

## REVISIONAL CIVIL

*Before Daya Krishan Mahajan, J.*

*JANGIR SINGH AND OTHERS,—Petitioners.*

*versus*

*MST. NIHAL KAUR AND OTHERS—Respondents.*

Civil Revision No. 536 of 1964.

1964

November, 26th

*Code of Civil Procedure (Act V of 1908)—Order 41 Rules 5 and 6—Appeal filed by judgment-debtor against the decree—Application for stay of execution under Order 41 Rule 5 also filed—Stay refused by the appellate Court—Decree-holder taking out execution by attachment and sale of immovable property—Judgment-debtor making application for stay of sale under Order 41 Rule 6(2)—Executing Court—Whether competent to order stay of sale of immovable property.*

*Held*, that although an application for stay of execution of a decree, made under Order 41, Rule 5(1) of the Code of Civil Procedure, may have been refused by the appellate Court, still after an order for sale of immovable property in execution of the decree has been made, the Court making such order has jurisdiction to, and indeed must, stay the sale on terms as to security or otherwise. It is for the Court to consider what terms are suitable and the fact that the stay has been refused under Order 41, rule 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under Order 41, rule 6. The only exception to it is where a sale has been ordered by the trial Court and an application is made to the appellate Court for stay of the sale and that application is rejected by the appellate Court.

*Petition under section 115 C.P.C., for revision of the order of Shri Jag Bhushan Garg, Subordinate Judge 1st Class Sunam dated 22nd August, 1964, dismissing the application of petitioners.*

D. C. GUPTA, ADVOCATE, for the Petitioners.

PURAN CHAND, ADVOCATE for the Respondents.

## JUDGMENT

Mahajan, J. MAHAJAN, J.—This petition for revision is directed against the order of the Sub-Judge, 1st Class, Sunam,

dated 22nd August, 1964, whereby the Sub-Judge refused the prayer of the judgment-debtor under Order 41, rule 6(2) of the Code of Civil Procedure. The prayer was that the sale be stayed on such terms as giving of security or otherwise as the Court may think fit until the appeal is disposed of.

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A decree for money was passed against the petitioner. Against that decree Regular First Appeal No. 406 of 1963 is pending in this Court. When the appeal was admitted interim stay of execution was granted. The decree-holders made an application for vacation of the interim stay. The matter, whether the stay should or should not continue, came up before Capoor J. and the learned Judge passed the following order:—

Mr. Puran Chand, learned counsel for the decree-holders, points out that the decree in question is a money decree and unless there are very exceptional reasons, stay of money decree is not ordered. He further points out that Shrimati Nihal Kaur decree-holder is the widow and the other decree-holders are the sons of the deceased Sahni Singh and they have no source of livelihood so that the *ad interim* stay order of this Court is operating as a great hardship. All that Mr. Agnihotri, on behalf of the appellants, could say in reply is that if the land of the judgment-debtors, who are in jail, is sold, they will be put to great loss. However, as there is a money decree against the judgment-debtor, it is incumbent on them to satisfy it subject, of course, to the decision in the appeal. Mr. Agnihotri prays that the judgment-debtors may be allowed a month's time to deposit the amount in Court and further that in case deposit is made the decree-holders should not be allowed to withdraw that amount unless they furnish security for restitution to the satisfaction of the executing Court and with notice to the judgment-debtors-appellants. I order accordingly. If the deposit of the decretal amount is not made within a month, the decree-holders will be entitled to take out execution. No order as to costs."

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In pursuance of this order the judgment-debtors could not deposit the decretal amount, with the result that the execution was taken out in the executing Court. During the course of the execution, the executing Court passed an order for sale of the property. After this order the judgment-debtors made an application under Order 41, rule 6(2). That application has been disposed of by the learned Sub Judge by his order, which is the subject-matter of this revision petition. The relevant part of this order reads thus:—

“\* \* \* there is absolutely no occasion or reason for ordering the stay of the execution. If the stay is granted, it would not only be an unreasonable impediment on the decree-holder in the execution of his decree but it would also be in violation of the orders of the Hon'ble High Court. The application for stay is, therefore, not maintainable and is hereby dismissed.”

