

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No. 779 OF 2022

M/s. P.K. Enterprises and another* *Petitioners

Mr. Bibekananda Bhuyan, Advocate
-versus-

Suresh Chandra Panda and others* *Opp. Parties

Mr. Prasanna Kumar Panda, Advocate
(For Caveator/Opp. Party No.1)

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
19.10.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. The CMP has been filed assailing the order dated 22nd July, 2022 (Annexure-4) passed by learned 1st Additional District Judge, Cuttack in R.F.A. No.18 of 2020, whereby entertaining an application under Order XLI Rule 5 C.P.C., the Appellate Court directed to stay further proceeding in Execution Case No. 20 of 2020 pending before learned 3rd Additional Civil Judge (Sr. Division), Cuttack subject to condition that the Petitioner shall deposit a cash of Rs.7,00,000/- and property security of Rs.7,98,375/- before learned Appellate Court with a further condition to pay Rs.15,000/- per month to the D.Hr- Opposite Party No.1 towards damages from the month of July, 2022 onwards in respect of the suit land till disposal of the appeal.
3. Mr. Bhuyan, learned counsel for the Petitioners assailing the sustainability of the impugned order under Annexure-4

submits that C.S. No. 586 of 2015 was filed by the Opposite Party No.1 for eviction of the Petitioners from Schedule-A property, realization of house rent and damages @ Rs.500/- per day with effect from 1st April, 2010 till the Petitioners vacate the suit premises along with cost. The present Petitioners being the Defendant Nos.1 and 2 filed counter-claim praying *inter alia* to direct the Plaintiff-Opposite Party No.1 to pay Rs.1,76,000/- and for damages @12% till its payment along with cost. C.S. No.124 of 2015 was filed by the present Petitioners for declaration of right over the Schedule-A property and for permanent injunction. The Opposite Party No.1 filed counter-claim praying *inter alia* to declare that the sale deed dated 26th November, 2011 executed in favour of the present Petitioners over Schedule-B land is null and void and for permanent injunction. C.S. No.586 of 2015 and counter claim filed in C.S. No.124 of 2015 filed by the Opposite Party No.1 were allowed directing eviction of the present Petitioners from Schedule-A land and to deliver vacant of possession of the same to Suresh Chandra Panda-Opposite Party No.1 within three months. The Defendants in C.S. No.586 of 2015 were held jointly or separately, liable to pay balance arrear rent of Rs.1,63,000/- for *pendente lite* and future interest @ 5% per annum to the Opposite Party No.1. It was further directed that the present Petitioners are also liable to pay damages @ Rs.500/- per day with effect from 1st April, 2015 till they vacate the Schedule-A premises. Counter claim filed in C.S. No.586 of 2015 as well as

C.S. No.124 of 2015 filed by the present Petitioners were dismissed. Assailing the judgment and decree passed in C.S. No. 586 of 2015, the Petitioners have preferred R.F.A. No.18 of 2020, which is pending in the Court of learned 1st Additional District Judge, Cuttack. During pendency of the appeal the Opposite Party No.1 filed Execution Case No.20 of 2020. Consequently the Petitioners filed an application for stay of execution proceeding in R.F.A. No.18 of 2020. While adjudicating the petition for stay of execution proceeding, the impugned order under Annexure-4 has been passed, which is under challenge in this CMP.

4. Mr. Bhuyan, learned counsel for the Petitioners submits that Order XLI Rule 5(3) C.P.C. makes it clear that while passing an order of stay of execution proceeding, the Court has to see that adequate security is provided by the Applicant for due performance of the decree or order. Order XLI Rule 5(3) C.P.C. reads as under:

