceedings in view at a possible appeal to His Majesty in Council. 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. Besides, their Lordships of the Judicial Committee do not hold their sittings continuously throughout the year and weeks may elapse before the most diligent of suitors is able to obtain special leave to appeal to His Majesty in Council: 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 *Nitvamoni Dasi v. Madhu Sudan Sen.* (1911) ILR 38 Cal 335 = 38 Ind APP 74 (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 restrained 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.'

The principle adopted in *Nanda Kishore v. Ram Golam* (supra) has been followed down the years by the Courts in India. In *Sarat Kumar Roy v. Official Assignee of Calcutta* AIR 1931 Cal 79 the Calcutta High Court took the view that there was inherent power in the Court to suspend the operation of the appellate decree, made by it during the pendency of an appeal before the Privy Council in order to save unnecessary costs and inconvenience to the aggrieved party. It was observed that the Court had inherent powers to make such order or give such directions as may be called for in the circumstances of a particular case pending the hearing of an appeal to the Privy Council. In *Bahadur Lal v. Judges of the High Court*. AIR 1933 All 18 the Allahabad High Court held that it had inherent jurisdiction to hold in abeyance an order suspending an advocate for three months until his appeal to the Privy Council was disposed of in order to prevent that appeal becoming nugatory by the lapse of time. It will be noted that at the time when the order of abeyance was made no proceeding could be said to be pending before the High Court

In *Tulsi Ram v. Radha Kishan*. AIR 1934 Lah 238 the Lahore High Court had dismissed an appeal against a preliminary decree and thereafter an appeal was preferred to the Privy Council: the High Court held that it had inherent power to stay the preparation of a final decree during the pendency of the appeal before the Privy Council. Some of the aforesaid cases were considered by the Hyderabad

High Court in *Rani Shankeramma v. Ramchandra Reddy*. AIR 1953 Hyd 73 and relying on what was said in those cases the Court held that it had inherent jurisdiction to stay its own order disposing of a writ petition with a view to preventing an appeal before the superior Court becoming infructuous. It was a case where the writ petition had been disposed of and an application for leave to appeal to the Supreme Court was proposed to be filed. It was observed by Jaganmohan Reddi. J. that 'if there is a right to appeal to the Supreme Court, then the inherent powers of the High Court to order the abeyance of its order for a limited time cannot be denied.'

In *Sajjan Singh v. State of Rajasthan* AIR 1954 Rai 301 the Rajasthan High Court, although it refused to grant a stay order in the exercise of its inherent powers, acknowledged that in a proper case it had jurisdiction to pass an order of stay in the exercise of its inherent powers, even after disposing of an application for leave to appeal to the Supreme Court. A case cited before us in which a contrary view appears to have been taken is *Purna Chand Sahu v. Chamra Bariha*. AIR 1954 Orissa 114 but there the Orissa High Court observed that the inherent powers could not be employed in opposition to the provisions of Order 45. Rule 13 of the Civil P. C.

8. The cases cited by the respondents laying down that the Court would not grant interim relief after disposing of the writ petition before it are cases where the writ petition was dismissed. The view taken there proceeded on the reasoning that as the petitioner had been denied relief in the writ petition it was not open to the Court to proceed contrary to the view already taken by it and grant interim relief on the stay application where earlier it had found no substance at all in the petitioner's claim in the writ petition. It was observed that in granting interim relief in those circumstances the Court would not be acting *ex debito justitiae*. Those cases are *Harishanker Dinanath v. State of Madhya Pradesh*. AIR 1953 Nag 254; *State of Uttar Pradesh v. Mukhtar Singh* AIR 1957 All 505; *Sajjan Singh v. State of Rajasthan*. AIR 1954 Rai 301 (*supra*) and *Kalyan Singh v. State of U P.*. AIR 1961 All 619 (FB). Having regard to the facts of the present case, where the writ petition has not been dismissed but allowed and an order made granting relief on the merits, those cases are distinguishable.