It is against this decision that the present petition for revision has been preferred by the judgment-debtors. The contention of Mr. D. C. Gupta, learned counsel for the petitioners, is that the learned Sub-Judge has failed to exercise jurisdiction vested in him by law in refusing to stay the sale. It is contended that the order of the High Court did not stand in the way of the learned Sub-Judge as to the prayer under Order 41, rule 6(2). In order to properly appreciate the various decisions that have been given from time to time on this provision, it will be proper to set out the provisions of order 41, rules 5 and 6. These provisions are :—

“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.

(2) Where an application is made for stay of execution of an appealable 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.

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- (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—

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(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(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, 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."

So far as the provisions of order 41 rule 6(2) are concerned, there can be no dispute that the executing Court must, on

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application of the judgment debtor, stay sale of immovable property on such terms as to giving of security or otherwise, until the appeal against its decree is disposed of. The difficulty only arises in those cases where the judgment debtor has gone up in appeal against the decree and had prayed for the stay of execution under Order 41 rule 5 and his prayer had been refused by the appellate Court. There is no direct authority of this Court or that of the Lahore High Court on this point. What has been held in various cases which have arisen under order 41 rule 6(2) was that it is incumbent on the executing Court to stay the sale in terms of order 41, rule 6(2). In *Firm Phaltu Mal-Hira Lal v. Banarsi Das* (1), it was held that "the executing Court could not summarily reject the application under Order 41, rule 6(2). It was obligatory on the Court to stay the sale on such terms as to giving security or otherwise as it thought fit." In *Firm Phaggu Mal-Mata Din v. Banarsi Das* (2), another decision of the Lahore High Court by Moti Sagar J., the learned Judge took the view that, "an order refusing to stay a sale of immovable property in execution of a decree during the pendency of an appeal in the High Court under Order 41, rule 6(2) of the Civil Procedure Code is appealable as a decree under section 47, Civil Procedure Code. It was further held that the Court was bound to act under Order 41, rule 6(2) when an application was made by the judgment-debtor. "In *Sankar Das and another v. Kasturi Lal and others* (3), Martineau J., took the view that, "the imposition of condition that the entire decretal amount should be deposited before the sale could be stayed under order 41, rule 6(2) was to defeat the very object of the rule, therefore, such a condition was against the spirit of the rule and could not be upheld." This view of the learned Judge did not find favour with the Madras High Court in *P. C. Thirumalai Gondar v. Town Bank Ltd. Pallachi* (4), where the Division Bench of the Madras High Court took a different view. It was held in that case that the Court would impose such a condition. A similar view to that of the Madras High Court in *P. C. Thirumalai Goundar v. Town Bank Ltd., Pollachi* (4), was taken by a Division Bench of the Calcutta High Court in *Ram Nath*

(1) A.I.R., 1924, Lah., 631.

(2) A.I.R., 1924, Lah., 671.

(3) A.I.R., 1925, Lah., 69.

(4) A.I.R., 1934, Madras, 709.

*Singh and others v. Raja Kamleshwar Prasad Singh* (5). In *Gian Chand. V. Manohar Lal* (6), Zafar Ali J., took the same view as was taken by Moti Sagar J., in the *Firm Phaggu Mal-Mata Din's case*. The learned Judge proceeded further and held that where the property had been sold but the sale had not been confirmed, the provisions of Order 41, rule 6(2) will still apply. The observations of Zafar Ali, J., run counter to those of the Andhra Pradesh High Court in *Yelamanchili Satyanarayanamma v. Yelamanchili Nageswara Rao* (7), wherein Sanjeeva Row Nayudu, made the following observations:—

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\* \* \* There is a good deal of difference between the stage before the sale is held and the stage after the sale is held; for in the latter stage, the rights of third parties would come in, and there are bound to be other complications. It is for this reason that the Sub-rule advisedly fixed the time when the application should be made. that is, when an order has been made for the sale of immovable property. The learned Subordinate Judge is clearly wrong in thinking that the expressions 'Order for sale' in Order 41, rule 6(2), Civil Procedure Code, includes the holding of the sale and the confirmation thereof."

