

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble the Chief Justice
Hon'ble Mr. Justice Joymalya Bagchi and
Hon'ble Mr. Justice Arijit Banerjee

F.M.A. No. 381 of 2004
Union of India
Vs.
Amitava Paul

With
F.A. No. 336 of 2007
Zoological Survey of India & Anr.
Vs.
M/s. Piscean Enterprises

With
F.M.A. No. 1111 of 2008
Union of India
Vs.
Sanjay Gooptu & Anr.

For the appellants : Mr. Indrajeet Dasgupta
(in FMA 381 of 2004 &
FMA 1111 of 2008)

For the appellants : Mr. Pradip Kumar Tarafdar,
(in FMA 336 of 2007) Mr. Indrajeet Dasgupta

For the respondent : Mr. Debasish Roy
(in FMA 381 of 2004)

For the respondents : Mr. Budhadev Ghosal,
Mr. U.S. Menon,
Mr. Rajiv Kumar Jain,
Mr. Abhirup Chakraborty

For the respondent : Mr.Sounak Mitra,

Controversy giving rise to the Reference :

In **Union of India Vs. M/s. Burma Construction, AIR 2004 (Cal) 174** a Division Bench of this Court while interpreting Order XLI Rule 1 (3) and Rule 5 (5) of the Civil Procedure Code held in an appeal from a money decree if the appellant is the Government, it shall not be mandatory on its part to deposit or furnish security in respect of disputed decretal amount in view of the exemption provided under Rule 8A of Order 27 of the Code. It would depend upon the discretion of the Court and such discretion ought to be exercised bearing in mind the aforesaid exemption provision.

In the aforesaid appeals contrary view was taken by another co-ordinate Bench. The Bench held that Order XLI Rule 1(3) of the Civil Procedure Code is mandatory and non-compliance thereof would entail dismissal of the appeal, more particularly, when the appellant fails to comply with the direction of the Court to make deposit or furnish security in respect of the decretal amount. Accordingly, the aforesaid questions of law were referred to a larger Bench for consideration.

Contention of the appellants :

Mr. Tarafdar, learned advocate appearing for the appellants in F.A. No. 336 of 2007 at the outset admitted that Order 27 Rule 8A of the Code did not exempt the Government as an appellant from satisfying the requirements of clauses (a) and (b) of Rule 5(3) of Order XLI of the Code of Civil Procedure. In other words, even if the appellant is the Government it has to satisfy the

requirements laid down in clauses (a) and (b) of Rule 5(3) of Order XLI in order to obtain an order of stay for execution of a decree.

Mr. Tarafdar, however, argued that in view of the exemption given to the Government under Order 27 Rule 8A of the Code no deposit or furnishing of equivalent security in respect of the disputed decretal amount can be insisted upon for grant of stay of execution of the decree.

In support of his contention, he referred to **State of Kerala Vs. T.K. Kuruvilla & Ors., AIR 2004 Ker 233.**

With regard to question no. 2, Mr. Tarafdar submitted that the issue whether Order XLI Rule 1(3) is mandatory or directory is no longer res integra in view of the law declared by the Apex Court in **Kayamuddin Shamsuddin Khan Vs. State Bank of India, (1998) 8 SCC 676, M/s. Malwa Strips Pvt. Ltd. Vs. M/s. Jyoti Ltd., AIR 2009 SC 1581.**

With regard to question no. 3 he submitted relying on **Himachal Road Transport Corporation Vs. Sushila Devi & Ors, AIR 1986 HP 78** that failure to deposit the disputed decretal amount or furnish security cannot as a matter of rule result in postponement of hearing of the appeal but the same ought to be left to the discretion of the Court in the factual matrix of each case.

