

IN THE COURT OF THE ADDL. DISTRICT JUDGE -I, MAVELIKARA
Present:- Smt.V.G. Sreedevi, Addl. District Judge-I

Tuesday, the 8th day of October, 2024/16th Aswina, 1946

I.A. No. 02/2024 in AS. No. 10/2024

(Filed on :26.02.2024)

(IA. No. 02/2024 in OS.No. 191/2017 on the file of the Munsiff's Court, Mavelikara)

Petitioner/ Appellant : Anil Kumar, aged 46 years,
 Evoorpallathu, Vazhuvadi, Mavelikara.

(By Adv. V.J. Alex)

Respondent : Nalini Kurup, aged 77 years,
 Vijayamandiram, Muthoor Muri,
 Thiruvalla.

(By Adv. Chandrasekharan Nair)

(Adv. R. Sujatha & Adv. Elizabeth Koshy)

This petition having been finally heard on 27.09.2024 and the court on 08.10.2024 passed the following:-

ORDER

This petition is filed under Order XLI Rule 5(1) of C.P.C. for staying the execution of the decree passed in O.S.191/2017 on the file of the Munsiff's Court, Mavelikara.

2. In the affidavit in support of the petition, the petitioner/appellant who is the defendant in the suit alleged as follows:- The suit was for permanent prohibitory injunction as well as mandatory injunction. The learned Munsiff decreed the suit, thereby, the defendant was restrained by an order of permanent prohibitory injunction from tampering or removing the fencing at the eastern

portion of the B schedule way and obstructing the construction of boundary wall or fencing on the northern side of B schedule. There is every chance of succeeding the appeal, hence prayed for staying the proceedings in the execution.

3. Objection was filed by the plaintiff/respondent contending that there is absolutely no chance for succeeding the appeal because the grounds stated are not sustainable. There is no necessity or apprehension on the part of the petitioner/defendant to stay the operation of the decree. Moreover, there is no provision in law to stay the entire execution proceedings in pursuance of the decree. Hence, prayed for dismissal of the petition.

4. Heard both sides.

5. The point that arises for consideration is:

Is the decree liable to be stayed, as prayed for?

6. The point:- The suit was one for permanent prohibitory injunction and the suit was decreed directing the defendant not to cause any obstructions in the construction of boundary fencing separating B schedule and also not to encroach into the way. The defendant in the suit who is the appellant herein is highly aggrieved and according to him, the said decree is not sustainable and is liable to be set aside in the appeal.

7. The learned counsel for the respondent/plaintiff, on the other hand, contended that there is no provision to stay the operation of a decree because the Appellate Court cannot at the admission stage

invoke the power under order XLI Rule 33 of CPC and to support the said argument, the learned counsel has relied upon 2021 KHC 5838, Raveendran v. Lalitha and Others. In the said judgment, the Hon'ble High Court has considered the question, what is the jurisdiction of the Appellate Court at the time of admission of the appeal, whether it is under Order XLI Rule 5 or Order XLI Rule 33. It is held therein: "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 Rule 33 of Order 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 of hearing, but not before, at any rate, not at the stage of considering or determining the entertainability and admissibility of an appeal."

8. It is true that the petitioner is seeking stay of execution of the decree. That can be done by the Appellate Court at the stage of admission and it is permissible also. When the decree holder is filing execution petition and is executing the decree, thereby the compound wall is constructed, definitely that would cause irreparable injury to the defendant/appellant who is the petitioner herein. So, only after deciding the entire matter on merits, the decree can be executed. Hence, in view of the said circumstance, I am inclined to allow the petition. Therefore, this point is found in favour of the petitioner.

9. **In the result,**

The petition is allowed, thereby, the execution proceedings under the decree is stayed till the disposal of the appeal.

(Dictated to the Confidential Assistant transcribed and typed by her, corrected by me and pronounced in open court on this the 8th day of October, 2024)

V.G. Sreedevi

Additional District Judge-I

Appendix : Nil

Additional District Judge-I