FULL BENCH.

Before Justice Sir Cecil Walsh, Mr. Justice Mukerji and Mr. Justice Banerji.

PARSOTAM SARAN (OBJECTOR) *v.* BARHMA NAND AND OTHERS (OPPOSITE PARTIES).*

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April, 27.

Civil Procedure Code, order XLI, rule 5—Execution of decree —Stay order passed by appellate court—Sale held in ignorance of the order—Validity of sale.

Where a subordinate court went on with the execution of a decree and sold certain property in ignorance of the fact that an order for stay had been passed by the High Court, and the property was purchased by a third party, it was *held* that, there being no other objection, the sale must stand. *Sahu Nand Kishore* v. *Shadi Ram* (1), distinguished. *The Ganges Flour Mills Co.* v. *Shadi Ram* (2), *Nonidh Singh* v. *Musammat Sohun Kooer* (3), *Mian Jan* v. *Man Singh* (4), *Maijha Singh* v. *Jhow Lal* (5), *Sant Lal* v. *Umrao-un-nissa* (6), *Bessesswari Chowdhurany* v. *Harro Sundar Mozumdar* (7), *Hukum Chand Boid* v. *Kamalanand Singh* (8), *Muthu Kumarasami Rowther* v. *Kuppusami Aiyangar* (9), *Ramanathan Chetty* v. *Arunachellam Chetty* (10), and *Venkatachalapati Rao* v. *Kameswaramma* (11), referred to.

Per MUKERJI, J.—The principle of *stare decisis* does not apply, as the question raised is not of substantive law but of procedure alone.

In this case an order *ex parte* was made by a Judge of the High Court, probably between 10 and 11 o'clock in the morning on the 21st of January, 1924, staying a sale. The sale in question was fixed to take place after 12 on the 21st of January and, therefore, probably took place after the order of the Judge on the same day. The order

* First Appeal No. 1 of 1926, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 29th of August, 1925.

(1) (1926) 24 A.L.J., 519. (2) (1917) 16 A.L.J., 46.
(3) (1872) N.W.P. H.C.R., 135. (4) (1880) I.L.R., 2 All., 686.
(5) (1874) N.W.P. H.C.R., 354. (6) (1889) I.L.R., 12 All., 96.
(7) (1892) 1 C.W.N., 226. (8) (1905) I.L.R., 33 Calc., 927.
(9) (1909) I.L.R., 32 Mad., 71. (10) (1912) I.L.R., 38 Mad., 766.
(11) (1917) I.L.R., 41 Mad., 151.

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was not communicated to the court, or, at any rate, the court below did not receive notice of the order until the 23rd of January. That was too late to prevent the sale taking place, because it had already taken place and the property had been purchased by a third party. There was no valid objection to the sale on the merits, but objection was taken that the sale was invalid, having taken place after the order of stay of the 21st of January above referred to. The order of stay was obtained *ex parte*, that is to say, behind the back of the other side, at a time when the applicant knew quite well that any order which was made could not be communicated to the court below in time to prevent the sale. On that ground, on the 27th of February, 1924, a two Judge Bench of this Court held that the application in the presence of the other side to grant the stay must be rejected because the sale had taken place already. The executing court refused to set aside the sale. The objector thereupon appealed to the High Court. This appeal coming before a Bench of two Judges was referred to the CHIEF JUSTICE for the appointment of a larger bench, in view of the decision in *Sahu Nand Kishore* v. *Shadi Ram* (1).

Munshi *Shambhu Nath Seth*, for the appellant.

Dr. *Kailas Nath Katju* and Maulvi *Mukhtar Ahmad*, for the respondents.

MUKERJI, J.—This appeal has been referred to a Bench of three Judges at the instance of the learned Judges who first heard it. The reason for the reference was that they felt doubtful about the soundness of the case of *Sahu Nand Kishore* v. *Shadi Ram* (1).

The question for decision is whether, in the circumstances of the case, the stay order passed by the High Court should have the effect of nullifying a sale that was held before the order of this Court could be communicated

(1) (1926) 24 A.L.J., 519.

either to the court below or to the officer conducting the sale.