Contention of the respondents :

Mr. Ghosal, learned advocate appearing for the respondents submitted that though a money appeal may not be forthwith dismissed for non-compliance of Order XLI Rule 1(3) of the Code, failure of the appellant to comply with specific direction of the Court may justify postponement of hearing of the appeal and even dismissal thereof. He further joined issue with the appellants and

submitted that the exemption provision under Order 27 Rule 8A of the Civil Procedure Code cannot be interpreted to mean that the Court is powerless to direct deposit of whole or part of the disputed decretal amount as a condition for grant of stay of execution of decree. He referred to **The State of West Bengal Vs. M/s. Texmaco Ltd., 2013(2) CLJ (Cal) 241** and **Land Acquisition Collector Vs. Smt. Sita Dei & Anr., AIR 2007 Orissa 152** in support of such contention.

Mr. Mitra, learned advocate appearing for the respondent in FMA No. 1111 of 2008 while adopting the submissions of the Mr. Ghosal submitted that the Constitutional provision under Article 112(3)(f) of the Constitution of India cannot absolve the Government of the liability to deposit the disputed decretal amount or furnish security thereof within such time as directed by the Court in terms of Order XLI Rule 1(3) of the Code as the two provisions operate in different fields and have been incorporated for different purposes. He further submitted that Order 27 Rule 8A of the Code does not exempt the Court from directing the Government from making deposit of whole or part of the disputed decretal amount so as to enable the decree holder to withdraw a portion thereof subject to the result of the appeal.

Statutory/Constitutional provisions relevant for adjudication of the Reference :

For adjudication of the aforesaid Reference, the following Statutory/Constitutional provisions are relevant for consideration.

“Order XLI Rule 1(3) :

R. 1. Form of appeal.- (1) What to accompany memorandum.-

.....

(2).....

(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."

"Order XLI Rule 5 and 6

R. 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 to 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 as may ultimately be binding upon him.

(4) Subject to the provisions 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.

R.6. Security in case of order for execution of decree appealed from.- (1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may or like cause direct the court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment debtor to the court which made the order, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of."

"Order 27 Rule 8A

R. 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."

"Article 112. Annual financial statement.-

(1) The President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year, in this Part referred to as the "annual financial statement".

(2)

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of India-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) **any sums required to satisfy any judgement, decree or award of any court or arbitral tribunal.**

Question nos. 2 and 3 :

For the sake of convenience let me first take up question no. 3, namely, whether an appeal may be dismissed for non-compliance of Order XLI Rule 1(3) of the Code, for consideration.

To answer this issue it may be profitable to refer to the legislative history of Rule 1(3) and Rule 5(5) of Order XLI of the Code.

Sub-Rule 3 of Rule 1 and sub-Rule 5 of Rule 5 of Order XLI were inserted by Section 87 of the Code of Civil Procedure (Amendment) Act, 1976 with effect from 1st February, 1977. Initially, the proposal for amendment did not incorporate Rule 5(5) of Order XLI. On the other hand, it was proposed that sub-Rule (1A) be incorporated after Rule 3(1) of Order XLI, inter alia, providing for dismissal of the memorandum of appeal in the event of failure to make deposit or furnish security by the appellant.

The proposed sub-Rule (1A) read as follows :

“(1A) Where the appellant fails to make the deposit or furnish security specified in sub-rule (3) of rule 1, the Court shall reject the memorandum of appeal.”

The proposal was referred to the Joint Committee of both the Houses of Parliament and pursuant to the report of the Joint Committee, the aforesaid

proposed sub-Rule (1A) of Rule 3 was deleted and the present sub-Rule 5 of Rule 5 was incorporated. It may be worthwhile to refer to the Joint Committee Report in this regard.

“ 65. Clause 87 (Original clause 90).-

(i) The Committee note that under the proposed new sub-rule (1A) of rule 3 in Order XLI, if the appellant fails either to deposit the amount disputed in the appeal or to furnish security for such amount, the memorandum of appeal shall be rejected. The Committee feel that such a provision will deprive a judgement-debtor having a good case, to pursue the appeal on account of his inability to deposit the disputed amount or to furnish security for such amount.

The Committee are, therefore, of the opinion that in order to see that justice is done to both the parties, the proposed sub-rule might be amended in such a way that neither the judgement-debtor is deprived of his right to pursue the appeal nor the decree-holder is deprived of the remedy. Proposed sub-rule(1A) has been amended to provide that stay of execution of the decree will not be granted unless the deposit is made or security is furnished and has been transposed as sub-rule (5) of rule 5.

xxx xxx xxx xxx xxx xxx.”

