

Khosla J.—I agree.

REVISIONAL CIVIL

Before Bhandari, C. J.

S. SANTOKH SINGH,—Petitioner

versus

BHAI SIRI RAM AND 9 OTHERS,—Defendants-Respondents

Civil Revision No. 276 of 1953

1954

*Stay—Preliminary decree for accounts—Accounting whether should be stayed pending appeal—Rule in such cases stated—Civil Procedure Code, Order 41, Rule 5—Effect of—Practice contrary to the provisions of law—Whether can be recognized* <sup>26th</sup> March.

Held, that the court will not stay taking accounts pending an appeal unless an irreparable injury would otherwise be caused. It is unreasonable that save in exceptional circumstances an unsuccessful litigant should be permitted to protract the litigation by requiring that accounts should not be taken until after the appeal has been heard and decided.

Held further, that an established practice cannot be countenanced by the court if it is contrary to express provisions of law. Rule 5, Order XLI of the Civil Procedure Code declares in unambiguous language that 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. The use of the word 'may' confers a discretion on the Court to stay or not to stay proceedings and it is idle to suggest that this discretion must always be exercised in favour of the appellant. The matter is one of discretion and the High Court can interfere only if the Court below has acted on wrong principles.

*Petition under section 115 of Act V of 1908, Civil Procedure Code for revision of the order of Shri Shamsheer Bahadur, District Judge, Jullundur, dated the 9th July 1953, refusing to stay further proceedings in the court of Shri Sham Lal, Senior Sub-Judge, Jullundur, where the preliminary decree for rendition of accounts was granted to plaintiff against defendant No. 1.*

D. K. MAHAJAN, for Petitioner.

H. R. MAHAJAN, for Respondent No. 1.

### JUDGMENT

**Bhandari, C. J.** **BHANDARI, C. J.** The short point for decision is whether in the absence of special circumstances an unsuccessful litigant should be permitted to delay the passing of a final decree by filing an appeal from the preliminary decree and requiring that no further proceedings should be taken until his appeal is heard and decided.

The trial Court passed a preliminary decree in a suit for rendition of accounts and appointed a commissioner to examine the accounts. The defendant preferred an appeal to the District Judge and presented an application under Order XLI rule 5 and section 151 of the Code of Civil Procedure for the stay of further proceedings before the local commissioner until such time as the appeal was heard and decided. The District Judge declined to order a stay and the defendant has accordingly come to this Court in revision.

Mr. D. K. Mahajan who appears for the defendant prays that the proceedings in the present case be stayed as it is an established practice of the Courts to stay proceedings in such cases until the appeal against the preliminary decree is determined. I regret I am unable to concur in this contention. In the first place, I am not aware of any practice that the Court will, in every case, whether there are particular circumstances in the case or not, make an order for the stay of proceedings pending an appeal from the preliminary decree. On the contrary the practice appears to be that the Court will not stay the taking of

accounts pending an appeal (*Nerot v. Burnand.*) (1) unless an irreparable injury would otherwise be caused (*Coleman and Co. Ltd. v. Stephen Smith and Co. Ltd.*). (2) *In Re. Palmer's Trade Mark* (3) it was held that when a question of law has been decided on a preliminary objection, and an appeal has been brought, the Court will not in general stay the trial of the issues of fact pending appeal. In dismissing the application to stay the proceedings pending an appeal to the House of Lords, Cotton L. J. observed as follows :—

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“No doubt the House of Lords may take a different view, but that is no reason for depriving the applicants of what is their right. They wish to go on with the proceedings, and this Court has decided that they have a right to do so; and the mere fact of extra costs being incurred, which may be useless if the House of Lords decide in favour of the appeal, is no sufficient reason for restraining them.”

Secondly, it is obvious that even if a particular practice has been established it cannot be countenanced by the Court if it is contrary to the express provisions of law. Rule 5 of Order XLI of the Civil Procedure Code declares in unambiguous language that 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. The use of the word ‘may’ confers a discretion on the Court to stay or not to stay proceedings and it is idle to suggest that this discretion must always be exercised in favour of the appellant.

Thirdly, it is unreasonable that save in exceptional circumstances an unsuccessful litigant should be permitted to protract the litigation by requiring that accounts should not be taken until after the appeal has been heard and decided.

(1) 2 Russel 56.

(2) (1911) 2 Ch.D. 572, 580.

(3) (1882) 22 Ch.D. 88,

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Fourthly, the matter is one of discretion and the High Court can interfere only if the Court below has acted on wrong principles.

It may be that, as contended by Mr. Mahajan, the appeal is likely to succeed, but the mere fact that there are strong grounds for the appeal would not justify an order of stay. A person is expected to prefer an appeal only when there are strong reasons for doing so.

For these reasons, I would uphold the order of the learned District Judge to the extent that the commissioner appointed by the Court to examine the accounts of the parties should continue to examine the accounts and to submit his report thereon, no final decree will, however be passed in the case until the appeal preferred against the preliminary decree has been heard and decided. The learned District Judge should endeavour to deal with this appeal as quickly as possible. The parties have been directed to appear before the commissioner on Monday, the 26th April, 1954.