The facts of the case are given in the referring order and I will mention them very briefly, only in order to indicate the precise point I have to decide. The judgement-debtor, who is the appellant before this Court, filed certain objections to the execution of a decree held against him by the decree-holders respondents. His objection was dismissed by the execution court on the 12th of January, 1924. The date fixed for sale in execution of the decree was the 21st of January, 1924. On the same 21st of January, the judgement-debtor, on the strength of his having filed an appeal against the order of the 12th of January, 1924, put in an application for stay of the sale fixed for the same day. Apparently, the attention of the learned Judge was not drawn to the fact that the sale was going to be held on the very day he was passing the order, for, otherwise, I take it, he would not have made an order the compliance with which would have been practically impossible. The stay was granted and was to be till the disposal of the hearing of the rule issued. When the rule was returned, the Judges made the following order :—"The sale having already taken place, no stay order can be passed now. The application is accordingly rejected."

The sale advertised for the 21st of January, 1924, took place in due course. The purchaser was a person other than the decree-holder. The judgement-debtor applied in the court below for setting aside the sale on various grounds, with only one of which we are concerned. His other grounds for setting aside the sale were not substantiated. The present ground did not find favour with the court below.

The appellant's contention is that the mere fact that this Court ordered the stay of the sale was sufficient to

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make the sale a nullity. It is argued that it was not necessary for the stay order to take effect that it should have been communicated, either to the court below, or to the officer conducting the sale. The appellant takes his stand on the ruling in *Sahu Nand Kishore* v. *Shadi Ram* (1), already mentioned.

The question raised has been a subject-matter of much difference of opinion in various courts. In this Court the opinion has been, mostly, in the appellant's favour and it was argued on that account that on the principle of *stare decisis* we should follow previous cases. In my opinion this principle does not apply. It is not a question of substantive law, on a particular interpretation of which titles have been acquired. It is a question of procedure alone and any cases that may come up in future for decision will be decided according to our present judgement, if we happen to differ from the previous cases.

It appears that in this Court cases have been decided on two grounds. In some cases it has been said that the very fact of an appellate court passing an order for stay of execution took away the jurisdiction of the lower court to proceed with the execution and that, therefore, the sale must be treated as a nullity. In other cases the ground for decision has been this: Although the appellate court's order has not been communicated to the court below or to the sale officer, it is *possible* that the fact of the passing of such an order has been spread as a rumour and possible bidders have refused to bid to the full value of the property. It appears to me that the second ground for setting aside a sale is based on a presumption of fact and is different from the question of law before us. It has been found in this case, as a fact, by the court below, that there was no irregularity in publishing or conducting the sale. There is no

(1) (1926) 24 A.L.J., 519.

finding that the order of stay was known to anybody bidding at the sale. Indeed, in the circumstances of the present case, the presumption of fact is that the order was not known to anybody present at the sale. Let us, however, go a little deeper into the question of rumour. A rumour has not always got the truth for its foundation. It may turn out to be true, and it may turn out to be false. When an application for stay of execution is actually rejected, a rumour may be afloat that it has been granted. It is, therefore, unsafe to base any conclusion of law on a mere surmise that a rumour as to the *truth* may have reached the bidders. If, however, it be established that one of the parties to the execution has been responsible for the spread of a rumour which has prejudiced the other party, the sale will probably be set aside on the ground of fraud or other personal grounds such as estoppel, etc. Each case will have to be dealt with on its own facts. It is unsafe to lay down a general rule, a rule of law, on a pure surmise as to *facts*.

That being so, we have to examine only those authorities which lay down that the mere passing of an order for stay was sufficient to oust the authority of the executing court to proceed with the execution.

The cases cited are numerous and are :—

Nonidh Singh v. *Musammat Sohun Kooer* (1), *Mian Jan* v. *Man Singh* (2), *Maijha Singh* v. *Jhow Lal* (3), *Sant Lal* v. *Umrao-un-nissa* (4), *The Ganges Flour Mills Co., Ltd.* v. *Shadi Ram* (5) and *Sahu Nand Kishore* v. *Shadi Ram* (6).