Such legislative history of incorporation of Rule 1(3) and Rule 5(5) of Order XLI in the Code makes it amply clear that the intention of the legislature while incorporating Rule 1(3) of Order 41 of the Code was not to make the requirement of deposit or furnishing security of disputed decretal amount a ground for rejection of appeal. On the other hand, a less grave consequence for non-compliance of such condition, was envisaged, namely, to disentitle the appellant to pray for stay of execution of the decree as provided in Rule 5(5) of Order XLI.

This view has been expressed by the Apex Court in the case of **Kayamuddin Shamsuddin Khan Vs. State Bank of India, (1998) 8 SCC 676**, wherein it has been held as follows :

"6. The learned counsel for the respondent has invited our attention to Sub-rule (3) of Rule 1 of Order XLI in the CPC, as amended in the State of Maharashtra, which reads as under:

"(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:

Provided that the Court may dispense with the deposit or security where it deems fit to do so for sufficient cause."

7. The submission of the learned counsel for the respondent is that the High Court was right in giving the direction regarding the deposit of Rs 75,000 as per the aforesaid provision and since the appellant has failed to comply with the same the appeal has been rightly directed to be dismissed. We, however, find that the only consequence for non-compliance with the direction given under Sub-rule (3) of Rule 1 of Order XLI is as provided in Sub-rule (5) of Rule 5 of Order XLI which reads as under:

"(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."

It may be apposite to observe that the Apex Court in the aforesaid decision was dealing with the interpretation of Order XLI Rule 1(3) of the Code, as amended in the State of Maharashtra, where the appellate Court has power to dispense with making deposit or security in fit and proper cases. However, in **M/s. Malwa Strips Pvt. Ltd. Vs. M/s. Jyoti Ltd., AIR 2009 SC 1581** the Apex Court interpreted Order XLI rule 1(3) of the Code as provided in the Central Law

and held that the said provision although couched with the expression "shall" must be read as directory and not mandatory. It quoted with approval the ratio laid down in **Kayamuddin (Supra)** and held as follows :

"8. We will proceed on the assumption that although the word 'shall' has been used in Order XLI Rule 1 (3) of the Code, the same is not mandatory in character, and, thus, may be read as directory."

xxx xxx xxx xxx xxx xxx xxx xxx

"10. We may, however, notice that although the provisions of sub-rule (3) of Rule 1 of Order XLI have been held not to be mandatory, this Court in Kayamuddin Shamsuddin Khan vs. State Bank of India [(1998) 8 SCC 676] opined that non-compliance of a direction to deposit the decretal amount or part of it or furnish security therefor would result in the dismissal of the stay application but not the entire appeal, stating:

"8. This would mean that non-compliance with the direction given regarding deposit under Sub-rule (3) of Rule 1 of Order XLI would result in the Court refusing to stay the execution of the decree. In other words, the application for stay of the execution of the decree could be dismissed for such non-compliance but the Court could not give a direction for the dismissal of the appeal itself for such non-compliance."

In view of the law declared by the Apex Court in **Kayamuddin & M/s. Malwa Strips Pvt. Ltd. (supra)**, there is no escape from the conclusion that the obligation under Order XLI Rule 1(3) is not mandatory but directory in nature and failure to comply with the same shall not result in rejection of the appeal, but would disentitle the appellant to pursue a prayer for stay of execution of the money decree.

Hence, question no. 3 is answered in the negative.

