

State of Kerala Vs. Kuruvilla

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Court : Kerala

Decided On : Mar-03-2004

Reported in : AIR2004Ker233; 2004(1)KLT996

Judge : S. Sankarasubban and; A.K. Basheer, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 27, Rule 8A - Order 41, Rules 1(3) and 5(3)

Appeal No. : I.A. No. 2209 of 2003 on R.F.A. No. 384/2003

Appellant : State of Kerala

Respondent : Kuruvilla

Advocate for Def. : Bechu Kurian Thomas, Adv.

Advocate for Pet/Ap. : Govt. Pleader

Judgement :
ORDER

S. Sankarasubban, J.

1. The above I.A. is filed by the State to stay all further proceedings in pursuance to the execution petition filed in O.S. No. 150 of 1997 of the Sub Court, Kottayam. F.A.O. No. 384 of 2003 is filed by the State represented by the District Collector,

Kottayam against the judgment and decree in O.S. No. 150 of 1997. The suit was filed by the respondents for damages for breach of contract. An amount of Rs. 12,16,667.50 has been decreed in favour of the plaintiffs. It is against the above judgment and decree that this appeal is filed.

2. When the matter came up for hearing, we heard learned Government Pleader for the appellant and Sri. Bechu Kurian Thomas learned counsel for the respondents. Learned Government Pleader submitted that the State is entitled to get an order of stay without providing security in view of Order XXVII, Rule 8A of C.P.C. On the other hand, Sri. Bechu Kurian Thomas submitted that the court has a discretion in this matter and the court can direct the State to deposit a portion of the amount. He further submitted that Order XXVII, Rule 8A is enacted on the assumption that all the State Governments are solvent. He submitted that the court can take notice of the fact that the Government has itself admitted that it is not able to discharge the liabilities and many cheques issued by the Government were not encashed for a long time.

3. Order XXVII, Rule 8A clearly states 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. Order XLI, Rule 5 enables the Appellate Court to grant stay. Learned Government Pleader brought to our notice the decision in Collector, Cuttack v. Padma Charan Mohanty (1980 Cuttack Law Times Vol. 50 page 191). In that decision, it has been stated as follows:

'Introduction of Sub-rule (3) of Rule 1 and Sub-rule (5) of Rule 5 of Order XLI has not affected the privilege of exemption from furnishing security so far enjoyed by the Government. Sub-rule (3) of Rule 1 for the first time, by the Amendment of 1976, imposed an obligation on the appellant is appealing from a decree for payment of money, either to deposit the amount in dispute in appeal or to furnish such security in respect thereof as the court may direct. By introducing Sub-rule (5) of Rule 5 of Order XLI, the Legislature purported to reiterate the position that where the appeal is against a decree for payment of money the appellant must

deposit the amount in dispute in appeal or furnish security notwithstanding anything contained in Sub-rules (1), (3) and (4) of Rule 5. Rule 8A of Order XXVII, however, provides an exception. It states that no such security as is in Rules 5 and 6 of Order XLI shall be required from the Government. Sub-rule (5) of Rule 5 expressly mentions furnishing of security as specified in Sub-rule (3) of Rule 1. So Rule 5 mentions about security under Sub-rule (3)(c) of Rule 5. Therefore, even though security is required under Sub-rule (3) of Rule 1 from the appellant, whoever he may be, that security having been mentioned in Sub-rule (5) of Rule 5 cannot be required to be furnished by the Government by reason of Rule 8A of Order XXVII, Civil Procedure Code'.

It is also stated thus: 'Security is generally required to be furnished where the appellant's solvency is doubtful and to secure the fruits of litigation to the respondent in the event of his ultimate success. The solvency of the Government cannot ever be in doubt. It is in that view that Rule 8A of Order XXVII was first introduced as a part of Order XLI and has been retained as a part of Order XXVII irrespective of amendment of Rules 1 and 5 by the 1976 amendment'. Learned counsel for the respondents cited U.P. Avas Evam Vikas Parishad, Lucknow v. Satya Prakash and Ors. (1997 AIHC 3266 Allahabad). That was concerning with an award passed under the Land Acquisition Act. The court discussed the present issue in paragraph 20 of the judgment. It is stated thus:

'Order XXVII, Rule 8A 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 deposit 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

cannot be any straight-jacket formula'.

