

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Seshagiri Ayyar
and Mr. Justice Bakewell.*

KASARIBADA VENKATACHALAPATI RAO (APPELLANT,
DECREE-HOLDER), APPELLANT,

v.

1917.
August 6
and 7 and
September
19.

MADDIPATLA KAMESWARAMMA *alias* KAMAKSHAMMA
(SECOND RESPONDENT—JUDGMENT-DEBTOR'S LEGAL REPRESENTATIVE),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution by an Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.

Held by the Full Bench :—Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid.

The order is effective only from the time it is communicated to the first Court.

Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar (1910) I.L.R., 33 Mad., 74 and *Besseswari Chowdhurany v. Hurro Sundar Mozumdar* (1892) 1 C.W.N., 226, followed.

Hukum Chand Boid v. Kamalanand Singh (1906) I.L.R., 33 Calc., 927, not followed.

Ramanathan v. Arunachellam (1915) I.L.R., 38 Mad., 766, overruled.

APPEAL against the Appellate Order of P. N. SATAGOPIA NAYUDU, the Temporary Subordinate Judge of Kistna, in Appeal No. 118 of 1915, preferred against the order of C. VARADARAJULU PANTULU, the District Munsif of Narasapur, in Civil Miscellaneous Petition No. 1950 of 1914 in Original Suit No. 38 of 1912.

The facts are given in the ORDER OF REFERENCE.

V. Ramasam for the appellant.

P. Nurayanamurti for the respondent.

This Appeal coming on for hearing in the first instance before ABDUR RAHIM and BAKEWELL, JJ., the following ORDER OF REFERENCE TO A FULL BENCH was made by :—

* Appeal Against Appellate Order No. 128 of 1916 (F.B.).

VENKATA-
CHALAPATI
RAO

v.
KAMESWA-
RAMMA.

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—In this case the appellant decree-holder obtained an order of attachment of certain properties of the judgment-debtor on the 14th March, 1914 and attachment was actually carried out on the 17th March. It appears that the judgment-debtor who had filed an appeal against the decree made an application for stay of execution and obtained an interim order staying execution till the disposal of the appeal, on the 13th March, 1914. This order was finally vacated on the 15th April, the judgment-debtor having failed to furnish security as required by the Appellate Court. In the meantime, that is, after the order for interim stay was passed, and before that order was set aside, the judgment-debtor sold the property to a third person. The question that we have been asked to consider in the appeal is whether the order of attachment of the 14th March has any effect so as to affect the alienation subsequently made by the judgment-debtor or whether the attachment must be held to be *ultra vires* and ineffectual because of the fact that the Appellate Court had made an interim order of stay previous to the date of attachment, though it was not communicated to the Court that passed the order of attachment and the decree-holder had no knowledge of it at the time he made the application.

The question, so far as the principle involved is concerned, was decided by a bench of this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) where it was laid down accepting the view of the law laid down by the Calcutta High Court in *Bessesswari Chowdhurany v. Hurro Sundar Mozumdar*(2) that an order of the Appellate Court granting interim stay does not operate so as to suspend proceedings in execution before the first Court before the date of its communication to the latter Court. The learned Judges had before them another ruling of the Calcutta High Court in *Hukum Chand Boid v. Kamalanand Singh*(3) which was to the contrary effect, but they preferred the view expressed in *Bessesswari Chowdhurany v. Hurro Sundar Mozumdar*(2). In a subsequent case in this Court reported in *Ramanathan v. Arunachellam*(4), the same question came up for consideration before Mr. Justice SADASIVA AYYAR and Mr. Justice SPENCER. Mr. Justice SADASIVA AYYAR

(1) (1910) I.L.R., 33 Mad., 74.

(3) (1906) I.L.R., 33 Calo., 927.

(2) (1892) 1 C.W.N., 226.

(4) (1915) I.L.R., 38 Mad., 766.

expressly dissented from the decision in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) and Mr. Justice SPENCER also seemed to be inclined to the same opinion though he thought that *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1) might be distinguished from the case which he had to deal with. We are inclined to agree with the earlier ruling of this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1). We think that it is ordinarily the duty of a division bench to follow on a pure question of law a previous ruling of another division bench unless it is of opinion that that ruling is wrong in which case the proper course is to refer the question to a full bench so that the law on the point may be conclusively ascertained so far as this High Court is concerned. Having regard, however, to the fact that dissent has been expressed by Mr. Justice SADASIVA AYYAR and also by Mr. Justice SPENCER from the view of the law expressed in *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(1), it is necessary that the question involved which is one of importance should be settled by a Full Bench.