“5. Stay by Appellate Court.-

XXX XXX XXX XXX

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.”*

5. He, therefore, submits that the Court while passing an order of stay of execution of the decree has to satisfy itself that the J.Dr has furnished adequate security for due performance of the decree. It cannot act as an executing Court in directing the J.Dr to comply any direction in the judgment decree. He, further submits that learned appellate Court while adjudicating the petition has referred to the ratio decided in the cases of ***Iftikhar Iman Mallick @ Iftikhar Imam –v- Mst. Mehroom Nisha***, reported in 2014 (II) CLR 750 and ***Ananta Charan Pothal –v- Smt. Guramani Pothal and others***, reported in 2013 (II) OLR 919, wherein this Court has held that learned appellate Court can direct deposit of the decretal amount for the purpose of grant of stay of execution proceeding as contemplated under Order XLI Rule 5(3) C.P.C.. But, the Court may not insist for cash deposit only, partly cash deposit and partly property security is sufficient to meet the purpose of the provision. He, therefore, submits that direction to pay Rs.15,000/- per month to the D.Hr-Opposite Party No.1 is contrary to the object and tenor of the provision for stay of the execution proceeding. If such an amount is paid to the D.Hr-Opposite Party No.1, then it would be very difficult on the part of the Petitioners to recover the same, in the event they succeed in the appeal. He further submits that by directing payment to damages to the Opposite Party No.1, the Court has impliedly allowed the execution case in part, which is not permissible in law. He, however, submits that the Petitioners have already deposited Rs.7,00,000/- in cash and has furnished

property security for rest of the amount. They have also deposited a sum of Rs.60,000/- before learned appellate Court towards damages from July to end of October, 2022. He, therefore, prays for setting aside the impugned order under Annexure-4 to the extent of directing payment of Rs.15,000/- per month to the D.Hr-Opposite Party No.1 and to modify the impugned order by directing the J.Drs-Petitioners to deposit the same before learned appellate Court.

6. Mr. Panda, learned counsel for the Opposite Party No.1 vehemently objects to the same and contends that the Petitioners had earlier moved this Court in CMP No.948 of 2022 assailing the order dated 23rd September, 2022 passed by learned District Judge, Cuttack in Civil Revision Petition No.06 of 2022, whereby an application for stay of Execution Case No.20 of 2020 was rejected. While disposing of the CMP, this Court vide order dated 28th September, 2022 directed as under:

“6. Accordingly, this CMP is disposed of with a direction that in the event the Petitioners, without prejudice to their case, comply with the order dated 22nd July, 2022 passed by learned 1st Additional District Judge, Cuttack in R.F.A. No.18 of 2020, further proceeding in Execution Case No.20 of 2020 shall remain stayed, which shall be subject to any order to be passed in CMP No.779 of 2022.

7. Since this order is passed without serving any notice on the Opposite Party, he is at liberty to move this Court for variation of this order, if he feels aggrieved.”

Petitioners have not complied with the said order till date as they instead of paying Rs.15,000/- per month towards damages to the Opposite Party No.1, have only deposited a sum

of Rs.60,000/- before learned appellate Court, which was not the direction of either learned appellate Court or this Court. Thus, the Petitioners have not come to the Court with clean hand. As such, the CMP is liable to be dismissed on that score alone.

7. He further submits that the Opposite Party No.1 being the D.Hr, should not be prevented from enjoying the fruit of the decree. By depositing the damages before learned appellate Court, the J.Drs have put the D.Hr to serious prejudice as the Opposite Party No.1 is deprived of getting the aforesaid amount from which he earns his livelihood. He also refers to Section 108 of the Transfer of Property Act, 1882 (for short 'the Act') and submits that in view of the 108(1) of the Act, the lessee is bound to pay or tender at the proper time and place the premium or rent to the lesser or his agent in his behalf. Thus, the Petitioners are liable to pay the damages to the Opposite Party No.1. He further submits that in addition to the power conferred under Order XLI Rule 5(3) C.P.C., the Court can exercise discretionary power under Section 151 C.P.C. to direct payment of damages to the D.Hr, which the Court has done. Hence, the impugned order under Annexure-4 warrants no interference.

8. Heard learned counsel for the parties. Perused the impugned order under Annexure-4, case laws as well as provisions of law relied upon by learned counsel for the parties.

