

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CIVIL REVISION PETITION No.2055 of 2016

ORDER:

This civil revision petition is filed against the order dated 23.02.2016 in E.A.No.19/2016 in E.P.No.85/2015 in O.S.No.197/2010 on the file of the Principal Senior Civil Judge, Mancherial, by and under which, the learned Judge dismissed the application filed by the petitioners/defendants Nos.1 to 3 under Order 21, Rule-26 CPC seeking stay of all further proceedings in E.P.No.85/2015.

2. Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the respondents.

3. The petitioners are defendants Nos.1 to 3 in O.S.No.197/2010, which was decreed on 08.12.2014. Thereafter, the plaintiff filed E.P.No.85/2015. Aggrieved by the judgment and decree passed in O.S.No.197/2010, the petitioners/defendants Nos.1 to 3 filed appeal along with delay condonation petition. On the pretext that the appeal is filed, the petitioners filed E.A.No.19/2016 seeking stay of execution proceedings. The Court below while observing that the concept of passing decree and giving right to the party to enforce the decree as contemplated under Order 21 CPC is undoubtedly at the fag end of the litigation and by any stretch of imagination, it cannot be curtailed under the guise of order 21 rule-26 of CPC with the sole intention to defeat and defraud the rights of respondent/decreed holder, dismissed the said petition.

4. The 1st respondent/decreed holder filed counter contending that the petition filed by the petitioners under Or.21 Rule-26 CPC is not maintainable under law. The petitioners/defendants after lapse of one year, filed appeal with a petition to condone the delay and in the delay petition, the appellate court ordered notice. No interim order was

granted in the unnumbered appeal. Merely on the ground that appeal is filed, no interim order of stay of execution proceedings can be granted. The petitioners/defendants have taken reasonable and sufficient time and when the execution proceedings are pending, only in order to procrastinate the said proceedings, filed the above petition.

5. The contention of the learned Counsel appearing for the petitioners/J.Drs. is that the Executing Court ought to have exercised the discretion and afforded reasonable time for the petitioners/J.Drs. to obtain appropriate orders from the appellate Court where the appeal has already been preferred and the Court below ought to have dismissed the application filed under Order 21 Rule 26 C.P.C. to stay the execution of the decree. It is further contended that since the decree is for recovery of money and the amount is in the bank in a Fixed Deposit and has already attached by the Court in pursuance to an order under Order 38 Rule 5 C.P.C., no prejudice would be caused if there is stay of execution of the decree till appropriate orders are obtained from the appellate Court and on the other hand, if there is no stay, the decree holder is likely to take away the amount which will be difficult to be recovered in the event of their succeeding in the appeal, the chances of which are bright. Learned Counsel submits that the interest of justice demand that there shall be stay of execution of the decree for some time during which the petitioners/J.Drs. are likely to obtain appropriate orders from the appellate Court.

6. Learned Counsel appearing for the respondent/decreed holder submits that there are no merits in the petition and the Court below has rightly dismissed the same. It is submitted that the amount that is attached liable to be recovered in execution of decree is only 1/4th share to which the decree holder has been declared to be entitled to and the remaining 3/4th amount has already been taken away by three J.Drs. and having taken away their share of amount, there is no

justification whatsoever for the petitioners/J.Drs. to deny the respondent/decreed holder from withdrawing her share of amount. That apart, the petitioners/J.Drs., are not diligent in pursuing the matter and the appeal they have preferred is hopelessly belated and is filed more than a year after the suit was decreed with a petition under Section 5 of the Limitation Act and therefore petitioners/J.Drs., are not entitled to any indulgence from the Court.

7.The point for consideration is as to whether the execution of the decree in E.P.No.85 of 2015 on the file of the Principal Senior Civil Judge, Mancherial, is liable to be stayed for certain period so as to enable the petitioners/J.Drs., to obtain appropriate orders from the appellate Court where they have filed the appeal along with I.A.No.8 of 2016 under Section 5 of the Limitation Act on the file of the III-Additional District Judge, Asifabad?

8. The admitted case is that one Ram Murthy died and at that time there was an amount of more than Rs.16 lakhs in his account. The 1st petitioner/J.Dr.No.1 is the wife whereas the 2nd petitioner/J.Dr.No.2 is son. The respondent/decreed holder and the 3rd petitioner/J.Dr.No.3 are the two daughters of the said Ram Murthy. After the death of Ram Murthy, in view of the nomination, the bank authorities have transferred the amount into the account of the 1st petitioner/J.Dr.No.1. The decree holder filed O.S.No.197 of 2010 claiming 1/4th share out of the amount left behind by late Ram Murthy in the bank and after contest, the said suit was decreed on 08.12.2014. The petitioners/J.Drs. did not file an appeal against the said Judgment and Decree till January, 2016. Only in January, 2016, they preferred Appeal Suit on the file of the III-Additional District Judge, Asifabad, and also an application seeking stay of execution of the decree but since there was a delay in preferring the appeal, they filed I.A.No.8 of 2016 under Section 5 of the Limitation Act, the notice of which has been

ordered to the respondent/decreed holder on 25.01.2016. Even before that, the respondent/decreed holder filed E.P.No.85 of 2015 in April, 2015. The petitioners/J.Drs. filed E.A.No.19 of 2016 for staying the execution of the decree under order 21 Rule 26 C.P.C., but the same was dismissed by the Executing Court on 23.02.2016.

