

Mulraj

Vs

Murti Raghonathji Maharaj

Civil Appeal No. 1938 of 1966

(V. Bhargava, K. N. Wanchoo, R. S. Bachawat JJ)

02.03.1697

JUDGMENT

WANCHOO, J.

This is an appeal by special leave against the judgment of the High Court of Allahabad. Brief facts necessary for present purposes are these. The respondent filed a suit against the appellant for eviction from a shop which the appellant had taken on monthly rent from the respondent. The suit was filed after permission had been obtained under the U. P. (Temporary) Control of Rent and Eviction Act, No. III of 1947, (hereinafter referred to as the Act), in the court of the Munsif in Jhansi. It was contested by the appellant and one of the points raised before the trial court was that as the permission to sue had been granted at a time when there was a stay order, the Magistrate granting the permission had no jurisdiction to do so and therefore the permission was a nullity. On that basis it was contended that the suit should fail for no suit could continue under the Act without such permission.

The Munsif dismissed the suit. The respondent then went in appeal. The appeal court upheld the order of the Munsif taking the view that the permission granted after the stay order had been passed was a nullity. The respondent then came in second appeal to the High Court, and the only point considered there was whether the permission granted by the Magistrate was a nullity or not. It may be mentioned that though the stay order had been passed on September 29, 1961 by the District Magistrate, the Magistrate who was dealing with the matter of permission, had no knowledge of it when he granted the permission on October 4, 1961. The question that arose before the High Court therefore was whether the permission granted in these circumstances could be said to be a nullity. The High Court held that the stay order could not and did not take away the jurisdiction of the Magistrate from the moment it was passed and that as the Magistrate had no knowledge of or information about the stay order when he granted the permission on October 4, 1961, that permission was with jurisdiction and the suit would therefore be maintainable. As no other point was apparently in dispute in the High Court it allowed the appeal and granted a decree for ejection and rent in favour of the respondent. The appellant then obtained special leave from this Court, as there is some conflict of opinion between the High Courts on this question.

As we have already indicated, the facts on the question raised before us are not in dispute. When the application for permission was pending before Sri Nigam, Magistrate I Class, who had jurisdiction to deal with that application by virtue of the authority delegated to him by the District Magistrate, it appears that the appellant applied for the transfer of proceedings relating to permission from Sri Nigam's court. On that transfer application, the District Magistrate passed an order staying further proceedings till the disposal of the transfer application. This order was not communicated to the

Magistrate Concerned by the office of the District Magistrate. Nor does it appear that the appellant informed the Magistrate of the order of stay with the result that on October 4, 1961, the Magistrate gave permission to the respondent to file a suit for eviction. When however the respondent filed the suit in the Mufi's court, the appellant raised the question that as a stay order had been passed on September 29, 1961, the permission granted on October 4, 1961, was a nullity as the Magistrate dealing with the matter had lost his jurisdiction thereunder.

There has been difference of opinion among the High Courts on the question of the effect of a stay order, particularly with reference to execution proceedings. The High Courts of Calcutta, Patna and Punjab have held that in such a case the stay order takes effect from the moment it is passed and the fact that the court executing the decree has no knowledge of it makes no difference and all proceedings taken in execution after the stay order has been passed are without jurisdiction. On the other hand, the High Courts of Madras and Kerala have taken the view that the executing court does not lose its jurisdiction from the moment the stay order is passed and that the order being in the nature of a prohibitory order the court carrying on execution does not lose its jurisdiction to do so till the order comes to its knowledge and that proceedings taken in between are not a nullity. The Allahabad High Court seems to have taken an intermediate view and has held that where rights of third parties like a stranger auction-purchaser have intervened the fact that the executing court had no knowledge would protect third parties.

