

Before R. N. Mittal, J.

BALDEV KRISHAN,—Petitioner.

versus

PUNJAB STATE AGRICULTURAL MARKETING BOARD,
CHANDIGARH,—Respondent.

Civil Revision No. 2316 of 1984.

February 13, 1985.

Code of Civil Procedure (V of 1908)—Order 41 Rules 5 and 6—Money decree passed by the trial court—Second appeal by the judgment debtor pending in the High Court—Application for stay of execution under Order 41 Rule 5 declined by the High Court—Judgment debtor—Whether could thereafter approach the trial court under Rule 6(1)—Executing Court—Whether could stop disbursement of the decretal amount.

Held, that sub-rule (1) of rule 5 of order 41 of the Code of Civil Procedure 1908 relates to stay of execution by appellate court. It *inter alia* provides that the appellate court may for sufficient cause stay execution of a decree. Sub rule (3) prescribes certain pre-requisites for grant of stay. One of the pre-requisites is that the appellant furnishes security for the due performance of the decree as may ultimately be binding upon him. Rule 6 relates to security in case of order for execution of decree appealed from. From a reading of this rule it is evident that in case an order for execution of the decree has been made, the Court which passed the decree is entitled to ask the decree-holder for security for restitution of the property taken in execution of the decree and for the due performance of the decree of the appellate court if an appeal is pending against the decree. Both the rules thus operate in different fields. Sub-rule (1) read with sub-rule (3) of rule 5 prescribes furnishing of the security for the due performance of the decree by the judgment-debtor whereas sub-rule (1) of rule 6 prescribes the furnishing of the security for restitution of the property by the decree-holder. Sub-rule (1) further provides that the appellate court is also entitled to pass such an order which the trial court can pass. Therefore, it cannot be held that in case an application under order 41, rule 5 filed by the judgment-debtor has been dismissed, he cannot approach the trial court under sub-rule (1) of rule 6. However, under sub-rule (1) the executing court could not stop the disbursement of the decretal amount. At the most it could ask the decree-holder to furnish security for restitution of the amount for due performance of the decree of the appellate court.

(Paras 4, 5 and 6)

Yelamanchili Satyanarayanamma vs. Yelamanchili Nageswara Rao
(1959) II An. W.R. 439.

Dissented from.

Petition under Section 115 C.P.C. for the revision of the order of the Court of Shri L. R. Roojam, PCS., Additional Senior Sub Judge, Rajpura dated 29th May, 1984, directing that the amount of Rs. 1,64,000 be not paid to the decree-holder till final decision of Regular Second Appeal No. 191 of 1984 filed by he J.D. and which is pending for disposal in the Hon'ble High Court. Necessary directions be issued to the concerned Banks. As ordered for further proceedings to come up on 3rd August, 1984.

K. P. Bhandari Senior Advocate with Ravi Kapur, Advocate, for
the Petitioner.

S. C. Pathela Advocate, for the Respondent.

JUDGMENT

Rajendra Nath Mittal, J.

(1) This revision petition has been filed by the decree-holder against the order of the Additional Senior Sub Judge, Rajpura dated 29th May, 1984, directing that the amount of Rs. 1,64,000 be not paid to the decree-holder till the final decision of Regular Second Appeal No. 191 of 1984 pending in the High Court.

(2) Briefly the facts are that an amount of Rs. 1,64,000 belonging to the judgment-debtor was ordered to be attached by the executing Court in pursuance of a decree passed in favour of the plaintiff-decree-holder. On an application by the judgment-debtor before the executing Court it was ordered that the amount attached be sent for from the Bank but it may not be paid to the decree-holder till Regular Second Appeal No. 191 of 1984 filed by the judgment-debtor against the decree sought to be executed, was decided by the High Court. The decree-holder has come up in revision to this Court.

(3) It is contended by the learned counsel for the petitioner that the respondent-judgment-debtor filed an application for stay of the execution in the Regular Second Appeal which was declined and, therefore, the executing Court could not stop the disbursement of the decretal amount under Order 41, rule 6 of the Code of Civil Procedure. According to him, the executing Court had become

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functus officio after the application under Order 41, rule 5 had been dismissed by the High Court. In support of his contention he places reliance on *Yelamanchili Satyanarayanamma vs. Yelamanchili Nageswara Rao*, (1).