9. Learned Principal Junior Civil Judge observed that the provisions of Order 21 Rule 26 C.P.C., are not applicable to the facts of the instant case and hence declined to grant the relief.

Order XXI Rule 26 C.P.C., reads as under:-

“When Court may stay execution:- (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance of Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to required security from, or impose conditions upon, judgment-debtor:- Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court shall required such security from or impose such conditions upon, the judgment-debtor as it thinks fit.”

10. Upon carefully perusing the above provision, I am of the opinion that the learned Executing Court was not right in holding that the present case does not fall within the ambit of Order XXI Rule 26 C.P.C. As already stated, the petitioners/J.Drs., being aggrieved by

the Judgment and Decree, which is sought to be executed, had already preferred an appeal though with an application under Section 5 of the Limitation Act and also filed an application under Order 41 Rule 5 C.P.C., to stay the execution of the decree. Therefore, when the petitioners/J.Drs., have brought to the notice of the Executing Court that an appeal had been preferred and is pending consideration, the Executing Court ought to have given some reasonable time to the petitioners/J.Drs. to obtain appropriate orders from the Appellate Court taking into consideration the principles of natural justice and the loss which would occasion to the petitioners/J.Drs., in the event of there being no stay of the execution of the decree and once the decree is executed, nothing survives for the petitioners/J.Drs. and the appeal itself becomes infructuous.

11. In a similar fact situation, there is a decision rendered by the Madras High Court reported in **M.NAZRUDDIN v. THE IDOL OF ARULMIGU NAVANEEDHA KRISHNASAMI AND DURGAI AMMAN VAHAIRA TEMPLES, REPRESENTED BY TRUSTEES AND OTHERS (MANU/TN/1358/1998)**. The learned single Judge of the Madras High Court while referring to various authorities observed that the provisions of Order XXI Rule 26 C.P.C., will apply both to the transferor Court as well as transferee Court. In the case before the Madras High Court, the suit was decreed *ex parte* and the judgment-debtors preferred applications to set aside the *ex parte* decree. While those applications were pending, the decree holder filed Execution Petition for executing the decree and the Executing Court refused to grant stay of the execution of the decree. The Madras High Court further observed that there was sufficient cause for the revision petitioner/judgment-debtor to seek an order of stay of execution of the *ex parte* decree for a reasonable time to get a decision either one way or the other in the application filed under Order IX Rule 13 C.P.C. and

therefore the Executing Court failed to exercise the jurisdiction vested in it and acted in exercise of its jurisdiction illegally. Having observed so, the revision petition was allowed and the Execution Petition was directed to be stayed till the disposal of the petitions filed under Section 5 of the Limitation Act and also under Order 9 Rule 13 C.P.C., and two months period was fixed for disposal of the Interlocutory Applications during which period the execution of the decree was stayed.

12. In the instant case, as already stated, the dispute is between the mother, brother and sister on the one hand, and one sister on the other. It is a money decree. The decretal amount is in a bank in Fixed Deposit and the same has been secured by way of attachment before Judgment. The four legal heirs of late Ram Murthy namely the petitioners/J.Drs., and the decree holder are claiming right over the same. The decree holder would obtain decree for her 1/4th share out of the amount lying in the bank which is under attachment. After the suit was decreed, no doubt the petitioners/J.Drs., were not diligent in pursuing their remedy of appeal but have filed the appeal with a delay due to which they had to file an application under Section 5 of the Limitation Act and the same is pending before the appellate Court viz., III-Additional District Judge, Asifabad. If the decree is executed and the decree holder withdraws the amount, nothing survives and virtually the appeal becomes infructuous. That apart, if the amount is allowed to be retained in the bank for some time till the petitioners/J.Drs., obtain appropriate orders in the appeal, no serious prejudice would be caused to the respondent/decreed holder since her interest is already safe and secure. All the above facts and circumstances need to be taken into consideration while adjudicating the right of the parties. The Court below ought to have given some reasonable time to the petitioners/J.Drs., to obtain appropriate orders from the appellate

Court. In view of the above discussion, I feel that the interest of justice demands that the impugned order need to be set aside by affording reasonable opportunity to the petitioners/J.Drs., to obtain the appropriate orders from the appellate Court and the suitable direction can be given to the appellate Court to dispose of I.A.No.8 of 2016 filed under Section 5 of the Limitation Act within time frame.

13. In the result, the Civil Revision Petition is allowed. The order passed in E.A.No.19 of 2016 dated 23.02.2016 is set aside. The execution of the decree in E.P.No.85 of 2015 shall be stayed till 15th October, 2016 and the learned III-Additional District Judge, Asifabad, where the un-numbered appeal along with I.A.No.8 of 2016 under Section 5 of the Limitation Act is pending, shall dispose of the same positively by 10th October, 2016. Needless to say that the future course of action in the Execution Petition shall depends upon the Orders of the appellate Court. No costs.

Miscellaneous petitions, if any, pending in this C.R.P. shall stand closed.

M.S.K.Jaiswal, J

Date: 2nd August, 2016
Dsr/Smr

Note:

Registry is directed to send a copy of this order to the III Addl.District Judge, Asifabad, Adilabad District.