



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

122

CR-6177-2024**Date of Decision: 24.10.2024**

Pardeep Kumar Mehta

...Petitioner

Versus

Kamlesh Chander Mahajan and another

...Respondents

CORAM: HON'BLE MR. JUSTICE VIKAS SURI

Present:- Mr. Nitin Rathee, Advocate, Legal Aid Counsel,
for the petitioner.

VIKAS SURI, J.

1. Prayer in the present petition under Article 227 of the Constitution of India is for setting aside the order dated 05.08.2024 (Annexure P-1) passed by the learned Additional Civil Judge (Senior Division), Mukerian, whereby the application for staying the execution proceedings, has been dismissed.

2. Learned counsel for the petitioner submits that the respondents are seeking enforcement of judgment and decree dated 31.05.2022 passed in Civil Suit No.59036/2013. The petitioner-judgment debtor has preferred his statutory appeal against the aforesaid judgment and decree dated 31.05.2022, which has been registered as CA/119/2022 and the same is still pending adjudication before the first Appellate Court. Learned counsel for the



petitioner submits that an appeal is in continuation of the trial, and during the pendency of the appeal, the impugned decree ought not to have been executed, as the trial is deemed to be continuing and the learned Executing Court should have stayed the proceedings, as such.

3. Learned counsel for the petitioner has raised a strange argument that the provisions of Order XLI Rule 5 of the Code of Civil Procedure, 1908 (for short 'CPC') would apply only to an appeal preferred under Section 100 CPC and not to an appeal preferred under Section 96 CPC, as is the case in the present matter.

4. Heard learned counsel for the petitioner and with his able assistance perused the record.

5. Concededly, an appeal is pending against the judgment and decree sought to be executed before the first Appellate Court. It is also not disputed that a money decree has been passed against the petitioner judgment-debtor and no stay has been granted by the learned first Appellate Court. The application filed by the petitioner-JD for staying the execution proceedings before the learned Executing Court has been opposed by the respondent-decree holders by filing a reply thereto, wherein certain preliminary objections have been taken, including that the Executing Court does not have the jurisdiction to stay the execution. It is further pleaded that the said jurisdiction vests only in the Appellate/Revisional Court, and that the Executing Court cannot go behind the decree.

5.1 Upon consideration of the pleadings and the rival contentions,



learned Executing Court dismissed the application vide impugned order dated 05.08.2024 with the following observations:-

“Heard. Record perused. Vide present application, the JD has prayed for staying the proceedings of present execution only on the ground that his appeal against the judgment and decree passed by the Ld. Lower court is pending in the court of Ld. Addl. District Judge, Rupnagar but merely on this ground, the proceedings of present execution cannot be stayed, especially, in view of the provisions contained in Order XLI Rule 5 CPC of the as per which mere filing/pendency of an appeal shall not operate as stay of proceedings under a decree or order appealed nor execution of decree shall be stayed until and unless, the same has been stayed by the Ld. Appellate Court by passing an order and in this case no such stay order has been placed on record by the applicant/JD. So, merely on the ground that appeal is pending before the Ld. Appellate Court, the proceedings of present execution cannot be stayed. So far these reasons, the present application filed by applicant/JD is hereby dismissed. Application stands disposed off. Be tagged.”

6. A perusal of the aforesaid reproduction would show that the learned Executing Court has rightly placed reliance upon the provisions of Order XLI Rule 5 CPC, which are reproduced hereinafter:-

Stay of proceedings and of execution

5. Stay by Appellate Court.—(1) 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, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.



Explanation.—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) **Stay by Court which passed the decree.**—Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provision of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.”

7. A closer reading of the aforesaid provisions would show that it does not carve out any distinction between an appeal preferred under Section 96 CPC or under Section 100 CPC. The term ‘Appellate Court’ has not



been defined under the Code of Civil Procedure. It is well settled that an appeal is a creation of the statute and the Court to which an appeal lies under the statutory provisions would, therefore, be the Appellate Court. Learned counsel for the petitioner has failed to point out any provision, which may even remotely suggest that the provisions of Order XLI Rule 5 CPC are not applicable to an appeal preferred under Section 96 CPC. In fact, the applicability of the said provision would equally extend to an appeal preferred under Order XLIII Rule 1 CPC.

8. It is not disputed that Section 96 CPC provides for an appeal against every decree passed by any Court exercising original jurisdiction. An appeal from original decrees is provided under Order XLI CPC. A bare perusal of Order XLI CPC would show that it constitutes a complete code in itself insofar as it pertains to an appeal from a decree, which is also applicable to an appeal from an order. It contains the procedure of preferring an appeal, the form of the appeal, the contents of the memorandum and the grounds which may be taken in appeal etc. Order XLI CPC is, thus, a comprehensive code for the exercise of jurisdiction by the Appellate Court. By the very scheme of these provisions, the applicability of Order XLI CPC cannot be said to exclude an appeal preferred under Section 96 of the Code *ibid*.

9. There can be no denial to the fact that an appeal is a continuation of the suit. However, the same cannot be stretched to mean that once the rights of the parties have been determined by the decree, the same



cannot be executed during the pendency of an appeal thereagainst.

10. It is well settled that the learned Executing Court cannot go behind the decree. Rule 5, Chapter 12 Part C, High Court Rules and Orders, Volume 1, provides for execution of the decree pending appeal. The said Rule is in consonance with the mandate of Rule 5 of Order XLI CPC. It is, thus, stipulated that the mere filing of an appeal against a decree does not, by itself, operate as a bar to its execution. In such eventuality, the execution has to proceed, unless it is stayed by an order of Appellate Court or the Court, which passed the decree under sub-rule 2 of Rule 5 of Order XLI CPC or Rule 6 *ibid*. The supra Rule 5 of the High Court Rules and Orders, is extracted hereunder:-

“5. Execution of decree pending appeal:-The filing of an appeal from a decree is, by itself, no bar to its execution, and execution may proceed unless it is stayed by an order of the Appellate Court or the Court which passed the decree (vide Order XLI, Rules 5 and 6). It should be noted, however, that when an order is made for the sale of immovable property during the pendency of the appeal, and the judgment-debtor applies for stay of the sale, the Court ordering the sale is bound to stay it, though it can impose such terms as to security or otherwise as it thinks fit [Order XLI, Rule 6 (2)].”

11. In view of the aforesaid, this Court is of the considered view that no ground is made out warranting interference in the impugned order dated 05.08.2024. The petitioner has failed to point out any irregularity or illegality in the impugned order much less any jurisdictional error or perversity.



12. Accordingly, the present revision petition being bereft of any merit, is dismissed.

13. However, the petitioner would be at liberty to approach the first Appellate Court under the provisions of Order XLI Rule 5 CPC, if the said remedy has not already been availed of by him.

October 24, 2024
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(VIKAS SURI)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No