

(1997) 03 AHC CK 0091

In the Allahabad High Court

Case No : Civil Miscellaneous Stay Application No. 6049/97; [Arising out of F.A. No. 6 of 1993]

State of U.P., Through Collector Jhansi

APPELLANT

Vs

Akhilesh Kumar & Ors.

RESPONDENT

Date of Decision : 20-03-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 8A, Order 41 Rule 1(3), Order 41 Rule 5

Land Acquisition Act, 1894 — Section 23(1), 28

Citation : (1997) 03 AHC CK 0091

Hon'ble Judges : D.K.Seth, J

Judgement

D. K. Seth, J.—While admitting the appeal on an application for stay of execution of judgment and decree dated 721992 passed in Land Acquisition Reference Case No. 19 of 1990, this Court on 8th January, 1993 passed an order that the appellant may deposit the entire decretal amount in the executing court within three months. In case such amount is deposited, it will be open to the respondents to withdraw half of the amount without furnishing security and remaining half of the amount upon furnishing security to the satisfaction of the executing court.

2. A Special Leave Petition was moved before the Hon''ble Supreme Court against the said order, in which the Apex Court was pleased to stay the operation of that part of the order by which 50% was to be withdrawn without furnishing security, to the extent that the appellant need not deposit the said half of the amount. But ultimately while disposing of the Special Leave Petition, the Apex Court directed the deposit of the balance 50% amounting to Rs. 12,52,202.15 which may be withdrawn by the respondent upon furnishing bank guarantee. Admittedly the entire sum has been deposited. Learned counsel for the respondent admits that the respondent has withdrawn the entire sum in terms of the order passed by the Apex Court, namely by furnishing security he has withdrawn 50% and by furnishing bank guarantee he has withdrawn 50%. The

entire amount deposited has been withdrawn. The respondents on the other hand claim that the said amount should include interest solatium amounting to Rs. 4,34,601.17 and had accordingly approached the executing court for direction to the appellant to deposit the said amount. By an order dated 981996, the executing court directed the appellant to deposit the said amount. Against the said order dated 9th August 1996, the appellant had preferred an appeal being First Appeal No. 430 of 1994. By order dated 2131996, the said appeal was dismissed as incompetent by this Court on the ground that the said order was an order of interpretation of the award and not an award itself, therefore, no appeal is maintainable under Section 54 of the Land Acquisition Act against the said order. In the said order, liberty was granted to the appellant to approach this Court during pendency of the appeal against the award itself. Accordingly the present application has been filed in the appeal for stay of the operation of the said order dated 981996.

3. In the facts and circumstances of the case, it appears that the amount is payable to the respondents by the appellant, which is a part of the State. It cannot be said that the amount at the hands of the defendant appellant is insecure, so far as the respondents are concerned. It cannot be said that in case the appeal fails the respondents cannot recover the amount from the defendant appellant. The responsibility of payment of the appellant is also supported by the State. The provision of Order XLI, Rule 1(3) of the Code of Civil Procedure was incorporated to secure and safeguard the interest of the decree holder, having regard to safeguard the interest of the judgment debtor as well, as has been laid down in the case of Central Bank of India v. State of Gujarat, AIR 1987 SC 2320. Having regard to the facts and circumstances of the present case it can not be said that the money payable by the appellant is insecure so far as the respondent is concerned.

4. The question of calculation of interest would be the final decision for execution of the award. Deposit of security while granting the order of stay is ensured only for the purpose that the execution may not be avoided and it does not operate as execution of the whole of the decree itself. Since the appeal against the order dated 811993 has not recorded any order staying execution upon deposit of the amount as directed. The appellant has shown his bona fide by depositing an amount above Rs. 25,00,000 which has already been withdrawn by the respondent.

5. The learned counsel for the respondent insists that in case the entire amount is not directed to be deposited in that event appellant should furnish adequate security as provided in Order XLI, Rule 1 (3) of the CP.C. Sri P. K. Bisaria. learned counsel opposes the said prayer and contends that by reason of Order XXVII, Rule 8A the appellant is not required to furnish security in terms of Order XLI, Rule 5 of the Code.

6. Order XLI, Rule 1(3) requires the appellant to deposit decretal amount or furnish security in respect thereof as the Court may direct, according to its

discretion. Such direction or deposit is not dependent on the question of grant of stay. The same is general proposition. Such order can be passed even when no prayer for stay is asked for or even when stay is being refused. Whereas Order XLI Rule 5 is dependent on the question of stay. But however, the court may impose a condition of compliance of Rule 1(3) of Order XLI when considering the question of grant of stay or granting such stay. Order XLI Rule 5(5) makes the situation clear where it provides that in case the appellant fails to make deposit or furnish security, if ordered by the Court, the execution of the decree shall not be stayed. Subrule (5) of Rule 5 stands substituted by means of Allahabad Amendment vide Notification dated 3101993 as published on 111994 providing:

"(5) Notwithstanding anything contained in the foregoing subrules where the appeal is against a decree for payment of money, the Appellate Court shall not make an order staying the execution of the decree, unless 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 Appellate Court may think fit."

Notification No. 552/VHd134, dated 3101993 published in U. P. Gazette Part2, dated 111994"

According to the said provision the appellant is not entitled to any order of stay unless he deposits the disputed amount or furnishes security in respect thereof as the court may direct. Therefore, independent of Rule 1(3) by reason of Allahabad Amendment the court may direct deposit or furnishing of security in terms of Order XLI, Rule 3(4) of the Rules.

7. Order XXVII covering the suits by or against the Government or public officer in their official capacity in Rule 8A provides as under:

"8A. No security to be required from Government or a public officer in certain cases: 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."

8. Order XXVII Rule 8A above exempts the Government from furnishing any security as mentioned in Rules 5 and 6 of Order XLI. Even without Allahabad Amendment for the purposes of consideration of grant of stay, the State Government may not be required to furnish Security. But the said provision does not provide that the State Government would not be required to deposit decretal amount. So far as the deposit of the decretal amount is concerned, there being no exemption the Government stands on the same footing as ordinary litigant while preferring appeal. In such event it is discretion of the court. The court may direct the deposits for whole or part of the decretal amount or the disputed amount in its discretion. Similarly, while exercising such discretion the court is free even not to direct deposit of any of the amount or part thereof. But, however, such discretion is judicious one, having regard to the facts and

circumstances of the case. There can not be any straight jacket formula. It depends on facts and circumstances of each case, in which the court would exercise its discretion and in what manner and how.

9. That apart a sum of rupees four lacs and odd has been claimed and so determined by the order dated 981996 by way of interest on solatium. The payment of interest on solatium was never contemplated under Section 28 of the Land Acquisition Act. The clear expression used in Section 28 never made payment of interest on any amount other than enhanced compensation. The compensation, additional compensation and solatium are three different components. The additional compensation and solatium are different from compensation. The interest having been payable only on compensation the same does not include additional compensation or solatium. In the case of *Yadavrao Pathade v. State of Maharashtra*, 1996(1) L.A.L. 518, while considering such questions it has been held, "In other words Section 28 does not comprehend payment of interest on solatium when it expressly mentions payment of interest on compensation u/S. 28 referable to Section 23(1) of the Act." While so holding the decision in the case of *Prem Nath Kapoor v. National Fertilizers Corporation of India Limited*, 1996(2) SCC 71, was relied upon, where similar view was taken even after the case of *Periyas* case. In the case of *Yadavrao Pathade* (supra) *Periyas* case was also distinguished with the reasoning that unfortunately neither the provision were considered non distinction of the above provision had been brought to the notice of this court at that time. Therefore mistaken view was taken *Periyas* (supra) case to hold that interest on solatium is part of component of compensation under Section 23(1) of the Act.

10. Therefore, it can not be said that the said sum of rupees four lacs and odd being claimed as interest on solatium is payable as part of the Award. However, the above observation is subject to the decision by the executing court at the appropriate time and stage when occasion may so arise.

11. Thus the amount already deposited is hereby treated to be sufficient compliance of the order dated 8th January 1993.

12. In that view of the matter the further proceedings of the execution shall remain stayed. The operation of the order dated 9th August, 1996 shall also remain stayed till disposal of the appeal. The said order shall be subject to the result of the appeal and subject to the final adjudication in execution when occasion so arises.

13. The application dated 24th January 1997 is thus allowed. The order dated 8th January, 1993 stands modified to the above extent.

Application allowed.