PATNA HIGH COURT

Liakat Mian

Vs

Padampat Singhania

A.F.A.D. No. 537 of 1950

(Reuben, Imam and Ramaswami, JJ.)

18.04.1951

JUDGMENT

Reuben, J.

1. The case has been refd. to a Special Bench for a decision as to when an order under Order 41 Rule 5, Civil Procedure Code passed by an appellate Ct. becomes operative, whether it operates from the moment when it is passed or only after communication to the Subordinate Ct.

2. This appeal, which is directed against a decree for the recovery of possession of certain property, was filed on 13-4-1950. On the 14th of April by an order under Order 41 Rule 5, an order for ad interim stay of delivery of possession was passed. The necessary requisites were filed on the 17th of April and the order was issued for communication to the subordinate Ct. By some mischance the applt. made an error in naming the subordinate Ct. and the communication was addressed to the Permanent Munsif of Araria instead of the Addl. Munsif of Araria. It reached the Permanent Munsif on the 25th of April and was given effect to in execution case No. 8 of 1949 of his Ct. instead of being given effect to in the execution case of the same number in the Ct. of the Addl. Munsif in which the decree under appeal was being executed. In consequence, the Addl. Munsif delivered possession of the property in suit to the D. H. in June 1950.

3. The question at issue has come under the consideration of the Cts. in several reported decisions. The earliest of these is *Bessesswari v. Horro Sundar*[1], in which property was sold in execution of a decree and purchased by a third party subsequent to a stay order under section 545, Civil Procedure Code of 1882. Their Lordships held that the stay order was in the nature of a prohibition to the executing Ct. and would, therefore, take effect only when communicated. The executing Ct. therefore, had jurisdiction to sell the property and the sale was a valid one. Exactly the opposite view was taken by Woodroffe and Mookerjee JJ. in *Hukum Chand v. Kamalanand*[2], in which the decree, as here, was for recovery of possession. While distinguishing the case of Bessesswari, (1 C. W. N. 226), on that ground that the question arose between the J. D. and a third party purchaser, their Lordships went on expressly to dissent from the decision in that case. They agreed that a prohibitory order, for instance an injunction, will operate

as a prohibition only from the moment of communication but took the view that an order of stay is not such an order and, from the moment when it is made, suspends the power of the subordinate Ct. to carry on further execution proceedings. In *Muthukumarasami v. Kuppusami*[3], a case of an execution sale, their Lordships folld. the case of Bessesswari, (1. C.W.N. 226), in preference to that of *Hukum Chand v. Kamalanand*[4], but without any discussion. In *Ramanathan v. Arunachellam*[5], another case of execution sale, Sadasiva Ayyar J. expressly differed from the decision is Muthukumarsami Rowther's case, (33 Mad. 74 : 3 I. C. 82), and expressed the view that unless otherwise provided in the order itself the order operates immediately and suspends from that moment the jurisdiction of the Subordinate Ct. to proceed with the execution of the decree under appeal. The facts of the case were that a telegram waj sent to the Vakil at Madura informing him of thes order of stay and the Subordinate Ct. of Ramnad was moved by a petn. accompanied by an affidavits to stay the sale but it refused to act on the telegram in the absence of an official communication. Spencer J. made this a ground for distinguishing the case of Muthukumarsami Rowther, (33 Mad. 74 : 3 I. C 82). In his opinion, the Subordinate Ct. acted injudiciously in not postponing the sale in order to ascertain the truth of the information received and he treated this as a reason for setting aside the sale. At the same time he observed that there was much force in the observation of Woodroffe J. in *Hukum Chand v. Kamalanand*[6], "

> "That there is no reason why the operation of an order of the H. C. should be nude contingent, say, upon the due performance of the duties of the post office."

The matter next came before a F. B. in *K. Venkatachalapati v Kameswaramma*[7]*.)*, in respect of an attachment in execution of a decree made after the passing of an order of stay. Their Lordships accepted the view in Bessesswari's case, 1 C.W.N. 226. According to Ayling J., the order of the appellate Ct. is in the nature of a prohibition and therefore, operates only from communication. Seshagiri J. refd. to the provisions of Order 41 Rule 5 and argued that the Ct. of first instance retains jurisdiction to execute a decree in spite of the filing of an appeal and therefore, the power can only be taken away by communication made to it.