I have examined each and every one of these cases, but I am not satisfied that any proper principle has been laid down in the cases which have been decided in a

(1) (1872) N. W. P. H. C. R., 135. (2) (1880) I. L. R., 2 All., 686.
(3) (1874) N. W. P. H. C. R., 354. (4) (1889) I L. R., 12 All., 96.
(5) (1917) 16 A. L. J., 46. (6) (1926) 24 A. L. J., 519.

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manner the appellant would want us to decide his case. In Calcutta there are two cases :—

Bessesswari Chowdhurany v. *Harro Sundar Mozumdar* (1) and *Hukum Chand Boid* v. *Kamalanand Singh* (2).

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In Madras there are three cases :—

Muthukumarasami Rowther v. *Kuppusami Aiyangar* (3), *Ramanathan Chetty* v. *Arunachellam Chetty* (4), and *Venkatachalapati Rao* v. *Kameswaramma* (5).

The Calcutta cases are conflicting. The two earlier Madras cases hold conflicting views and the law has been settled there by the Full Bench case in 41 Madras.

In the recent cases, in which it has been held that by the appellate court making an order for stay the lower court's authority to execute its own decree is superseded, reliance has often been placed on American authorities and specially on Freeman's book. One of the learned Judges deciding the case in 41 Madras has pointed out that the American rule is based on the peculiar law obtaining in some of the States and is not a safe guide to us in India.

In such state of authority I think it safe to rely on general principles and on the language of the law. The law is contained in order XLI, rule 5, of the Code of Civil Procedure and lays down that the mere filing of an appeal shall not operate as a stay of proceedings, but the appellate court may order stay of execution. Now, when an appellate court orders stay of execution it gives a direction to somebody. The execution is not in the hands of the appellate court. It has to tell the court of first instance that it is to stay its hand in the execution of its decree. It necessarily follows that if the lower court has no information

(1) (1892) 1 C. W. N., 226. (2) (1905) I. L. R., 33 Calc., 927
(3) (1909) I.L.R., 33 Mad., 74. (4) (1913) I. L. R., 38 Mad., 766.
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of the order of the appellate court it cannot stay execution and the execution must proceed. What principle, then, is there on which we are bound to hold that what was done in perfect good faith and in possession of clear jurisdiction becomes null and void solely because, unknown to the court below, an order had been passed? Taking analogy from general life; if *A* directs his agent *B* to purchase a ton of wheat from *C* and then countermands his order and if *B*, before he receives the subsequent order of *A*, makes the purchase from *C*, can it be contended with any show of reason that the purchase by *B* is not binding on *A*? The court does nothing beyond selling the judgement-debtor's property on behalf of the judgement-debtor. It only carries out what the judgement-debtor is morally bound to do. When a sale proclamation is made, it is announced to the world that, on such and such day, such and such property will be sold to the highest bidder. The public are invited to come and bid. If an innocent third party makes the purchase, will there be any moral justification for the court to say, later on, that he would not have his money's worth, although he took so much trouble to procure the money, to come to the place of sale and to bid, simply because there was an unknown order passed before the sale? On moral grounds such a procedure will have to be condemned. In this connection I would like to cite the observations of their Lordships of the Privy Council in the case of *Kala Mea* v. *Harperink* (1), at the last page. Their Lordships clearly call the sale officer an "accredited agent of the court."

If, then, I am right in saying that a stay order is nothing but an order directing somebody to do an act, that order can have no effect on the action of the person so directed, till the party has learnt what his instructions are. It is not merely sufficient to say that the officer

(1) (1908) I. L. R., 36 Calc., 323, 334.

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conducting the sale is to be held blameless for his conduct. That goes without saying. There could be no possibility of charging such an officer with misbehaviour. We must go further and say that the act of the officer or the lower court is good and valid for the simple reason that they never knew that they were directed to act in a different way.