5. Order XLI, Rule 1(3) states that where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, to deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Order XLI, Rule 5 deals with stay by Appellate Court. It states that 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. Order XLI, Rule 5(5) stated that 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. We don't agree with the contention of the learned counsel for the respondents that in spite of the enactment of Order XXI, Rule 8A doing away with security, when the Government is the party. Order XXVII, Rule 8A has been enacted for the purpose of enabling the State to get stay of decree without furnishing security. This is on the ground that the State is solvent. Learned counsel for the respondents then submitted that it can be taken notice by this Court that the Government is not able to meet even the essential expenditures in the face of the tightness of financial position. We are not able to accept this argument that the Government is not solvent. Probably, the Government may be getting time to deposit the amount. That does not mean that the Government is not solvent. Of course before ordering stay, the court has to look into the facts and circumstances of the case. It is only when the Appellate Court is satisfied that circumstances exist enabling the appellant to get an order of stay. In that circumstances, the court can direct the appellant to deposit the decree amount or part of it or to furnish security. We don't agree.

6. In *State of Kerala v. Govindan Ponnamm* (1987 (1) KLT 206) an identical question arose before this Court. A learned Single Judge held that in spite of the inclusion of Order XLI, Rule 1(3) the privilege given to the Government under Order XXVII, Rule 8A is not taken away. Learned Judge took the view that the

provisions of Order XLI, Rules (3) and Rule 5(5) had to be read subject to Order XXVII, Rule 8A. Order XLI, Rule (3) states that 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. Order XLI, Rule 5 deals with granting of stay by the Appellate Court. Order XLI, Rule 5(5) states thus:

'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'. Learned counsel for the respondents argued that Order XLI, Rule 1(3) is mandatory. Learned counsel contended that Order XLI, Rule 1(3) read along with Sub-rules 3 and 5 of Order XLI makes it obligatory on the part of the appellant to deposit the amount decreed. According to us, Order XLI, Rule 1(3) cannot be said to be mandatory. Nothing is stated in Order XLI as to what will happen to the appeal, if Rule 1(3) is not complied with. It does not state that if the amount is not deposited or security is not given, appeal can be dismissed. In so far as nothing is stated as to what will happen in violation Order XLI, Rule 1(3), according to us, Order XLI, Rule 1(3) is only directory.

6. Next question is regarding the question whether the court can order deposit of amount for granting stay under Order XLI, Rule 5(3). According to us, the court cannot order deposit of the amount when the State is the appellant in so far as Order XXVII, Rule 8A provides that the Government cannot be compelled to give security. According to us, Order XLI, Rule 5(3) and Order XXVII, Rule 8A have to be read harmoniously. If such a reading is taken, it will be sure that the benefit of Order XXVII, Rule 8A given to the State cannot be deprived of by directing deposit of decretal amount. Hence according to us, Order XXVII, Rule 8A demands that no security can be required to be given by the State. As we already stated earlier in the decision reported in 1987 (1) KLT 206 when the matter came up for consideration before the learned Single Judge of this Court, the learned Judge stated as follows:

'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. 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 inspite 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. An 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 on the recommendation of the Joint Committee. This fact when taken along with Sub-rule (5) of Rule 5 already referred to 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 inspite 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'.

Thus, according to us, Order XXVII, Rule 8A is applicable in the case and after going through the judgment and decree and the pleadings furnished by both the parties, we are satisfied that it is a case where stay has to be granted. Hence, we grant an interim stay of execution of the decree. Learned counsel for the respondents then submitted that an early posting may be given, since it arises out of the suit for damages.

Post the appeal for hearing in the third week of March, 2004.