4. The view in Bessesswari's case, (1 C. W. N. 226), was next taken by a F. B. of the Allahabad H. C. in *Parsotam v. Barhma Nand*[8], Mukerji J., who delivered the leading judgment, regarded the order of stay as a "direction to somebody" and therefore, dependent on communication. He took the analogy of a principal directing his agent to purchase a ton of wheat and then countermanding his order by a direction received by his agent only after the completion of the purchase. He pointed out that by the sale proclamation the public are invited by the Ct. to come and bid for the property and asked whether there would be any moral justification for subsequently informing an innocent third party purchaser that the sale was void by reason of an uncommunicated order of stay. With respect, I would submit that analogy is not a safe guide and that moral considerations are irrelevant in a matter of interpretation. The case before their Lordships was one of a stranger purchaser and his Lordship held that the sale was a valid sale. He drew a distinction between such a case and that of a D. H. purchaser, observing :

> "The D. H. cannot shake off his character as such merely by reason of his auction-purchase, and he is bound by all orders passed in the ease. A stay order, therefore, will operate against him and it may be that a purchase by a D. H. will be set aside on the mere ground of the passing of a stay order."

The point was next consd. but not decided in *Jatis Chandra v. Kshirode Kumar*[9], Premising that Hukum Chand Boid's case, (33 Cal. 927 : 8 C. L. J. 67) merely disapproved the reasoning in the case of Bessesswari, (1 C. W. N. 226) and not the decision therein, their Lordships proceeded on the assumption that a stay order made by the appellate Ct. operates from the time when it is passed. They took the view that the Subordinate Ct. nevertheless did not lose jurisdiction over the execution proceedings and the order passed by it in contravention of the stay order might be irregular or even illegal but was still an act done in exercise of jurisdiction, to be set aside by appropriate proceedings. They observed :

> "The Ct. which passed the order or did the act may itself recall it, and ought to do so, when it is later on apprised of the stay order."

Apparently, they contemplated that on the attention of the executing Ct. being drawn to the existence of the stay order the executing Ct. will automatically restore the status quo ante the passing of the order of stay. The reason for this view is explained immediately after, namely that, if the action taken contrary to the stay order be regarded as without jurisdiction the discovery that this was so might be made so late that injustice might result to an innocent party. Finally, the question came before a F. B. of the Lahore H. C. in *Karam Ali v. Raja*[10], The F. B. on a detailed discussion of the authorities came to the conclusion that the order of stay operates from the moment when it is passed and has the effect from that moment of depriving the subordinate Ct. of its jurisdiction to execute the decree. Munir, Ag. C. J., who delivered the leading judgment, proceeded on an interpretation of Order 41 Rule 5 and observed that any consideration of inconvenience or hardship is irrelevant, as, in his opinion, the meaning of the rule is plain, an opinion with which I respectfully agree.

5. The provision which we have to interpret is:

> "An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Ct. 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 Ct may for sufficient cause order stay of execution of such decree." It is noticeable that this rule does not provide for an order directed to anybody. It empowers the appellate Ct in
> absolute terms to stay execution. It does not specify any person or Ct. to whom the order is to be communicated. In the absence of any provision or direction to the contrary an order of a Ct. must be taken to operate from the moment when it is made :
> "The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the Judge, and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and in curia before the Ct. rises, and delivered to the parties." [Lord Westbury, L. C. in Ex parte Hookey, (1362) 45 E R 1261 : (4 De G. F. and J. 456). Vide, also *Jones v. Roberts*[11], (M'Cl and Yo 567) and *Verlander v. Codd*[12],

On its terms, the rule directs that proceedings in execution may not be taken contrary to an order of stay passed by the appellate Ct. It follows that from the moment the stay order is passed the executing Ct. is deprived of the power of executing the decree and any action taken by it in execution of the decree would be without jurisdiction.

6. An interpretation which makes the operation of the order depend upon communication is open to the objection that it introduces into the rule something which is not to be found there. Also, far from making for certainty such a rule would make for uncertainty. It raises at once the question as to what is to be consd. as communication. Will a statement from the Bar made to the executing Ct. or an affidavit from a party informing the Ct. of the passing of such an order be "communication"? Or, supposing that the copy of the order issued by the Ct. is received in the executing Ct. but owing to some cause is not brought to the notice of the presiding officer, is it to be taken that there is "communication"? Or, if the decree has been transferred to another Ct. for execution, will "communication" to the Ct. which passed the decree be sufficient? It also makes the date of the operation of the order depend on the efficiency and honesty of the officers responsible for transmitting the order and on possible sharp practice on the part of persons interested in delaying it. The importance that there should be certainty as to the date from which an order of a Ct. operates is well expressed by Lord Westbury L. C. (ibid) in words which will bear repetition :

