

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 1ST DAY OF NOVEMBER 2021 / 10TH KARTHIKA, 1943

OP(C) NO. 963 OF 2021

AS 86/2020 OF ADDITIONAL DISTRICT COURT - IV, KOLLAM

PETITIONER/S:

RAVEENDRAN
AGED 51 YEARS
S/O.SIVADASAN, NEZHICHERY THODIYIL,
THEKKECHERRY, KANJAVELI P.O., THRIKKARUVA
VILLAGE, KOLLAM TALUK.
BY ADV H.VISHNUDAS

RESPONDENT/S:

- 1 LALITHA
AGED 75 YEARS
D/O.BHARATHI, PUTHENPURAYIL, VANMALA, THEKKE
CHERRY, KANJAVELI P.O., THRIKKARUVA VILLAGE,
KOLLAM TALUK - 691 602.
- 2 GIRISH KUMAR @ ASOKAN
AGED 53 YEARS
S/O.GOPALAKRISHNAN, PUTHENPURAYIL, VANMALA,
THEKKECHERRY, KANJAVELI P.O., THRIKKARUVA
VILLAGE, KOLLAM TALUK - 691 602.
- 3 GANESH KUMAR
AGED 45 YEARS
S/O.GOPALAKRISHNAN, PUTHENPURAYIL, VANMALA,
THEKKE CHERRY, KANJAVELI P.O., THRIKKARUVA
VILLAGE, KOLLAM TALUK - 691 602.
- 4 GEETHA BAI
AGED 55 YEARS
D/O.GOPALAKRISHNAN, PUTHENPURAYIL , VANMALA,
THEKKE CHERRY, KANJAVELI P.O., THRIKKARUVA
VILLAGE, KOLLAM TALUK - 691 602.

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 28.09.2021,
THE COURT ON 01.11.2021, DELIVERED THE FOLLOWING:**

JUDGMENT

Dated this the 1st day of November, 2021

The petitioner was the plaintiff in O.S.No.37 of 2014 on the files of the Principal Munsiff's Court, Kollam. The prayer in the suit was for a permanent prohibitory injunction restraining the respondents/defendants from trespassing into plaint B schedule pathway and from taking vehicles through the pathway or parking vehicles therein. The suit was decreed with cost. Aggrieved, the second respondent filed appeal (AS No.86 of 2020) before the Additional District Court-IV, Kollam. While admitting the appeal, the appellate court passed Ext.P3 order, staying the operation of the decree and judgment till the disposal of the appeal.

2. When this original petition came up for

admission, it was pointed out that the petitioner had filed I.A.No.3 of 2021 before the appellate court seeking review of Ext.P3 order. Therefore, by order dated 25.08.2021, the appellate court was directed to pass orders on that interlocutory application. By Ext.P4 order, the appellate court dismissed I.A.No.3 of 2021, finding that on the facts of the case, an order staying the operation of the judgment and decree is highly essential.

3. Adv.H.Vishnudas, learned Counsel for the petitioner assailed Ext.P3 order by contending that Order XLI Rule 5 of the Code of Civil Procedure, empowers the appellate court to only stay the proceedings and execution of a decree and the court is not clothed with the power to stay the operation of the judgment and decree. It is contended that as per Order XLI Rule 5, mere filing of an appeal shall not operate as a stay

of proceedings under a decree, except so far as the appellate court may order and further that, execution of a decree shall not be stayed by reason of an appeal having been preferred. Even stay of execution of a decree can only be for sufficient cause. According to the learned Counsel, the caption "stay of proceedings and of execution" to Order XLI Rule 5 clearly indicates the intention of the legislature. Going by the provision, the appellate court can do nothing other than staying the proceedings under the decree or staying execution of the decree. Moreover, stay of operation of a judgment will have the effect of relegating the parties to the pre-suit stage. To support the contentions, reliance is placed on the following decisions;

Sulochana Peter v. Chellamma Swarnamma [2011 (1) KLT 93], Harish Premshankar Bhatt and another

v Kailasbhai K. Sabaria [2015 KHC 2887].