The Court which passed the decree has full jurisdiction to proceed with its execution until its hands are stayed by the order of the Appellate Court, and it is difficult to see how that Court, if a proper application for execution is made to it, could refuse the application until the order of the Appellate Court granting stay of execution has been communicated to it. There can be no doubt that an order for prohibitory injunction, so far as it affects the question of validity of any act of the party against whom it is made is concerned, does not come into operation until it is communicated to him. The Civil Procedure Code expressly lays down that the mere preferring of an appeal will not operate to stay execution. It seems to follow that until the first Court receives the order of the Appellate Court staying execution, it is bound to proceed to execute the decree on proper application being made to it by the judgment-creditor. It is then difficult to conceive how an order, which the Court of first instance was bound by law to pass, could be said to be made without authority. The grounds of convenience seem also to

VENKATA-
CHALAPATI
RAO
v.
KAMESWA-
RAMMA.
—
ABDUR
RAHIM, J.

(1) (1910) I.L.R., 33 Mad., 74.

VENKATA-
CHALAPATI
RAO

v.
KAMESWA-
RAMMA.

ABDUR
RAHIM, J.

preponderate against the opposite view. The question which we refer to the Full Bench is :—

“ Where subsequent to an interim order for stay of execution made by the Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction ? ”

ON THIS REFERENCE,

V. Ramesam for the appellant.—An order of attachment made by a Court of first instance in ignorance of an order of stay by an Appellate Court is not a nullity and it is good until it is set aside: Halsbury's Laws of England, volume 14, page 30, section 63. (He was stopped.)

P. Narayanamurti for the respondent.—The order of the first Court is a nullity and it need not be set aside; *Ramathan v. Arunachellum*(1). In the case of an injunction the order is addressed to a party, but in the case of a stay the order is not addressed to anybody: *Hukum Chand Boid v. Kamalanand Singh*(2), *Ex parte Hookey*(3), Spelling on Injunctions, volume 1, article 177, *Mian Jan v. Man Singh*(4) and Halsbury's Laws of England, volume 14, page 29.

Their Lordships delivered the following OPINIONS :—

AYLING, J.

AYLING, J.—With all respect to the views of the learned Judges in *Hukum Chand Boid v. Kamalanand Singh*(2) I prefer to follow the reasoning of an earlier Bench of the same Court, *Bessesswari Chowdhurany v. Hurro Sundar Mozumdar*(5) which has been adopted by this Court in *Muthukumarasami Rowther Minda Nayinar v. Kuppasami Aiyangar*(6). I regard an order of an Appellate Court staying execution as in the nature of a prohibitory order to the Lower Court which becomes effective only on communication. Till it is communicated steps in execution taken by the Lower Court must be treated as legally valid.

I would answer the reference in the negative.

(1) (1915) I.L.R., 38 Mad., 766.

(2) (1906) I.L.R., 33 Calo., 927 at pp. 934 and 943.

(3) (1862) 31 L.J., Ch., 429; s.c. 45 E.R., 1261.

(4) (1880) I.L.R., 2 All., 626.

(5) (1892) 1 C.W.N., 226.

(6) (1910) I.L.R., 33 Mad., 74.

SESHAGIRI AYYAR, J.—Notwithstanding the high regard I entertain for the opinions of the two learned Judges who decided *Hukum Chand Boid v. Kamalanand Singh*(1) and to the opinion of SADASIVA AYYAR, J., I am unable to agree with their conclusions. In my opinion, sufficient attention has not been paid by these learned Judges to the provisions of Order XLI, rule 5. The legislature has enacted by that rule that the Court of first instance still retains jurisdiction to order execution notwithstanding the fact that an appeal has been preferred against its decision. That power can only be taken away by some communication made to it by the Court to which it is subordinate and in which an appeal has been preferred. A Court exercising jurisdiction which is conferred on it in express terms cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary.

As regards the citation of the American authorities, I wish to point out that it appears from what is said in *Spelling on Injunctions*, volume II, section 1713, that the preferring of an appeal operates in some of the States to suspend the powers of the Court below. In that view, it may be justifiable to hold that the lower Court need not be informed of the action taken by the Court of Appeal.

I agree in holding that *Muthukumarasami Rowther Minda Nayinar v. Kuppusami Aiyangar*(2) was rightly decided. My answer to the reference is in the negative.

BAKEWELL, J.—I agree with Mr. Justice AYLING.

BAKEWELL, J.

N.R.

(1) (1906) I.L.R., 33 Cal., 927 at pp. 938 and 943.

(2) (1910) I.L.R., 33 Mad., 74.