With regard to question no. 2 as to whether a money appeal may be disposed of on merits though the appellant had not deposited or furnished

security as directed by the Court in terms of Order XLI, Rule 1(3), the referring Bench relying on **Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh & Anr., AIR 2006 SC 269** was of the view that non-compliance of direction of the Court would result in dismissal of the appeal. Ratios in **Kayamudding (supra)** and **M/s. Malwa Strips Pvt. Ltd. (supra)** had not been placed before the referring Bench for its consideration. On the other hand, the Bench had relied upon the aforesaid report where the Apex Court was not dealing with the consequence of non-compliance of Rule 1(3) of Order XLI but with the consequence of defects in the manner of signature of the appellant in the memorandum of appeal and the authority of his lawyer to present the said memo. In such factual matrix, the Court held an appeal ought not to be rejected outright in case of any defect in the form or manner of drawing up such appeal but opportunity ought to be given to the appellant to rectify such defect failing which the appeal shall stand rejected.

In this perspective the Apex Court observed as follows : -

“17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are :-

- i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.**
- ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;**
- iii) where the non-compliance or violation is proved to be deliberate or mischievous;**

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.”

It is trite law that a judgement cannot be read as a statute but its ratio must be understood in the backdrop of the factual dispute which it seeks to decide [see : **Haryana Financial Corporation Vs. Jagdamba Oil Mills, (2002)3 SCC 496, para 19-22**]. The aforesaid observation of the Apex Court with regard to the dismissal of an appeal for non-removal of procedural defects in the form and manner of drawing up and presentation of the memo cannot therefore be treated as binding precedent vis-à-vis non-compliance of direction to make deposit or furnish security under Order XLI Rule 1(3) of the Code. It needs no elucidation that such requirement of furnishing security under Rule 1(3) of the Code does not relate to the form and manner of drawing up of the memo of appeal so as to constitute a ground for rejection of the memorandum under Rule 3 of Order XLI of the Code.

Hence, it would be incorrect to rely on the ratio of **Uday Sankar (supra)** to come to the conclusion that failure to comply with a direction of the Court to make deposit or furnish security under Order XLI Rule 1(3) of the Code will result in dismissal of the appeal, particularly, in the light of the law laid down by the Apex Court in **Kayamuddin (supra)** and **M/s. Malwa Strips Pvt. Ltd. (supra)** that such provision is not mandatory but directory in nature.

It is settled law that although directorial provision cannot be ignored, non-compliance thereof does not invariably render an action invalid or nullity. It has

been held in **Drigraj Kuer Vs. A.K. Narain Singh**, AIR 1960 SC 444 when a provision is directory in nature it does not give discretion to the Court to dispense with the same but non-compliance thereof does not render its action invalid. The Court held as follows :

“A provision giving a discretionary power leaves the donee of the power free to use or not to use it at his discretion. A directory provision, however, gives no discretionary power to do or not to do the thing directed. A directory provision is intended to be obeyed but a failure to obey it does not render a thing duly done in disobedience of it, a nullity.”

Similarly, in **Ram Deen Maurya (Dr.) Vs. State of Uttar Pradesh & Ors.**, (2009) 6 SCC 735 the Apex Court held as follows : -

“43. To answer this issue, it is necessary to find out, whether the rule is directory or mandatory. If it is mandatory, then it is settled rule of interpretation, it must be strictly construed and followed and act done in breach thereof will be invalid. But if it is directory, the act will be valid although the non-compliance may give rise to some other penalty if provided by the Statute. It is often said that a mandatory enactment must be obeyed or fulfilled exactly, but, a directory provision non-compliance of it, has been held in many cases as not affecting the validity of the act done in breach thereof (See principles of Statutory Interpretation, 11th Edition 2008 by Justice G.P. Singh).”

Judged from this perspective, non-compliance of the obligation under Order XLI Rule 1(3) which is directory in nature would not denude jurisdiction of the Court to hear the appeal on merits and therefore it cannot be held that the appellate Court must mandatorily postpone hearing of a money appeal till the direction given to the appellant to make deposit or furnish security is complied with.

However, the issue requires to be viewed from another angle too. Willful and deliberate non-compliance of a lawful direction of a Court of law amounts to

an act of contempt. It is the duty of every Court to uphold the majesty of law and the sanctity of its own orders. Hence, in appropriate cases if the Court is of the view that non-compliance of its direction to make deposit or furnish security is willful, deliberate and contumacious in nature and causes prejudice to the respondent/decreed holder, it shall be within its discretion to postpone the hearing of the appeal till the appellant purges himself of such contumacious conduct and complies with the direction of the Court.

