
(1986) 10 KL CK 0049

In the High Court Of Kerala

Case No : C. M. P. No. 3763/86 in A.S. 48 of 1986 and C. M. P 3764/86 in A.S.No. 45 of 1986

State of Kerala

APPELLANT

Vs

Govindan Ponnammam and Others

RESPONDENT

Date of Decision : 23-10-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 8A, Order 27 Rule 8A, Order 40 Rule 1, Order 41 Rule 1, Order 41 Rule 1(3)

Citation : (1986) 23 KLJ 1047

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : K.P. Dandapani Government Pleader for State, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—Both the appeals are filed by the State of Kerala against two money decrees obtained by the same set of persons in two suits for declaration and mandatory injunction directing the defendant State to refund money deposited as bid amount and duty in Abkari auctions. The two C.M.Ps are for stay of execution. A learned Judge of this court ordered interim stay and notice in both the petitions. The petitions came up for hearing at the instance of the respondents. They wanted the State in both appeals to be directed under Order XLI Rule 1 (3) of the CPC to deposit the entire decree amount. Order XLI, Rule 1 (3) reads --

(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."

Mr. K.P. Dandapani on behalf of the respondents said that under Order XLI, rule 1 (3) deposit of the amount disputed in the appeal or furnishing security in respect thereof is mandatory for the maintainability of an appeal when it is against a

decree for payment of money. He cited two decisions in support of His contention. [do not think that the argument is sound. Before dealing with that argument I think it is necessary to refer to two other provisions. Order XLI, rule 5 says:

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.

2. According to sub-rule (3) three conditions are to be satisfied before ordering stay of execution. Third condition of which alone we are concerned here is that security has been given by the applicant for the due performance of decree or order as may ultimately be binding upon him. Rule 6 also deals with security but we are not concerned with it because it relates to an order for execution of decree from which an appeal is pending. Under sub-rule (4) of rule 5 the Court can make even an *ex parte* order provided the conditions of sub-rule (3) are

satisfied. If these conditions are satisfied and if there is sufficient cause, it is within the jurisdiction of the Appellate Court to grant to stay of execution. Sub-rule (5) provides that 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. That is the only consequence of non-compliance of the provisions of Order XLI, rule 1 (3). Order XXVII, rule 8A says that no such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, when the Government undertake the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. Mr. Dandapani is of the view that this provision applies only to Order XLI, rules 5 and 6 and not to Order XLI, rule 1 (3) which, according to him, is independent of rules 5 and 6, I do not think that I will be able to agree with that view also.

3. Sub-rule (3) of rule 1 of order XLI was added by the amending Act 104 of 1976. It empowers the Appellate Court in money decrees to direct the appellants to furnish security or deposit the disputed amount in an appeal as it thinks fit. Prior to this the Appellate Court had no suo motu power to order the judgment-debtor to deposit the amount or furnish security in appeal. Money decrees used to be delayed by frivolous appeals and stay orders therefrom. Decree-holders had thereby to face great difficulties in execution of their decrees. It was to benefit the decree-holders and to lessen their hardships that this sub-rule was introduced. The sub-rule is not mandatory because it is not provided anywhere in the Code that if the amount is not deposited or security is not offered the appeal is liable to be dismissed. It is true that even without an application for stay filed by the app. 11 the Appellate Court is suo motu entitled to direct the appellant to furnish security or deposit the amount disputed in appeal. The object is only to safeguard the interest of the decree-holder in realising the amount due under the decree. The only consequence of non-compliance of the direction of the Court under Order XLI, rule 1 (3) to deposit the amount or furnish security is that provided under Order XLI, rule 5 (5) that in such cases the Court shall not make an order staying execution of the decree. Non-compliance of sub-rule (3) of rule 1 by the appellant thus only fetters the jurisdiction of the appellate court in granting stay of execution and thereby enabling the decree-holder to execute the decree in spite of the pendency of the appeal because as provided in Order XLI, rule 5 an appeal shall not operate as an automatic stay of execution. Normally, in the absence of other provisions or directions the amount deposited by the appellant as per direction of the Appellate Court under sub-rule (3) of rule 1 of Order XLI also operates only as security. Unless remitted by way of compromise formula with liberty to the decree-holder to draw the same or allowed by the Appellate Court, the amount cannot be drawn by the decree-holder otherwise than by execution of the decree.

4. When along with the appeal against a money decree the appellant applies for stay of execution and the court orders stay on condition of depositing the amount or furnishing security the stay normally becomes operative only when the deposit

is made or security furnished. In such cases there is no question of any fresh or independent direction for the same purpose suo motu under Order XLI, rule 1(3). Both the provisions are interconnected and intended for the same purpose and object namely ensuring the prospects of the ultimate decree being enforced.

5. In express provision requiring the Court to reject the memorandum of appeal in cases where the appellant against a money decree fails to make the deposit or furnish security as ordered by the Court, was sought to be introduced by way of amendment as sub-rule 1A of Order XLI, rule 3. That rule was subsequently deleted in the recommendation of the Joint Committee. This fact when taken along with sub-rule (5) of rule 5 already referred to by me clearly indicates that even failure to make a deposit or furnish security will not affect maintainability of the appeal. The only result in such cases is that the decree-holder will be free to execute the decree and enjoy the fruits of his litigation/in spite of the appeal filed by the judgment-debtor and its pendency so that the delay caused by the appeal will not in any way prejudice the decree-holder whose interest is sought to be safeguarded.

6. Unless some safeguards are made ensuring realisation of the decree amount by the time the appeal is disposed of, the decree-holder may have sometimes to incur the risk of being unable to realise anything by lapse of time. If this contingency is not there, there may not be any purpose in insisting on the deposit or making the security. That may be the reason why Order XXVII, rule 8-A provided that no such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. In such cases what ever be the delay in the disposal of the appeal that is not going to affect in any way the right of the decree-holder to realise the amount due under the decree. In such cases no purpose will be served by asking the State to deposit the amount or furnish security. The decisions reported in *Syndicate Bank Vs. Rallijes India Ltd. and Another*, or AIR. 1986 Himachal Pradesh 78 cited by Mr. Dandapani have not held anything better in favour of his clients. In these two appeals the appellant is the State of Kerala which challenged the basis of the decree and the maintainability of the suits themselves as those for mandatory injunctions on payment of court-fee for such lesser amounts than covered by the monetary claims in the two suits. Interim stay was granted in both the appeals without any direction to deposit the disputed amount or furnish security. This is quite in accordance with Order XXVII, rule-8-A and I am not in a position to say that the Orders were passed without sufficient cause as provided in rule 5 of Order XLI of the Code of Civil Procedure.

Both the Petitions are therefore allowed and the interim stay ordered in both the appeals are made absolute till the disposal of the two appeals.