4. It is contended that the impugned Ext.P3 order was passed without considering these crucial aspects and the precedents. Even though, the fundamental flaw was brought to the notice of the appellate court by filing I.A.No.3 of 2021, the learned Judge refused to review the order.

5. Order XLI Rule 5 of CPC reads as under;

"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.

3[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.]

Going by the plain meaning of Order XLI Rule 5, it provides for only stay of the proceedings under a decree or stay of execution of the decree. The provision does not empower the appellate court to stay the operation of the judgment. Stay of operation of the judgment is

not the same as staying the operation of the proceedings under a decree or staying the execution of a decree. An order staying the operation of the judgment will amount to staying the findings in the judgment, which cannot be done at the stage of admission.

6. In the impugned order, the appellate court has indicated the reasons for granting the order of stay. Therefore, I do not find any force in the submission that the order is bad for application of mind and lack of reasons. At the same time, even on being convinced of the reasons for granting stay, the appellate court could have stayed only the proceedings under the decree or execution of the decree and not, the operation of the judgment.

7. Pursuant to the order of this Court, the appellate court considered and dismissed the

review application (I.A.No.3 of 2021), relying on Order 41 Rule 33 of CPC. It is pertinent to note that the appellate court is not expected to exercise the power under Order 41 Rule 33 CPC, while admitting an appeal. Such power can be exercised while considering the appeal on merits. The position needs no further clarification in the light of the dictum laid down in Sulochana Peter, the relevant portion of which is extracted hereunder;

"The power enjoined under such Rule cannot be invoked by the Appellate Court to admit an appeal, which is found not entertainable. Needless to point out, invoking the powers under R.33 of O. XLI of the Code for exercise of the extraordinary powers vested with the Appellate Court would come into play, if so satisfied by the facts presented, only at the stage of consideration of the appeal on merits, at the time or hearing, but not before, at any rate, not at the stage of considering or determining the entertainability and admissibility of an appeal."

In the result, the original petition is allowed, Exts.P3 and P7 orders are set aside and the appellate court is directed to consider the application for stay (I.A.No.1 of 2020) afresh and to pass orders thereon, after affording an opportunity of hearing to the parties.

Sd/-

V.G.ARUN
JUDGE

Scl/

APPENDIX OF OP(C) 963/2021

PETITIONER EXHIBITS

EXHIBIT P1	TRUE COPY OF THE INTERLOCUTORY APPLICATION NO.1/2020 FILED BY THE 2ND RESPONDENT IN A.S.NO.86/2020 IN PRODUCED HERewith AND MARKED AS EXHIBIT P1.
EXHIBIT P2	TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER/RESPONDENTS IN IA NO.1/2020 IN A.S.NO.86/2020 IS PRODUCED HERewith AND MARKED AS EXHIBIT P2.
EXHIBIT P3	CERTIFIED COPY OF THE ORDER DATED 14/12/2020 IN I.A.NO.1/2020 IN A.S.NO.86/2020 IS PRODUCED HERewith AND MARKED AS EXHIBIT P3.
EXHIBIT P4	TRUE COPY OF THE REVIEW PETITION IN IA.NO.3/2020 IN AS NO.86/2020 IS PRODUCED HERewith AND MARKED AS EXHIBIT P4.
EXHIBIT P5	TRUE COPY OF THE COUNTER AFFIDAVIT IS PRODUCED HERewith AND MARKED AS EXHIBIT P5.
EXHIBIT P6	TRUE COPY OF THE PRINTOUT OF DAILY PROCEEDINGS IN A.S.NO.86/2020 DATED 20/03/2021 FROM THE E-COURTS.GOV KOLLAM DISTRICT COURT WEBSITE IS PRODUCED HERewith AND MARKED AS EXHIBIT P6.
Exhibit P7	PHOTOCOPY OF THE REVIEW ORDER DATED 3.9.2021 IN IA NO 3/2021 IN AS NO 86/2020 OF ADDL DISTRICT COURT IV KOLLAM