In this regard I quote with approval the observation of HP High Court in **Himachal Road Transport Corporation Vs. Sushila Devi & Ors, AIR 1986 HP 78** as follows :-

“25. The question which still survives for consideration is whether the Court is entirely helpless in a situation where the appellant defies with impunity an order made by the Court as aforesaid, under Sub-rule (3) of Rule 1 of Order 41, and whether such an appellant can ask the Court as of right, under all circumstances and in all situations, to deal with his appeal on merits. In other words, the question is whether the Court in such a case is entirely helpless and has no power to enforce the order? We do not think such a view can or ought to be taken. If the Court is satisfied on the facts and in the circumstances of the case that the disobedience to the order is wilful the appellant will be guilty of civil contempt within the meaning of the Contempt of Courts Act, 1971 and he will be liable to be dealt with under the provisions of the said Act. Besides, such wilful disobedience being to an order made in exercise of a procedural law, the Rule that the party in contempt may not be heard till he has purged himself of the contempt comes into operation. It is settled law that where a party disobeys an order of the Court, in order to secure obedience to that order, the right of the party to be heard in a proceeding arising out of the same cause will be denied to him, if his disobedience is such that, so long as it continues it impedes the course of justice in the cause and there is no other effective means of securing its compliance (See : Om Parkash v. Board of School Education. ILR (1974) Him Pra 693 : (AIR 1975 Him Pra 57) (FB). Of course, the bar to hearing in such cases until the impediment is removed is placed under discretionary powers of the Court on considerations of public policy and it may be

justifiably applied only on the proof of wilful disobedience and not otherwise.”

Question no. 2 is therefore answered in the affirmative in the light of the observations made hereinbefore.

Question Nos. 1 and 4 :

As both the questions are interlinked they are taken up together for consideration. Order XLI Rule 5(3) of the Code, inter alia, provides that no order of stay of execution of a decree shall be made unless the Court is satisfied :-

- (a) Substantial loss is caused to the appellant in the event stay of execution is not made;
- (b) The application for such relief has been made without unreasonable delay; and
- (c) Security has been given by the appellant for due performance of such decree or order in the event the appeal is dismissed.

Furthermore, Rule 5(5) of Order XLI provides that in a money appeal notwithstanding anything contained in the sub-Rules of Rule 5 if the appellant fails to make deposit or furnish security as specified in Rule 1(3) thereof, the Court shall not make an order staying the execution of the decree. Hence, in respect of a money decree not only the appellant is required to satisfy the conditions laid down in Rule 5(3) of Order XLI but it is incumbent on him to comply with the requirement of making deposit or furnishing security in respect of the disputed decretal sums as specified in Rule 1(3) thereof. However, when the appellant is the Government an exemption clause is incorporated in Order 27 Rule 8A of the Code. The said Rule, inter alia, provides that no security, as

mentioned in Rule 5 and 6 of Order XLI, shall be required from the government when the latter is the appellant. By operation of the aforesaid Rule, the Government is therefore exempted from furnishing security as mentioned in Rule 5 and 6 of Order XLI of the Code for due performance of the decree or order appealed against. The philosophy behind such exemption is the presumption of solvency and law abiding character of the Government in the matter of due performance of decrees of Court upon dismissal of the appeal. However, such exemption cannot be interpreted to mean that stay of execution of a decree is a matter of course when the Government is the appellant. Notwithstanding the exemption to furnish security, the Government like any other appellant must satisfy the Court that it shall suffer substantial loss if the execution of such decree is not stayed and that there is no inordinate delay in seeking such relief. Hence, operation of Order 27 Rule 8A does not entitle the Government to an order of stay of execution of a decree even if it does not satisfy the conditions of sub-clauses (a) and (b) of Rule 5(3) of Order XLI of the Code.