As is apparent from what has been stated above, none of these cases deal with the points that fall for determination in this petition. Reference has also been made to *Dhirendra Nath Roy v. Sailaj Kumar Bose* (8), wherein the Division Bench of the Calcutta High Court took the view that "where an order has been made for sale and an application under Order 41, rule 6 has been made to the Court, the Court should stay the sale on suitable terms and the Court must consider what terms are suitable. The fact that the stay has been refused under Order 41, rule 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under Order 41, rule 6." Reliance was placed upon *Jitendra Nath Choudhuri v. Bholanath Choudhury and others* (9), for the above proposition. It

- (5) 9 I.C., 323.
- (6) A.I.R., 1929, Lah., 68.
- (7) 1959 (2) An., W.R., 439.
- (8) A.I.R., 1940, Cal., 582.
- (9) 44, C.W.N., 701.

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was observed by Edgley J., that "although an application for stay of execution of a decree, made under order 41, rule 5(1) Civil Procedure Code, may have been refused by the appellate Court, still after an order for sale of immovable property in execution of the decree has been made, the Court making such order has jurisdiction to, and indeed must, stay the sale on terms as to security or otherwise."

On the other hand, in a decision of the Allahabad High Court in *Har Narain Sahi v. Govind Rai* (10), it was observed that sub-rule (3) to rule 6 is only complementary to rule 5. This decision was, however, adversely commented upon in *Jugal Prasad Missir and others v. Jadubans Naraiyan Missir and others* (11). While dealing with the Allahabad case, Chatterji J., observed as follows:—

"With all respect to the learned Judge, I must say that this is against the express provision of the rule itself, which says that the sale shall be stayed."

Therefore, it will appear from what has been stated above that the only direct case on the point is of the Calcutta High Court in *Dhirendra Nath Roy v. Sailaj Kumar Bose* (8) There are certain observations in *Yelesmanchili Satyanarayanamma's case*, which run counter to the view taken by the Calcutta High Court. But these observations are obiter because in that case, an order under Order 41, rule 6(2) was passed after the sale had been conducted and was pending confirmation. Therefore, the stage for making an application under Order 41, rule 6(2) had passed in that case and, as observed therein, the trial Court had no jurisdiction, when the sale had been held, to refuse its confirmation. It appears to me that the rule laid down by the Calcutta High Court is the correct rule. The only exception I can see to it is where a sale has been ordered by the trial Court and an application is made to the appellate Court for stay of the sale and that application is rejected by the appellate Court. In such a situation the rule in the obiter observation of the learned Judge of the Andhra Pradesh High Court in *Yelesmanchili Satyanarayanamma's case* will hold good.

(10) I.L.R., 54, All., 874.

(11) A.I.R., 1941, Patna, 483.

Mr. Puran Chand, learned counsel for the respondents, contended that the order of Capoor J., refusing stay under Order 41, rule 5, Civil Procedure Code, finally concluded the matter. This argument loses sight of the fact that no order for sale had been made when the High Court dealt with the matter. Therefore it cannot be said that the High Court was seized of the matter which fell for decision by the trial Court on the judgment-debtor's application under Order 41, rule 6(2), or that on the same matter there is a decision by the appellate Court, by reason of which the trial Court will be precluded from acting under Order 41, rule 6(2). In the present case it was open to the trial Court to consider the application of the judgment-debtors on merits and impose such conditions on the judgment-debtors including conditions as to the deposit of the decretal amount subject to which the order for stay under order 41 Rule 6(2) would be granted. It could not refuse the application of the judgment-debtors on the ground that the matter had been settled by this Court. As there has been a denial of jurisdiction by the trial Court to decide the matter, I would in the exercise of my jurisdiction under section 115, Civil Procedure Code, allow this petition, quash the impugned order and direct the trial Court to decide the application of the judgment-debtors under Order 41, rule 6(2) on merits. Costs will be costs in the main execution application.

Parties are directed to appear before the trial Court on 14th December, 1964.

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