9. It seems to me then that two considerations determine the question which we are called upon to answer. The first is that the application relates to what has been decreed or ordered by the Court in a writ petition. The decree or order sought to be stayed was made by the Court, and the Court has control over it. For that reason, the Court has undoubted jurisdiction to entertain and decide the application, the nexus between the earlier decree or order of the Court and the application now presented to it supplying the basis.

10. The second consideration is that when an appeal is about to be prosecuted the litigation cannot be considered as at an end and the Court should move to prevent the proposed appeal from becoming nugatory. The stay is granted on the principle that the status quo between the parties should be maintained, if the circumstances justify the adoption of such a course, until the validity of the decree has been tested in the Court of ultimate appeal. The emphasis lies on the desirability of enabling the defeated party to exercise its right of appeal so that the validity of the decree or order can be examined. That consideration distinguishes it from a case pending trial in the Court. Whereas on a suit or writ petition the question is whether the suitor or petitioner has sufficiently proved his case, on the other hand, where an application, is for a stay order pending an appeal the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. In making such, a decision, an important factor to be considered is the possibility that the judgment may be reversed or varied, and that was the basis of *Erinford Properties Ltd. v. Cheshire County Council* (1974) 2 All ER 448 (supra). It will be useful to quote the observations of Magarry. J.:--

'Judges must decide cases even if they are hesitant in their conclusions: and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrongs. No human being is infallible, and for none are there more public and authoritative explanation of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative efforts-of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo Pending the appeal,'

11. At this stage, it may be noted that reliance was placed by the respondents on *Jairam Das v. Emperor*. AIR 1945 PC 94: *Bashiruddin Ahmad v. Emperor*. AIR 1937 Nag 181 and *Gorelal v. State*. AIR 1958 All 667 but those were cases involving the question whether bail should be granted to a convict when the consequence of it would be to abridge the sentence passed on him. In my opinion, they cannot serve as any guidance in the present case.

12. While being of opinion, that a Court passing a decree or order has inherent power to stay the execution, or suspend the operation, of a decree or order made by it. It is desirable to reiterate that this power is subject to the limitations adverted to earlier, especially those which arise upon a consideration of the relevant statute. It is also necessary to emphasise that the inherent power of a Court should not be capriciously or arbitrarily exercised. It should be exercised *ex debito iustitiae* to do that real and substantial justice for the administration of which alone the Court exists. The inherent powers should not be used where it would amount to an abuse of the process of the Court. There should be very good ground for staying the execution, or suspending the operation, of a decree or order. Mere inconvenience or annoyance is not enough to induce, the Court to take away from a successful party the benefit of his order.

13. Turning to the present case, it has been urged by the respondents that the proceedings on the writ petition are civil proceedings to which the principles embodied in the Civil P. C. apply, and inasmuch as Order 41. Rule 5 (2) of the Code permits the trial Court to stay the execution of its decree only where an appeal has not yet been filed against that decree, the learned Single Judge has no jurisdiction to entertain the stay application inasmuch as a Letters Patent Appeal has already been filed. We have been referred to *B. Jitendra Mohan Singh v. Thakurain Bindbasni Kunwar*. AIR 1945 Oudh 96. It was held there that if the appeal has been filed already the appellate Court will be seized of the case including the application for stay and the execution Court will have no jurisdiction to Pass a judicial order.

Now in order that Order 41. Rule 5(2) can be invoked, it must be applied subject to the limitations prescribed therein, and the limitations show that there must be an

appellate Court which can entertain a stay application and grant relief on it. If for certain reasons, such as those which exist in the present case, it is not possible for an appellate Bench to entertain the application and grant relief, the very *raison d'être* behind those limitations loses force. It is then eminently a case where the Court will exercise its inherent Powers. The appellate jurisdiction not being available, there is good reason for invoking the inherent powers of the learned Single Judge.

14. In the result. I hold that in view of the circumstances mentioned above the learned Single Judge has jurisdiction to entertain the stay application. How the jurisdiction will be exercised, whether in favour of the applicant or against him is a matter for the learned single Judge to consider.

15. I answer the question referred in the affirmative.

16. The papers of the case will now be laid before the learned Single Judge for disposing of the application.

C.R. Thakur, J.

I agree.