In respect of appeal from money decree the appellant is cast with an additional burden to make deposit or furnish security as directed by the Court under Rule 1(3) of Order XLI to entitle him to an order of stay as provided in Rule 5(5) of Order XLI.

In other words, compliance of direction of Court under Rule 1(3) of Order XLI for making deposit or furnishing security by the appellant of the disputed decretal amount is a condition precedent for grant of stay of execution of a money decree. In the event of non-compliance of such direction, the Court shall have not jurisdiction to grant an order of stay in view of Rule 5(5) of Order XLI of

the Code. However, when the appellant is the Government such jurisdictional embargo imposed by Rule 5(5) of Order XLI is obviated by the operation of Order 27 Rule 8A which exempts the Government from furnishing security as mentioned in Rule 5 and 6 of Order XLI. Hence, where the Government is the appellant the Court shall have jurisdiction to entertain and grant an order of stay of execution of a money decree without insisting on furnishing of security under Rule 1(3) of Order XLI of the Code provided it is satisfied as to the existence of conditions engrafted in sub-clause (a) and (b) of Rule 5(3) of Order XLI.

The aforesaid analysis gives rise to a residual issue – whether operation of Order 27 Rule 8A absolutely bars the discretion of the appellate Court to direct the appellant Government to deposit whole or part of the disputed decretal amount as a condition for grant of stay of execution of a money decree.

It has been argued that as deposit of the decretal sum is insisted upon by the Court as a security, such discretion is necessarily exempted by operation of Order 27 Rule 8A of the Code. Reliance is placed on the decision of the Kerala High Court in **State of Kerala Vs. T.K. Kuruvilla & Ors**, AIR 2004 (Ker) 233.

On the other hand, the Allahabad High Court in **U.P. Avas Evam Vikas Parishad, Lucknow Vs. Satya Prakash**, 1997 A I H C 3266 inter alia, held that by operation of Order 27 Rule 8A of the Code the Government is exempted from furnishing security but such exemption cannot take away the discretion of the Court in directing the Government to deposit whole or part of the decretal amount.

Similar view is taken by the Orissa High Court in **Land Acquisition Collector Vs. Smt. Sita Dei & Anr.**, AIR 2007 (Ori.) 152. A Division Bench of this

Court in **The State of West Bengal Vs. M/s. Texmaco Ltd., 2013(2) CLJ(Cal) 241**, inter alia, held that it was open to the Appellate Court to give direction to deposit whole or part of the disputed decretal amount in order to strike balance between the parties for the purpose of granting stay of execution of the decree.

In order to resolve the aforesaid controversy, one must examine the legislative intent for incorporating Order 27 Rule 8A in the Code. The aforesaid provision was engrafted to exempt the Government to furnish security as a guarantee for due performance of a decree as mentioned in Rule 5 and 6 of Order XLI. Notwithstanding such exemption, discretionary power of the Court to grant stay of execution of a decree can be exercised in favour of the Appellant Government only if it satisfies the Court as to the existence of clauses (a) and (b) of Rule 5(3) of Order XLI. As “substantial loss” to the appellant is a condition precedent to grant stay, execution of a money decree is ordinarily not stayed since satisfaction of a money decree does not amount to irreparable injury to the appellant as the remedy of restitution is available to him in the event the appeal is allowed. [See, **Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai, 2005(4) SCC 1, para 6**]. Under such circumstances, when the Court chooses to exercise its discretion in favour of the appellant State to grant stay of execution of a money decree it must balance the equities between the parties and ensure that no undue hardship is caused to a decree holder due to stay of execution of such decree. Hence, in appropriate cases, the Court in its discretion may direct deposit of a part of the decretal sum so that the decree holder may withdraw the same without prejudice and subject to the result of the appeal. Such direction for deposit of the decretal sum is not for the purpose of furnishing security for due

performance of the decree but an equitable measure ensuring part satisfaction of the decree without prejudice to the parties and subject to the result of the appeal as a condition for stay of execution of the decree.

To hold that the Court is denuded of such equitable discretion while granting stay of execution of a money decree in favour of the Government, would cause grave hardship to deserving decree holders who in the facts of a given case may be entitled to enjoy part satisfaction of the decree without prejudice and subject to the result of the appeal as a condition for stay of execution of the entire decree.