9. The factual aspect of the case is not disputed. The question remains to be adjudicated in this CMP is whether learned appellate Court is justified in directing the Petitioners to

pay Rs.15,000/- per month to the Opposite Party No.1 as a condition precedent to stay further proceeding in Execution Case No.20 of 2020. As would be apparent from the provision of Order XLI Rule 5(3) C.P.C., along with other requirement as provided under clauses (a) and (b) of Sub-rule 3, the Court has the discretion under clause (c) of Sub-rule 3 to stay execution of the decree subject to condition that the security has been given by the applicant (Petitioners herein) for the due performance of such decree or order as may ultimately binding upon him. The provisions nowhere provides for payment of the amount to the D.Hr as a condition precedent for stay of execution. Further the case laws in *Iftikhar Iman Mallick @ Iftikhar Imam* and *Ananta Charan Pothal* (supra), this Court has laid down the law that the Court while passing an order of stay of execution can direct to deposit of decretal amount for the purpose of stay of execution proceeding as contemplated under Order XLI Rule 5(3) C.P.C. But the Court may not insist upon cash deposit only. It can partly direct for cash deposit and partly property security depending upon the facts and circumstances of the case. Payment of damages is a money decree and the provision of Order XLI Rule 5(3) C.P.C. is squarely applicable to the instant case. The direction of learned appellate Court to pay the amount to the D.Hr-Opposite Party No.1 amounts to execution of decree in part, which is not the intent and object of the provision under Order XLI Rule 5(3) C.P.C. The provision is made to stay execution by securing performance of the decree and not to

execute a part of the decree itself. The case laws relied upon by learned appellate Court also nowhere makes any provision for payment of amount to the D.Hr. Thus, direction to pay damages @ Rs.15,000/- per month to the Opposite Party No.1 (D.Hr) is not sustainable in the eyes of law in the facts and circumstances of the case.

9.1. Section 108(l) of the Act is not applicable to the instant case as said provision relates to payment of rent and not damages. Further in view of the specific provisions under Order XLI Rule 5 C.P.C., the Court cannot exercise inherent power under Section 151 C.P.C. In the instant case, there is no material on record to show that direction to pay damages has been made by learned appellate Court in exercise of power under Section 151 C.P.C. Thus, the submission of Mr. Panda, learned counsel for the Opposite Party No.1 is not sustainable to this extent.

9.2. It appears that this Court while disposing of CMP No. 948 of 2022 directed the Petitioners to comply with the order passed by learned appellate Court vide Annexure-4 as a condition precedent for stay of Execution Case No. 20 of 2020 without prejudice to their case, which shall be subject to the order to be passed in this CMP. But, the Petitioners instead of paying Rs.15,000/- per month to the Opposite Party No.1, deposited Rs.60,000/- before learned appellate Court. Thus, the Opposite Party No.1 is entitled to receive the said amount in terms of the order under Annexure-4, which shall be subject to the order to be passed in R.F.A. No. 18 of 2020.

10. In view of the above, the impugned order under Annexure-4 directing payment of Rs.15,000/- per month to the D.Hr-Opposite Party No.1 is not sustainable and is accordingly set aside. Accordingly, this Court modifying the impugned order under Annexure-4 directs that the Petitioners shall go on depositing Rs.15,000/- per month before learned appellate Court till disposal of the appeal as a condition precedent for stay of Execution Case No.20 of 2020, the rest part of the order stands confirmed. Rs.60,000/- deposited by the Petitioners shall be released in favour of the Opposite Party No.1 by making proper application to that effect.

11. Since the parties to the appeal have already entered appearance, learned appellate Court shall make an endeavour to dispose of the appeal as expeditiously as possible preferably within a period of six months giving opportunity of hearing to the parties concerned, if there is no legal impediment.

12. With the aforesaid modification in the impugned order under Annexure-4, this CMP is disposed of.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge