

regulations governing the matter, there is obviously no legal right in the petitioner which he could seek to enforce for grace marks to be given to him as claimed. Counsel for the petitioner could indeed point to no such right under which grace marks to the petitioner could be enforced. As is well known Mandamus is a discretionary relief granted to enforce a specific legal right. No such right exists in the petitioner here. The fact that some grace marks may have been given to some other candidates could at best be construed as a concession extended to them or may be taken as an arbitrary exercise of power, but be that as it may, no right accrues thereby to the petitioner, amenable to enforcement in writ proceedings. To hold otherwise would be conferring legality to arbitrariness, in the matter of grant of grace marks, both with regard to the cases where they are to be given as also the extent thereof, a course which is clearly not permissible under cover of any legal or equitable consideration. We are constrained, therefore, to overrule the authority referred to above and to hold that the petitioner is not entitled to the relief claimed. This Writ Petition is accordingly hereby dismissed. In the circumstances, however, there will be no order as to costs.

S. S. Sandhawalia C.J.—I agree.

N. K. S.

Before R. N. Mittal, J.

SURJIT SINGH and others,—Petitioners.

versus

KARTAR KAUR and others,—Respondents.

Civil Revision No. 3199 of 1981.

February 7, 1983.

Code of Civil Procedure (V of 1908)—Order 21 Rule 26—Decree passed for possession of land—Judgment debtor seeking stay of execution of the decree to enable him to move the appellate Court for such a stay—Decree holder, however, taking possession in execution before the passing of the stay order—Judgment debtor applying for restitution of possession—Restitution allowed by the Court without imposition of any conditions—Such order of restitution—Whether invalid.

Surjit Singh and others v. Kartar Kaur and others (R. N. Mittal, J.)

Held, that from a reading of sub-rule (3) of Rule 26 of Order 21 of the Code of Civil Procedure, 1908, it is clear that before ordering restitution of the property, the Court is bound to ask the judgment-debtor to furnish security or impose upon him such other conditions as it thinks fit. The sub-rule is mandatory and the Court cannot pass any order for restitution in its contravention. Thus, an order directing the judgment-debtor to furnish security or imposing upon him other conditions is *sine qua non* for granting restitution of the property. Consequently, if the provisions of the sub-rule are not complied with, the order is invalid. (Paras 4 and 5).

Petition under section 115 C.P.C. for the revision of the order of the court of Shri R. K. Tyagi, Sub-Judge 1st Class, Ludhiana, dated the 16th December, 1982 issuing restoration warrant under Order 21, Rule 26(2) C.P.C.

Ravinder Chopra, Advocate, for the Petitioner.

Y. P. Gandhi, for respondents 1 to 3 & 5.

JUDGMENT

Rajendra Nath Mittal, J.

(1) This revision petition has been filed against the order of the Subordinate Judge, 1st Class, Ludhiana, dated 16th December, 1981, ordering restitution of the property under Order 21, Rule 26, Code of Civil Procedure.

(2) Briefly, the facts are that a decree for possession was passed regarding the land in dispute in favour of the plaintiff decree-holders. After the decree, the judgment-debtors made an application under Order 21, Rule 26 of the Code to the Court for stay of the execution proceedings on the ground that they wanted to file an appeal against the judgment and decree of the Court. Before the order of stay was passed by the Court, the decree-holders took possession of the land in execution of the decree. Consequently, the judgment-debtors made an application for restitution of the land on the ground that they had filed an application for stay within the reasonable time but order of stay could not be passed thereon and in the meantime the decree-holders took possession. The application was allowed and it was ordered by the Court that possession of the land be restored to the judgment-debtors. The decree-holders have come up in revision against the said order to this Court.

(3) It is contended by the learned counsel for the petitioners that once the possession of the land had been delivered to the decree-holders in the execution proceedings the Court could not order

restitution thereof to the respondent except by complying with sub-rule (3) of the said rule.

(4) I have given due consideration to the argument and find force therein. In rule 26(1), it is provided that the Court to which the decree has been sent for execution can, upon sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the judgment-debtor to obtain the stay order from the Court which passed the decree or the appellate Court. Sub-rule (2) says that if the property of the judgment-debtor has been seized under execution, the Court which issued the execution, may order the restitution of such property pending the result of such application. Sub-rule (3) *ibid* relates to the power to require security from the judgment-debtor or to impose some other conditions upon him for restitution of the property. It reads as follows:—

“R. 26 (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court shall require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

It may be relevant to point out that the sub-rule was amended by Act No. 104 of 1976 and the words “the Court shall require” have been substituted for those “the Court may require”. From a reading of the sub-rule it is clear that before ordering restitution of the property, the Court is bound to ask the judgment-debtor to furnish security or impose upon him such other conditions as it thinks fit. The sub-rule is mandatory and the Court cannot pass any order for restitution in its contravention. The intention of the Legislature is also clear from the amendment made by it in 1976. Therefore, I am of the view that an order directing the judgment-debtor to furnish security or imposing upon him other conditions, is *sine qua non* for granting restitution of the property.

(5) In the present case, the Court, while ordering restitution of the land failed to comply with the provisions of Rule 26(3) *ibid*. Therefore, the order is liable to be set aside.

(6) For the aforesaid reasons, I accept the revision petition with costs and set aside the order of the Court. Costs Rs. 200.