(4) I have duly considered the argument. Sub-rule (1) of rule 5 relates to stay of execution by appellate Court. It *inter alia* provides that the appellate Court may for sufficient cause stay execution of a decree. Sub-rule (3) prescribes certain pre-requisites for grant of stay. One of the pre-requisites is that the appellant furnishes security for the due performance of the decree as may ultimately be binding upon him. Rule 6 relates to security in case of order for execution of decree appealed from. The present order is purported to have been passed under sub-rule (1) of rule 6 which reads as follows:

“(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.”

(5) From a reading of the rule it is evident that in case an order for execution of the decree has been made, the Court which passed the decree is entitled to ask the decree-holder for security for restitution of the property taken in execution of the decree and for the due performance of the decree of the appellate Court if an appeal is pending against the decree. Both the rules thus operate in different fields. Sub-rule (1) read with sub-rule (3) of rule 5 prescribes furnishing of the security for the due performance of the decree by the judgment-debtor whereas sub-rule (1) of rule 6 prescribes the furnishing of the security for restitution of the property by the decree-holder. Sub-rule (1) further provides that the appellate Court is also entitled to pass such an order which the trial Court can pass. Therefore, it cannot be held that in case an application under

(1) (1959) II An. W. R. 439.

Order 41, rule 5 filed by the judgment-debtor has been dismissed, he cannot approach the trial Court under sub-rule (1) of rule 6. In the above view I am fortified to some extent by the observations of this Court in *Jangir Singh Ganda Singh and others vs. Mst. Nihal Kaur and others*, (2). In that case an application for stay under Order 41, rule 5 was dismissed by the appellate Court. Later an application was moved under Order 41, rule 6(2) by the judgment-debtor for staying the sale of the property, D. K. Mahajan, J. came to the conclusion that the executing Court could not refuse to exercise jurisdiction vested in it under Order 41, rule 6(2) in case an application of the judgment-debtor under order 41, rule 5 had been refused by the appellate Court. I am in respectful agreement with the above observations. It is true that in *Yalamanchili Satyanarayamma's case* (supra) it was observed—

“Powers exercisable either by a Court which had passed the decree under rule 6(1) or by a Court which had made an order for the sale of immovable property under rule 6(2) could only be exercised provided the matter had not been considered earlier by the appellate Court; so that where an appellate Court had refused to order stay of execution of the decree against which an appeal is pending before it, pending disposal of that appeal, the Court which passed the decree as well as the Court which had made the order for the sale of immovable property in execution of that decree must in law, be deemed to have become *functus officio* and could not exercise the powers contemplated by the two sub-rules of rule 6. To hold otherwise would mean that while the appellate Court considers that there was no justification for stay of execution of the decree pending the disposal of the appeal, and that the decree-holder should have the full benefit of the decree by way of execution, notwithstanding the pendency of the appeal, the Subordinate Court could by making its own order nullify the effect of the order of the appellate Court and grant a relief to the judgment-debtor which had been expressly negated and refused by the appellate Court.”

In that case the property of the judgment-debtor had been sold earlier and then the application under Order 41, rule 6 had been made. The main question before the learned Judge was whether

(2) AIR 1965 Punjab 438.

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Order 41, rule 6(2) of the Code would apply after the sale in execution had been held. Mahajan J. in *Jangir Singh's case* (supra) did not follow the ratio in the above-said case on the ground that the observations were made by way of obiter. I am in respectful agreement with the observations of Mahajan, J.

(6) It, however, deserves mentioning that under sub-rule (1) the executing Court could not stop the disbursement of the decretal amount. At the most it could ask the decree-holder to furnish security for restitution of the amount for due performance of the decree of the appellate Court. In view of the position of law Mr. Bhandari, learned counsel for the petitioner, has stated at the Bar, that his client would furnish the security for the said purpose in the executing Court at the time of the withdrawal of the amount.

(7) For the aforesaid reasons I accept the revision petition, set aside the order of the executing Court and direct that the amount be paid to the petitioner on furnishing security for restitution to its satisfaction. The security, may be accepted after notice to the judgment-debtor. No order as to costs.

N.K.S.

Before R. N. Mittal, J.

BAGHLA BRIQUETTE INDUSTRIES,—Appellant.

versus

PUNJAB FINANCIAL CORPORATION,—Respondent.

F.A.O. No. 484 of 1983

March 16, 1985.

Code of Civil Procedure (V of 1908)—Order 21 Rule 90—Limitation Act (XXXVI of 1963)—Article 127—Objections against sale filed within limitation as provided by Article 127—Sale, however confirmed before filing of objections—Objection application dismissed on the ground that sale already stood confirmed—Court—Whether empowered to confirm sale till the expiry of period of limitation for filing objections—Order of confirmation of sale and dismissal of objections—Whether liable to set aside.