

Phusia vs Mohammad Tasadduq Husain Khan on 28 November, 1951

Equivalent citations: AIR1952ALL684, AIR 1952 ALLAHABAD 684

ORDER

P.L. Bhargava, J.

1. This is an application under Order XLI, Rule 5, Civil Procedure Code, for stay of execution of a decree for possession of land by demolition of certain structures standing thereon. It is admitted that the decree has not yet been put under execution.

2. Learned counsel for the decree-holder-opposite party has raised a preliminary objection to the maintainability of the application, mainly on the ground that no application for execution having been made, there is no execution which can be stayed; but no authority, except the practice said to have been followed by a learned Judge of this Court, has been cited in support of this contention. On the other hand, learned counsel for the judgment-debtor-applicant has urged that, under Rule 5 aforesaid, an appellate Court has, for sufficient cause, power under the said rule, to stay execution of the decree appealed against whether an application to execute it has been made or not. In support of his contention, learned counsel for the applicant has invited my attention to a decision of the Bombay High Court in Laxman Ramchandra v. Shridhar Vaman (57 Bom. 202).

3. Sub-rule (1) of Rule 5 of Order XLI, Civil P. C. is in these terms :

"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."

Learned counsel for the opposite party has asked me to interpret the phrase "stay of execution of such decree", in the sub-rule quoted above, to mean a pending and not any contemplated execution. His contention is that unless an application for execution of a decree is made, there can be no execution of the decree, and no question of stay of execution of the decree. He has also invited my attention to the language of Sub-rule (3) of Rule 5, which, according to his contention, also contemplates cases where the decree is under execution.

4. Rule 6 of Order XLI, Civil P.C., relates to "stay of proceedings under a decree" and stay of execution of the decree appealed against by the appellate Court; and it only requires that an appeal should be pending against the decree. The rule further provides that the mere fact that an appeal has

been preferred against the decree shall not operate as a stay of proceedings under the decree or stay of execution of the decree. The rule empowers the appellate Court, "for sufficient cause", to order stay of execution of the decree; and it does not require that the execution proceedings must be pending before an order for stay of execution can be made by the appellate Court. The judgment debtor may be able to satisfy the appellate Court that the decree-holder may execute his decree without giving him sufficient time to move the Court for obtaining an order for stay of execution. For instance, in a case like the one before us, he may show that the appeal is pending in the High Court at Allahabad; the decree is to be executed by the Court of the Munsif of Agra; the executing Court will not be bound to issue notice to him if the execution is taken out within three years from the date of decree; and he lives in the interior of the district of Agra and will not be able to obtain an order of stay of execution in time to prevent the demolition of the structure in terms of the decree. In such cases, there being sufficient cause, the appellate Court, in exercise of the powers conferred upon it by Rule 5 aforesaid, can certainly stay execution of the decree in spite of the fact that no application for execution of the decree is made or pending. The stay ordered in the circumstances mentioned above will be stay of execution of the decree. If a decree is capable of execution, it can be executed in spite of the fact that an appeal has been preferred against that decree; and if there is sufficient cause for preventing the execution of the decree, it can be stayed by an order of stay made by the appellate Court. Thy stay of execution of the decree means the stay of any pending execution of the decree as well as any contemplated execution; and, according to my interpretation of Rule 5, the expression "stay of execution of such decree" in Sub-rule (1) of Rule 5 cannot be confined to stay of pending execution only; and execution may be stayed by the appellate Court even where no application for execution is made in circumstances like those mentioned above where sufficient cause is made out.

5. Sub-rule (3) of Rule 5 of Order XLI, Civil P.C., specifies cases in which an order for stay of execution shall not be made. The provisions of the sub-rule are applicable equally to stay of execution in a pending as well as contemplated execution. In my opinion, the language of the sub-rule does not support the contention put forward on behalf of the applicant.

6. Learned counsel for the opposite-party has, no doubt, referred to the practice, which he says, was followed by a learned Judge of this Court some years ago; but no case decided according to that practice has been cited before me.

Learned counsel for the applicant has not supported the statement about the existence of any such practice; and I am also not aware of any such practice. In any particular case, it may not be considered desirable to stay execution of a decree unless an application for execution has been made and the execution proceedings are pending; but that does not mean that the stay of execution can, under Rule 5, be ordered only in pending execution cases. I am, therefore, not prepared to adopt the interpretation of the expression "stay of execution of such decree", in Sub-rule (1) of Rule 5 suggested by the learned counsel for the opposite-party.

7. In my opinion, therefore, the power conferred upon an appellate Court under Sub-rule (1) of Rule 5 of Order XLI, Civil P. C. can be exercised if there is an appeal pending in that Court and sufficient cause is shown for making an order of stay of execution of the decree; and for the exercise of this

power it is not necessary that an application for execution should have been made or be pending at the time when an application for stay of execution is made.

8. This view is in accord with the view taken in the Bombay case cited above, where it was held that an appellate Court has, for sufficient cause power under Order XLI, Rule 5, Civil P.C. to stay the execution of a decree appealed against whether an application to execute it has been made or not. In that case one of the learned Judges observed at p. 205:

"No doubt the Appellate Court is not to stay execution unless certain conditions are fulfilled, the nature of which is indicated in Sub rule (3) of that rule. But assuming that those conditions are fulfilled, and that the Appellate Court does think' that there is sufficient cause for ordering stay of execution, I do not see why it should be laid 'down as an additional requirement that this power must not be exercised unless the decree-holder has in fact proceeded to execute the decree. Indeed the laying down of such a requirement would in many cases defeat the object that is sought to be achieved under this rule. The judgment-debtor is not in a position to know when the decree-holder intends to move the Court for executing his decree, and if he is to be prevented from taking a precautionary measure, namely, that of moving the Appellate Court to stay execution in anticipation of the decree-holder's move, it seems to me that the protection sought to be afforded to him under this rule might prove illusory."

9. If I may say so with respect, I entirely agree with the above view. I, therefore, overrule the preliminary objection."

10. In this case, as already stated, a decree has been passed for possession over land by demolition of certain structures standing thereon and although the decree-bolder has not yet put the decree into execution, he may do so at any time and the judgment-debtor, who is a resident of a village in the district of Agra, may not have sufficient time to obtain an order of stay from the appellate Court. In such a case, the judgment-debtor will be deprived of the remedy available to him under Rule 5 of Order XLI, Civil P. C. and the appeal filed by him may become infructuous.

11. Consequently, the order of ad interim stay granted on 7-9-1950, is made absolute pending the decision of the appeal by this Court.