

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

1934,
July 25.

P. C. THIRUMALAI GOUNDER (PETITIONER—FIRST
DEFENDANT), APPELLANT,

v.

THE TOWN BANK, LIMITED, POLLACHI, BY ITS
SECRETARY, T. K. MUTHUSAMI CHETTIAR (RESPONDENT—
DECREE-HOLDER), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XLI, r. 6 (2)—
Stay of sale under—Condition of grant of—Deposit of
decretal amount by judgment-debtor if may be a.*

A Court to which an application for stay of sale is made under Order XLI, rule 6, clause (2), of the Code of Civil Procedure has jurisdiction to make it a condition of the grant of stay that the judgment-debtor should deposit the decree amount into Court. The expression "be stayed on such terms as to giving security or otherwise" in the clause means that the term may be giving security or any other term, such as the deposit of the decree amount.

Ram Nath Singh v. Kamleshwar Prasad Singh, (1911) 9 I.C. 323, approved.

Shankar Das v. Kasturi Lal, A.I.R. 1925 Lah. 69, dissented from.

APPEAL against the order of the Court of the Subordinate Judge of Coimbatore, dated 16th December 1933 and made in Execution Application No. 1077 of 1933 in Execution Petition No. 359 of 1932 in Original Suit No. 107 of 1930.

*K. Bhashyam Ayyangar and V. C. Veer-
raghavan* for appellant.

*T. M. Krishnaswami Ayyar and M. Krishna
Bharati* for respondent.

* Appeal against Order No. 53 of 1934.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—The judgment-debtor is the appellant. In a suit brought against him a money decree for Rs. 6,000 was passed. In execution of that decree properties had been brought to sale. Then he filed an application under Order XLI, rule 6, clause 2, to stay the sale in execution. The learned Judge ordered that the sale can be stopped only on the petitioner depositing into Court the decree amount, i.e., the amount that would be due on the date the amount is deposited, on or before 15th January 1934, failing which, he ordered, the petition will stand dismissed with costs.

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Mr. Bhashyam Ayyangar on behalf of the appellant argued that under Order XLI, rule 6, clause 2, the lower Court had no jurisdiction to pass an order staying execution making it a condition that the decree amount should be deposited. According to him the only term which the learned Judge can impose under the Order is that security should be given and that he can impose no other condition. Whether this argument can be accepted or not will depend on the construction of the terms of the Order. Order XLI, rule 6, clause 2, runs as follows :

“ Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, *be stayed on such terms as to giving security or otherwise.*”

It is argued that the expression “ be stayed on such terms as to giving security or otherwise ” means that the execution can be stayed either on giving security or without security and that the word “ otherwise ” should be understood as having

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reference to security and nothing else. It is difficult to accept this plea having regard to the ordinary meaning of the expression used in the rule. The expression "terms as to giving security or otherwise" would mean that the term may be either giving security or any other term, such as the deposit ordered by the Court in this case. In *Ram Nath Singh v. Kamleshwar Prasad Singh*(1) it was observed by the learned Judges of the Calcutta High Court that under the terms of this Order the Court could make it a condition of the order for stay of sale that the money decreed should be deposited in Court in cash. We respectfully agree with this view of the meaning of the expression used in the Order. A decision of the Lahore High Court has been brought to our notice by the learned Advocate for the appellant which seems to support his contention. The learned Judges say in *Shankar Das v. Kasturi Lal*(2) that an order like the one in question is clearly against the spirit of the rule as it is tantamount to an order refusing to stay the sale. This view does not commend itself to us having regard to the ordinary meaning of the language used in Order XLI, rule 6, clause 2. We therefore hold that the lower Court has jurisdiction to make it a condition that the stay would be given only on the judgment-debtor depositing the money as ordered by the lower Court.

Then it was argued that on the merits the lower Court's order is not justified. We see no reason to interfere with the order on the merits. In the view which we take of the case it is unnecessary to decide the two other questions propounded for

(1) (1911) 9 I.C. 323.

(2) A.I.R. 1925 Lah. 69.

decision, namely, whether an appeal lies against the order in question and whether the previous order passed by the learned Judge in this case would be a bar to the passing of this order. The appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

RAMASAMI IYER AND ANOTHER (RESPONDENTS),
PETITIONERS,

1934,
May 4.

v.

VEDAMBAL AMMAL (PETITIONER), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 78—Mesne profits—Decree for—Holder of, who has obtained attachment under O. XXI, r. 42, of Code before ascertainment of amount of profits—Right to rateable distribution of—Execution application by him after ascertainment of profits—Necessity.

The holder of a decree for mesne profits who has obtained an attachment under Order XXI, rule 42, of the Code of Civil Procedure before the amount of mesne profits has been ascertained is entitled to a rateable distribution with other decreeholders under section 78 of the Code. An application for execution by him after the ascertainment of profits is not necessary to entitle him to the benefit of that section.

Viraragava v. Varada (1882) I.L.R. 5 Mad. 123, relied upon.

PETITION under sections 115 and 151 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur

* Civil Revision Petition No. 1716 of 1930.