> "The greatest possible confusion would arise were it otherwise. In fact, all persons dating their rights from the time of the order being pronounced would be thrown into a state of most inconvenient uncertainty, if they could not exhibit to another Ct. or produce for the purpose of any legal inquiry the order containing the directions of the Ct. with the date, in the certainty that that date will be accepted as the time when the order is made. There would be no possible mode by which the application of Acts of Parliament and the limitation of time could be regulated, unless the Ct. abides by a general principle of interpretation".

On the score of injustice also, I do not agree that the balance is in favour of the view take in Bessesswari's case, (1 C. W. N. 226). If a Ct. has acted without jurisdiction
and a person has entered into possession of property to which he is not entitled in law, he cannot complain if the person entitled thereto gets the property back. I have no doubt that the hands of the Cts. however, are sufficiently long to enable the person thus dispossessed to get any equitable relief to which he may be justly entitled.

7. For these reasons, I hold that the delivery of possession in this case was without jurisdiction. In the circumstances of the case, however, I do not think it is necessary to direct a restitution of possession. The property is a small area of Parti land on which some huts stood and have been removed. The valuation as given in suit is only Rs. 45. I propose to follow the course adopted in Hukum Chand Boid's case, 33 Cal. 927 : (3 C.L.J. 67) namely that the Respondents will remain in possession of the property subject to making a deposit of Rs. 400 as security for costs and compensation recoverable by the appellant in the case of his success in this appeal The deposit should be made in the Ct. below within one month from today. On the making of the deposit, the

ad interim stay order will stand discharged. Failing compliance, the ad interim stay order will be made absolute and the executing Ct. will restore possession to the applt. As the applt's own mistake led to this confusion it is fair that the parties should bear their own costs.

Imam, J.

8. This is an appln. by the deft. J. D. under Order 41 Rule 5, Civil Procedure Code for stay of execution proceedings in the Ct. below pending the hearing of the second appeal in this Ct. The pltfs. had instituted a suit for declaration of their title over and for recovery of possession of a very small piece of land upon which the Appellant had wrongly erected a structure. The whole suit was valued at Rs. 45. The Ct. of first instance and the lower appellate Ct had decreed the pltfs' suit. A second appeal was filed by the Appellant in this Ct. on 13-4-1950. On 14-4-1950, the Registrar of this Ct. ordered ad interim stay while admitting the appln. under Order 41 Rule 5 of the Code. The Second Appeal was admitted on 25-7-1950. An appln. for delivery of possession was filed by the pltfs. D. Hs. on 31-5-1950, in the Ct. of the Addl. Munsif of Araria. In June 1950, delivery of possession was made by the said Ct. to the D. He. Owing to the Appellant wrongly stating that the execution proceedings were pending in the Ct. of the Munsif at Araria, the order of ad interim stay of this Ct. was communicated to that Ct. and not to the Ct. of the Addl. Munsif of Araria, on 25-4-1950. Later on the mistake was discovered, but delivery of possession had already taken place.

9. The report of the Nazir dated 4-6-1950, shows that delivery of possession was made that day and the two thatched houses on the land in dispute were demolished. It may be mentioned that the decree had directed the Appellant to remove the houses within one month from the date of the judgment of the Ct. of first instance, otherwise the pltfs. would be entitled to get it done through the Ct.

10. The real question before this Ct. is whether the rule obtained in the appln. under Order 41 Rule 5 of the Code should be made absolute or discharged, that is to say, whether the appln. under Order 41 Rule 5 of the Code should be dismissed or allowed and the execution proceedings in the Ct. below should be stayed until the second appeal in this Ct. filed by the Appellant is disposed of. Order 41 Rule 5 of the Code expressly prohibits the stay of execution unless the appellate Ct. is satisfied (a) that substantial loss may result to the party applying for stay of execution unless the order is made (b) that the appln. has been made without unreasonable delay and (c) that security has been given by the Appellant for the due performance of such decree or order as may ultimately be binding on him. In the present case, the land in dispute is of a very small area and the whole appeal has been valued at Rs. 45 only. The thatched houses erected by the Appellant on the land have already been demolished on 4-6-1950, when delivery of possession was made to the D. H. In my opinion, having regard to all the circumstances, this is not a case where substantial loss will be suffered by the Appellant if stay of execution proceedings is not ordered. The houses having been demolished, there is nothing more for the Appellant to suffer, and the land is parti land, not culturable. If the Appellant succeeds in his appeal and the decree of the Cts. below is reversed, he can always apply for restitution under section 144 of the Code. The Ct. has ample powers under the said section to order mesne profits, damages and compensation. In my opinion, the appln. under Order 41 Rule 5 of the Code filed by the Appellant must be dismissed, and the ad interim order of stay must be vacated.