The earliest case on the point is *Bessesswari Chowdhurany v. Horro Sunder Mozmadar and others*(1). In that case a Division Bench of the Calcutta High Court held that "an order staying execution of a decree against which an appeal is pending is in the nature of a prohibitory order, and as such would only take effect when communicated. If a property is sold before such an order is communicated to the court holding the sale, such sale is not void and cannot be treated as a nullity". In *Hukum Chand Boid v. Kamalanand Sing* (2), another Division Bench of the same High Court dissented from the view taken in *Bessesswari Chowdhurany's* case (1) and held that an order of stay takes effect from the moment it is passed and the knowledge of the court to which it is addressed is immaterial and from the moment the order is passed the court to which the application is made for execution has no authority to execute it. It is these two cases of the Calcutta High Court which are the basis of the decisions of other High Courts. Some High Courts as already indicated, have accepted the view in *Bessesswari Chowdhurany's* case (1) while other High Courts have followed the view taken in *Hukum Chand Boid's* (2) case.

Before we consider the question raised before us, we may indicate the leading cases on the two sides briefly. The Patna High Court in *Liakat Mian v. Padampat Singhania*(3) and the Punjab High Court in *Din Dayal Lakhi Ram v. Union of India*(4) follow *Hukum Chand Boid's* (2) case. The Madras High Court in *Kasaribada Venkatachalpati Rao v. Maddipatla Kameshwaramma*(5) follows *Bessesswari Chowdhurany's* case (1). The Kerala High Court in *Cheeramparambilalikutty v. Thalavanaparambilalikutty*(6) also follows *Bessesswari Chowdhurany's* case(1). It is unnecessary to refer to other cases of these courts which were cited before us for they follow the view taken in these leading cases.

The Allahabad High Court in *L. Parsotam Saran v. B. Barhma Nand*(7), as already indicated, took an intermediate view and held that where a third party's interest intervened, the stay order does not nullify a sale in favour of a third party. But where only the parties to the execution proceedings were concerned it followed the view taken in *Hukum Chand Boid's* case(@).

We are of opinion that the view taken in *Bessesswari Chowdhurany's* case(1) is the correct one. An

order of stay in an execution matter is in our opinion in the nature of a prohibitory order and is addressed to the court that is carrying out execution. It is not of the same nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed, for such an order takes away the very jurisdiction of the court executing the decree as there is nothing left to execute thereafter. But a mere order of stay of execution does not take away the jurisdiction of the court. All that it does is to prohibit the court from proceeding with the execution further, and the court unless it knows of the order comes to the knowledge of the court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing court which continues to have jurisdiction to stay its hand till further orders. It is clear that as soon as a stay order is withdrawn, the executing court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the court is there all along. The only effect of the stay order is to prohibit the executing court from proceeding further and that can only take effect when the executing courts has knowledge of the order. The executing court may have knowledge of the order on the order being communicated to it by the court passing the stay order or the executing court may be informed of the order on the order by one party or the other with an affidavit in support of the information or in any other way. As soon therefore as the executing court has come to know of the order either by communication from the court passing the stay order or by an affidavit from one party or the other or in any other way the executing court cannot proceed further and if it does so it acts illegally. There can be no doubt that no action for contempt can be taken against an executing court, if it carries on execution in ignorance of the order of stay and this shows the necessity of the knowledge of the executing court before its jurisdiction can be affected by the order. In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well-settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well-settled that the injunction order not being addressed to the court, if the court proceeds in contravention of the injunction order, the proceedings are not a nullity. In the case of a stay order, as it is addressed to the court and prohibits it from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it acts illegally, and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court. In both cases knowledge of the party concerned or of the court is necessary before the prohibition takes effect. Take the case where a stay order has been passed but it is never brought to the notice of the court, and the court carries on proceedings in ignorance thereof. It can hardly be said that the court has lost jurisdiction because of some order of which it has no knowledge. This to our mind clearly follows from the words of O. XLI r. 5 of the Code of Civil Procedure which clearly lays down that mere filing of an appeal does not operate as stay of proceedings in execution, but the appellate court has the power to stay the execution. Obviously when the appellate court orders known to the executing court. We cannot agree that an order staying execution is similar to an order allowing an appeal and quashing execution proceedings. In the case where the execution proceeding is quashed, the order takes effect immediately and there is nothing left to execute. But where a stay order is passed, execution still stands and can go on unless the court executing the decree has knowledge of the stay order. It is only when the executing court has knowledge of the stay order that the court must stay its hands and anything it does thereafter would be a nullity so long as the stay order is in force.

