

THE HIGH COURT OF MADHYA PRADESH
CR No.284/2020
(HEMRAJ & ORS. VS. KALLU KHAN)
Through Video Conferencing

Gwalior, Dated : 18/06/2021

Shri S.K.Shrivastava, learned counsel for the petitioners.

Shri Ravi Rahul, learned counsel for the respondent.

This civil revision under Section 115 of C.P.C. has been filed against the order dated 07/03/2020 passed by Civil Judge, Class-II, Lateri, District Vidisha in Execution Case No.16-A/16/19, by which the Executing Court has stayed the further proceedings of execution case under Order 21 Rule 29 of C.P.C.

It is submitted by the counsel for the petitioners that a verbal prayer was made by the counsel for the respondent that since second appeal No.1040/2019 filed by the respondent is pending before the High Court, therefore, the further proceedings in execution case be stayed in the light of the provisions of Order 21 Rule 29 of C.P.C. It is submitted that the verbal prayer made by the counsel for the respondent was allowed, and the executing Court by impugned order has stayed the proceedings.

Challenging the order passed by the Court below, it is submitted by the counsel for the petitioners that the second appeal No.1040/2019 has not been admitted so far. No interim order has been passed and under these circumstances, the executing Court should not have stayed the proceedings merely on the ground that the

second appeal is pending before the High Court.

Per contra, the petition is vehemently opposed by the counsel for the respondent. It is submitted that the executing Court did not commit any illegality by staying the further proceedings of the execution case in the light of the pendency of second appeal No.1040/2019 before the High Court. Further, it was fairly conceded by the counsel for the respondent that the second appeal No.1040/2019 has not been admitted so far and there is no stay in the said appeal.

Heard the learned counsel for the parties.

From the order-sheets of the second appeal No.1040/2019, it appears that on 16/01/2020, the notices on I.A.No.118/2020, an application under Section 5 of Limitation Act and I.A.No.117/2020, an application under Order 22 Rule 4 of C.P.C. were issued. Thereafter, on 03/03/2020 fresh process fee was directed to be paid to the legal representatives of Hemraj. The said second appeal is not admitted so far and there is no stay.

From the order-sheets of the second appeal No.1040/2019, it is clear that the petitioner No.1 Hemraj has expired. No steps have been taken by the petitioners to bring the legal representatives of Hemraj on record.

Be that as it may.

The copy of the judgment and decree dated 29/09/2016 passed by Civil Judge, Class-II, Lateri, District Vidisha has been placed on

record, which shows that the respondent had filed a civil suit against defendant No.1 Sampat Bai. The petitioners are the legal representative of Sampat Bai. Sampat Bai had filed a counter claim, which was decreed and the respondent was directed to hand over the vacant possession of Survey No.599 area 2.251 hectares situated in Lateri, District Vidisha. It appears that the respondent filed an appeal, which was dismissed by Ist Additional District Judge, Sironj, District Vidisha, by judgment and decree dated 09/10/2018 passed in Regular Civil Appeal No.38A/2016. It appears that the respondent preferred an appeal on 02/04/2019 and since, there is a delay in filing the second appeal, therefore, an application under Section 5 of Limitation Act has also been filed. It is undisputed fact that the delay in filing the appeal has not been condoned so far.

The Supreme Court in the case of **Raghavendra Swamy Mutt Vs. Uttaradi Mutt** reported in **(2016) 11 SCC 235** has held as under:-

23. The submission of the learned Senior Counsel for the appellant is that Order 41 Rule 5 confers jurisdiction on the High Court while dealing with an appeal under Section 100 CPC to pass an ex parte order and such an order can be passed deferring formulation of question of law in grave situations. Be it stated, for passing an ex parte order the Court has to keep in mind the postulates provided under sub-rule (3) of Rule 5 of Order 41. It has to be made clear that the Court for the purpose of passing an ex parte order is obligated to keep in view the language employed under Section 100 CPC. It is because formulation of substantial question of law enables the High Court to entertain an appeal and thereafter proceed to pass an order and at that juncture, needless to say, the Court has the jurisdiction to

pass an interim order subject to the language employed in Order 41 Rule 5(3).

24. It is clear as day that the High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an ex parte order, it does not empower it not to formulate the substantial question of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in *Ram Phal*. Therefore, the High Court has rectified its mistake by vacating the order passed in IA No. 1 of 2015 and it is the correct approach adopted by the High Court. Thus, the impugned order is absolutely impregnable.

Thus, it is clear that unless and until the second appeal is admitted, the High Court has no jurisdiction to pass any interim order.

Further, Order 41 Rule 3A of C.P.C. reads as under:-

“3A. Application for condonation of delay.-

(1) When an appeal is presented after the expiry of the period of limitation specified there for, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the appeal within such period.

(2) If the court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the court does not, after hearing under rule 11, decide to hear the appeal.”

Thus, it is clear that when an appeal is presented after expiry of period of limitation, then it has to be accompanied by an application for condonation of delay and the Court shall not make an order stay of execution and decree, unless and until, the Appellate Court decides to hear the appeal under Order 41 Rule 11 of C.P.C.

Order 41 Rule 11 of C.P.C. reads as under:-

“11. Power to dismiss appeal without sending notice to Lower Court. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment.”

From the plain reading of Order 41 Rule 5(1) of C.P.C. it is clear that the appeal shall not operate as stay of proceedings unless and until, a stay order is passed by the Appellate Court. It is also clear from Rule 5(1) Order 41 of C.P.C. that even the execution of decree shall not be stayed by reason that the appeal has been preferred from the decree.

While considering the verbal prayer made by the counsel for the respondent, the executing Court has ignored the provisions of Order 41 Rule 3A of C.P.C., Order 41 Rule 5 of C.P.C. and judgment passed by the Supreme Court in case of **Raghavendra Swamy Mutt (supra)**.

Under these circumstances, viewed from any angle, the order passed by the executing Court cannot be given the approval of judicial stamp.

Accordingly, the order dated 07/03/2020 passed by Civil Judge, Class-II, Lateri, District Vidisha in Execution Case No.16-A/16/19 is hereby set aside.

The executing Court is directed to proceed further with the execution proceedings, unless and until, the execution of the decree is stayed by this Court in S.A.No.1040/2019.

With aforesaid observation, the petition is finally **disposed of**.

Pj'S/-

(G.S. Ahluwalia)
Judge