11. I have had the advantage of perusing the judgment of my learned brother, Reuben J. Having regard to the view I take on the merits of the appln. under Order 41 Rule 5 of the Code, I am of the opinion that it is not really necessary to decide in this case which view is the more correct one, that taken by the learned Judges of the Calcutta H. C. in *Hukum Chand v. Kamalanand*[13], or the view taken by the learned Judges of the Madras H. C. in *Venkatachalapati v. Kameswaramma*[14], As my learned brother, however, has taken, the view that the decision of the learned Judges of the Calcutta H. C. in Hukum Chand Boid's case, (33 Cal. 927 : 3 C.L.J. 67) is the correct view, I must express my own opinion. In my opinion, the decision of the learned Judges of the Madras H. C. in Venkatachalapati Rao's case, 41 Mad. 151: (AIR (5) 1918 Mad. 391 F. B.) is more acceptable to me than the view of the learned Judges of the Calcutta H. C. in Hukum Chand Boid's case: (33 Cal 927 : 3 C. L. J 67). Order 41, R. 5 of the Code expressly states that an appeal shall not operate as a stay of proceedings except so far as the appellate Ct. 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 Ct. may, for sufficient cause, order stay of execution of such decree; that is to say, if an execution proceeding is pending in the executing Ct. such proceeding shall continue although an appeal has been filed against the decree, unless the appellate Ct. orders stay of execution of the decree. When an appellate Ct. orders stay of execution of the decree, such an order must be regarded as one which prohibits the executing Ct. to proceed with the execution of the decree. The order being in the nature of a prohibitory order must be communicated to the executing Ct. which will then cease to proceed with the execution of the decree. Although R. 5 of Order 41 of the Code does not speak of the stay order of the appellate Ct. being communicated to the executing Ct. I think a reasonable reading of the rule indicates that where an appellate Ct. has
ordered stay of execution of the decree, such an order must be communicated to the executing Ct. otherwise the executing Ct. being ignorant of the order of stay, would be justified in proceeding with the execution proceedings. I do not think that any real practical difficulty can arise in interpreting R. 5 of Order 41 in the way the learned Judges of the Madras H. C. have done in Venkatachalapati Rao's case, (41 Mad, 151: AIR (5) 1918 Mad. 391 F. B.). To hold that every thing done by the executing Ct. after the date of the order of stay of the appellate Ct., and in ignorance of it, is without jurisdiction, would, in my opinion, raise many practical difficulties. I think, it would be more reasonable to say that such acts of the executing Cts. though done with jurisdiction, are voidable but not void. I think the provisions of Section 161 of the Code are sufficiently wide to cover a case where the executing Ct. has done certain things, in ignorance of the stay order of the appellate Ct. and such acts cannot be allowed to stand for the ends of justice, or to prevent abuse of process of the Ct. The observations of Lord Westbury in Ex parte Hookey, (1862) 46 E. R. 1261: (4 De G. F. and J. 456) must be read in connection with the facts of that case. The point which his Lordship was determining was as to what is the date from which limitation should be calculated under the provisions of a certain statute and he was of the opinion that the date from which such calculation should be made is the date on which the order is pronounced and not the date on which the order is drawn up. I think, there can be little room for doubt that the date of the order of a Ct. is the date on which it is pronounced. It is, however, quite a different matter as to whether the stay order of an appellate Ct. given on a particular date makes all proceedings before the executing Ct. without jurisdiction when that Ct. was ignorant of the order of the appellate Ct. I have merely in a short compass expressed my agreement with the view taken by the learned Judges of the Madras H. C. in Venkatachalapati Rao's case, (41 Mad. 151: A.I.R. (5) 1918 Mad. 391 F.B.) out of deference to the view of my learned brother, Reuben J. although I think in this case it is not necessary to decide the point at all as the circumstances in

the present case do not establish grounds for allowing the appln. under Order 41, R. 5 of the Code.