It is argued that this view would introduce uncertainty inasmuch as proceedings may go on and it

may take sometime-whether long or short-for the stay order to reach the court. There is in our opinion no question of uncertainty, even if we hold that the stay order must come to the knowledge of the court to which it is addressed before it takes effect. The court may receive knowledge either on receipt of an order of stay from the court that passed it or through one party or the other supported by an affidavit or in any other way. There is in our opinion no uncertainty by reason of the fact that the court to which the stay order is addressed must have knowledge of it before it takes effect for it can always be proved that the court to which the stay order was addressed had knowledge of it and that is not a matter which should really create any difficulty or uncertainty. Once it is clear that a stay order is in the nature of a prohibitory order, knowledge of it by the court which is prohibited is essential before the court is deprived of the power to carry on the proceedings. As was pointed out in *Bassesswari Chowdhurany's case* (1), "the appellate court has nothing to do with the execution of the decree; the execution proceeds under the direction of the court which made the decree and it has full authority to execute it. An order of stay does not undo anything which has been done; its utmost effect is to stop further action in the direction of execution, but it would only have that effect when it reached the court or person whose duty it was to obey it."

As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has knowledge of it, it cannot deprive that court of the jurisdiction to proceed with the execution before it. But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court. As the stay order is addressed to the court, as soon as the court has knowledge of it, it must stay its hand; if it does not do so, it acts illegally. Therefore, in the case of a stay order as opposed to an order of injunction, as soon as the court has knowledge of it, it must stay its hand and further proceedings are illegal; but so long as the court has no knowledge of the stay order it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure.

Though the court which is carrying on execution is not deprived of the jurisdiction the moment a stay order is passed, even though it has no knowledge of it, this does not mean that when the court gets knowledge of it, it is powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the court has knowledge of the stay order. We are of opinion that s. 151 of the Code of Civil Procedure would always be available to the court executing the decree, for in such a case, when the stay order is brought to its notice it can always act under s. 151, and set aside steps taken between the time the stay order was passed and the time it was brought to its notice, if that is necessary in the ends of justice and the party concerned asks it to do so. Though, therefore, the court executing the decree cannot in our opinion be deprived of its jurisdiction to carry on execution till it has knowledge of the stay order, the court has the power in our view to set aside the proceedings taken between the time when the stay order was passed and the time when it was brought to its notice, if it is asked to do so and it considers that it is necessary in the interests of justice that the interim proceedings should be set aside. But that can only be done by the court which has taken the interim proceedings in the interest of justice under s. 151 of the Code of Civil Procedure provided the order is brought to its knowledge and a prayer is made to set aside the interim proceedings within a reasonable time. Otherwise the interim proceedings in our opinion are not a nullity and in the absence of such exercise of power by the court executing the decree under s. 151, they remain good for all purposes.

What we have said about execution proceedings applies with greater force to stay orders passed in transfer applications, as in the present case. In the case of execution proceedings at any rate there is

an appeal in which a stay order is passed; the transfer proceedings are collateral proceedings and even though the superior authority may have the power to stay it cannot deprive the inferior authority having jurisdiction of that jurisdiction, unless the inferior authority is apprised of the order by the superior authority. In the present case the order of stay never came to the knowledge of the Magistrate concerned till he gave the permission on October 4, 1961. Later on the District Magistrate himself dismissed the transfer petition. The order was not brought to the knowledge of the Magistrate concerned by the appellant at any time. Nor did he ever apply to the Magistrate to set aside the permission passed in ignorance in the interest of justice. In these circumstances, the appellant cannot challenge the permission as a nullity in the suit which has been brought on the basis of that permission.

We may, however, add that what we have said above refers only to proceedings being carried on by courts or authorities after the stay order has been passed and before they have knowledge of it. But this may not apply in a case where stay is made for ministerial officers, as for example in the case of a court asking a bailiff not to sell and the bailiff selling without knowledge of the order the court prohibiting it to carry on the sale. The position in such a case may be different, but as to that we express no final opinion in the present appeal.

The appeal therefore fails and is hereby dismissed with costs.

Y. P. Appeal dismissed.

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