Hence, it is opined although Order 27 Rule 8A may exempt the appellants Government from the mandatory obligation of furnishing security in terms of Rule 1(3) for seeking stay of execution of a money decree as under Rule 5(5) of Order XXI, the said provision cannot be said to operate as an absolute clog on the discretion of the Court to direct the deposit of the decretal amount as a condition for grant of stay of execution of the decree in appropriate cases more particularly when such direction is coupled with the liberty to the decree holder to withdraw a portion thereof in part satisfaction of the decree without prejudice and subject to the result of the appeal

Coming to question no. 4, it may be noted Article 112, inter alia, provides that the President shall in respect of every financial year cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditures of the Government of India for that year which is described as the "annual financial statement" and commonly referred to as the Annual Budget.

Sub-Article 3 of the said Article describes the expenses which are charged on the Consolidated Fund of India. Clause (f) of such sub-article provides that sums required to satisfy any judgement/decreed or award passed by any Court or arbitral tribunal shall be charged on the Consolidated Fund of India. Similar provision is provided in Article 202 of the Constitution in respect of every State wherein the annual financial statement is caused to be laid by the Governor of that State before the legislative assembly of such State.

Article 112(3)(f) is a mere acknowledgement of a solemn liability of the Government arising out of any decree or award passed by any Court of law or arbitral tribunal. Such acknowledgement does not secure any specified amount for satisfaction of the money decree unlike a deposit made or security furnished by the appellant in terms of Rule 1(3) of Order XLI. As discussed above, although liability to furnish security as mentioned in Rule 5 and 6 of Order XLI is exempted by operation of Order 27 Rule 8A of the Code, no such exemption can be inferred from Article 112(3)(f) of the Constitution as the said constitutional provision and the statutory liability under Order XLI Rule 1(3) of the Code operate on different planes and were enacted for different purposes. While the constitutional provision is a mere acknowledgement of liability of the State arising out of a decree or an award, the statutory provision ensures a convenient and prompt mode to secure and execute a money decree which is appealed against.

Accordingly, question nos. 1 and 4 are both answered in the negative.

Conclusion :

In view of the aforesaid discussion, it is held as follows :-

- i) Order 27 Rule 8A does not exempt the appellant Government from satisfying the Court as to the existence of conditions (a) and (b) of Rule 5(3) of Order XLI in order to obtain stay of execution of the decree appealed against. Hence, question no. 1 is answered in the negative.
- ii) Liability under Order 41 Rule 1(3) to deposit or furnish security of the disputed decretal sum as directed by the Court in respect of a money appeal is directory in nature. Hence, failure to comply with such direction per se would not denude jurisdiction of the Court to hear the appeal on merits. However, if such failure is found to be willful, deliberate and contumacious in nature, the Court may in its discretion adjourn the hearing till the appellant purges his contempt and complies with such direction. Question no. 2 is, thus, answered in the affirmative subject, however, to the aforesaid rider.
- iii) In view of the law declared in **Kayamuddin (supra)** and **M/s. Malwa Strips Pvt. Ltd. (supra)** it is opined that a money appeal cannot be dismissed for non-compliance of requirements under Rule 1(3) of Order XLI. Question no. 3 is answered in the negative.
- iv) Article 112(3)(f) of the Constitution is a mere acknowledgement of the liability of the Government arising out of a decree/award passed by any Court or arbitral tribunal. The Constitutional provision operates in a

different field and does not absolve the liability of the appellant Government under Order XLI rule 1(3) of the Code which, however, is subject to the exemption engrafted in Order 27 Rule 8A thereof. Question no. 4 is therefore answered in the negative.

Reference is accordingly answered. Appeals be sent down to the appropriate Bench for decision on merits in the light of the law declared, as aforesaid.

I agree.

(Manjula Chellur, C.J.)

I agree.

(Arijit Banerjee, J.)

(Joymalya Bagchi, J.)