12. I would accordingly dismiss this appln. with costs. Hearing fee, one gold mohur.

Ramaswami, J.

13. The terms of the statutory rule- Order 41 Rule 5 are absolute, and as a matter of construction I hold that the jurisdiction of the Ct. executing the decree is superseded from the moment the stay order is passed by the appellate Ct. I can see no reason in principle why the operation of the order of the appellate Ct. should be made conditional on its being communicated to the executing Ct. It is no doubt true that if proceedings have to be taken against a person for contempt of the authority of the Ct. in proceeding with execution after the order of stay has been made, it is essential to prove that such person has disobeyed or acted in contravention of the order with knowledge that it had been made; but the operation of the order is not postponed till it has been communicated to the subordinate Ct. or the party intended to be affected by it. The reason is that the order of the appellate Ct, for stay has direct effect upon the execution proceeding itself, although if the proceedings are taken to punish the person who has carried on the execution after it had been stayed, it is necessary to show that he had notice of the order because it is only after such notice and his act would be in defiance of law and in contempt of Ct. In *Buffandeau v. Edmondson*[15], an American case, it was pointed out by the S. C. that injunction by an appellate Court for stay of execution operates as a supersede as to the execution as soon as it is made. The legal authority to proceed with the execution is withdrawn by the act of a competent Ct. and there is no more legal justification for the execution after the order for stay than there would be for execution after the proceedings have been quashed. In this context the observations of Lord Westbury *In re The Risca Coal and Iron Co*[16]. are important. The question in that case was whether under section 33 of the statute, 12 and 13 Vict. C. 108, which provided

> "that no notice of motion for a rehearing before the Lord Chancellor of Great Britain or Ireland respectively, of any order of the Master of the Rolls in England or Ireland, or of any of the Vice-Chancellors in England under the said Act or in this Act, shall be given after the expiration of three weeks after the order complained of shall have been made"

Time for the notice began to run from the date the order was pronounced or from the date when the order was drawn up. Dealing with the question of inconvenience that would arise if time began to run only from the date the order was drawn up, the Lord Chancellor observed:

> "I think, therefore, I shall abide by a rule of convenience: certainty in the matter is convenience, certainty you attain by abiding by the date of the order; uncertainty you introduce when you depart from that date. a variation from the common rule of abiding by the record is introduced by a departure from that date. Great laxity of practice would be introduced and encouraged by a departure from that date."

To the same effect is *Holtby v. Hodgson*[17], in which judgment having been signed in an action against a married woman, execution upon which was limited to her separate estate not subject to

any restraint upon anticipation, it was sought to attach in execution a sum of money recovered by her as damages in an action against the garnishee, and for which the Judge at the trial had directed judgment to be entered for her. It was held by the Ct. of Appeal that the money could be attached and further that the fact that judgment in the action against the garnishee was not in fact entered until after the commencement of the garnishee proceedings did nob affect the right of the pltf. to garnishee order.

14. For these reasons, I hold that delivery of possession made to the respondent in this case was without jurisdiction and I agree to the order which my learned brother Reuben has proposed.
Order accordingly.

Cases Referred.

[1] 1 C. W. N. 226
[2] 33 Cal. 927 : (3 C. L. J. 67)
[3] 33 Mad. 74 : (3 I. C. 82)
[4] (33 Cal. 927 : 3 C. L. J. 67)
[5] 38 Mad. 766 : (AIR (1) 1914 Mad. 261)
[6] (33 Cal. 927 : 3 C.L.J. 67)
[7] 41 Mad. 151 : (AIR (5) 1918 Mad. 391 F.b)
[8] 50 ALL 41: (AIR (14) 1927 ALL 401 F.B)
[9] A. i. B. (30) 1943 Cal. 319 : (I. L. R. (1943) 1 Cal. 274)
[10] AIR (36) 1949 Lah. 108 : (Pak. L. E. 1949 Lah. 83 F.B)
[11] (1825) 148 E R 538
[12] (1822) 57 E R 37 : (1 Sim. and St. 93)
[13] 33 Cal. 927: (3 C. L. J. 67)
[14] 41 Mad. 151: (A.I.R. (5) 1918 Mad. 391 F.B)
[15] (17 California 436)
[16] (1862) 31 l. J. Ch. 429: (45 E. r. 1261)
[17] (1890) 24 Q. b. D. 103: (59 L. J. q. b. 46)