There is no question of any dignity of the appellate court nor is there any question of jurisdiction involved. When the lower court sells or delivers possession in execution of a decree, it commits no disrespect to the appellate court if it is not aware that the appellate court has ordered otherwise. Our law does not take away the jurisdiction of the court of first instance to execute its own decree, on the ground that an appeal has been filed. On the other hand, it *positively affirms* the proposition that such a jurisdiction subsists. The question has, therefore, to be decided on general principles and on a common sense view of things. It is true that certainty is very often convenient, but you cannot apply a rule like that everywhere. Instances may be framed where it is dangerous to apply it.

In the case of *The Ganges Flour Mills Co. Ld.* v. *Shadi Ram* (1), a stay order was obtained on misrepresentation of facts, but the sale took place because the order could not be communicated in time to the proper quarters. The stay order was, later on, set aside on the ground that it had been obtained by fraud. It was held that the sale was good in spite of the stay order. If the rule of certainty had been applied it should have been held that the sale was bad because there was the certain and clear order for its stay. The facts in the case of *Sant Lal* v. *Umrao-un-nissa* (2) were different In that case there was no order of the appellate court, but the executing court itself had ordered a stay at the last moment. It was held that the power of the sale

(1) (1917) 16 A.L.J., 46. (2) (1889) I.L.R., 12 All., 96.

officer to sell was derived from the court and the court's order of stay deprived him of that power. In this case, it is not necessary to say whether *Sant Lal's* case was rightly decided. But if it were necessary to decide the point, I should hold, with respect, that it did not lay down good law. It is undoubtedly true that the sale officer derives his authority to sell from the court. But so do all agents from the principal. But who has ever heard that the principal is not bound by the agent's act, if the agent is unaware of the fact that his authority has been revoked? A sale officer acts on behalf of the court and is, to the extent of his duties clearly defined, the court's agent. The court is bound to confirm a sale except under circumstances well defined. It has no arbitrary power to set aside a sale under all circumstances. If, then, it is urged that the mere fact that a stay order (uncommunicated) was made, made the sale illegal, some better reason must be found than that the officer became *functus officio* without his knowing this.

Broadly speaking, an order for stay of sale is passed by a court executing a decree, on three grounds. First, where it is found on an inquiry under order XXI, rule 58, of the Civil Procedure Code that the property attached and sold belongs to a third party. In such a case, if the sale has really taken place, it will be set aside on the ground that the property sold did not belong to the judgement-debtor and that, therefore, the court could not sell it. In such a case it will probably be open to the purchaser to have it established in a suit that the property did belong to the judgement-debtor and was rightly sold. The second case where the stay is ordered is where the court is apprised of some serious defect in the proceedings. For example, it may be shown that the property has been materially misdescribed, or an incumbrance has been proclaimed that does not exist. In such cases the sale would be set aside on the ground

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of material irregularity in publishing or conducting the sale, provided the defect has led to substantial loss in the price fetched. The third class is where the judgement-debtor appears late and either on part payment of the decree money or with the consent of the decree-holder successfully persuades the court to pass a stay order. In such cases there would be no ground for setting aside the sale.

A clear and substantial distinction must be drawn between cases where the decree-holder has made the purchase and where the purchaser is a third party acting in good faith. The decree-holder cannot shake off his character as such merely by reason of his auction-purchase, and he is bound by all orders passed in the case. A stay order, therefore, will operate against him and it may be that a purchase by a decree-holder will be set aside on the mere ground of the passing of a stay order. On the same principle, where a sale is held in execution of an *ex parte* decree, the fact that the decree was subsequently set aside at the instance of the defendant does not affect the title of a third party purchaser, though it does affect the title of the plaintiff, if he makes the purchase. For a party to a proceeding must take subject to all orders passed in the case.

In the case of *Sahu Nand Kishore* v. *Shadi Ram* (1), the decree-holder purchased one of the properties and the other was purchased by a third party.

On the above grounds I have no hesitation in holding that the lower court was right and the appeal should be dismissed with costs, the sale being perfectly good.

WALSH, J.—I entirely agree for the reasons given by my learned brother and for those already given in our referring order.

BANERJI, J.—I agree that the sale was a good sale.

Appeal dismissed.

(1) (1926) 24 A.L.J., 519.