

(2008) 12 SC CK 0174

In the Supreme Court Of India

Case No : Civil Appeal No"s. 7410-7411 of 2008 (Arising out of SLP (C) No"s. 18095-18096 of 2008)

Malwa Strips Pvt. Ltd.

APPELLANT

Vs

Jyoti Ltd.

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 41 Rule 5(5), Order 41 Rule 5, Order 41 Rule 1(3)
Companies Act, 1956 — Section 87

Citation : AIR 2009 SC 1581 : (2009) AIRSCW 1113 : (2009) 2 AWC 1280
Supp : (2008) 13 JT 515 : (2009) 2 LW 845 : (2010) 2 MPJR 334 : (2009) 1
MPJR 253 : (2009) 154 PLR 513 : (2009) 1 SCALE 438 : (2009) 2 SCC 426 :
(2009) 1 Supreme 415

Hon'ble Judges : S. B. Sinha, J;Cyriac Joseph, J

Bench : Division Bench

Advocate : Shiv Sagar Tiwari, for the Appellant; Kamini Jaiswal, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Leave granted.

2. Appellant is a company incorporated and registered under the Companies Act, 1956 (for short, "the said Act"). It is engaged in manufacturing of copper strips and copper foils etc. It has its registered office at 17-20, Industrial Area No. 2, AB Road, Dewas, Madhya Pradesh. Respondent is also a company registered and incorporated under the said Act. It has its registered office at Nanubhai Amin Marg, Industrial Area, Vadodara. Respondent used to place orders for supply of copper rods strips and foils from time to time with the appellant. Allegedly, the payments used to be made towards the said supply from time to time. Appellant, inter alia, on the premise that a sum of Rs. 49,03,908.29 was owed to it by the respondent filed a Summary Suit under Order XXXVII of the Code of civil Procedure, 1908 (for short, "the Code"). An application for leave to defend the

suit was filed by the respondent. Appellant contended that as the respondent raised a defence only as regards the rate of interest and not the principal amount, its application should be dismissed. By an order dated 23.08.2007, the application for leave to defend the suit was allowed, subject to the condition that the respondent shall make payment of undisputed and admitted amount of Rs. 22,64,789.52. Such deposit was to be made by 22.9.2007. Respondent obtained extension of time to deposit the amount. However, as the said amount was not deposited, the trial court passed a judgment on or about 14.11.2007 decreeing the suit in favour of the appellant. Respondent preferred an appeal there against. An application for stay of the said judgment and decree passed by the trial Court was also filed. By reason of the impugned judgment, the High Court stayed the operation and execution of the decree in its entirety. While doing so, the High Court opined:

We are conscious of the fact that usually money decrees are not stayed in appeal. At the same time, it is not a universal principle of law that the stay can never be granted in cases relating to money decree. The Court has discretion to grant a stay keeping in view all facts and circumstances of the case, including the manner in which the trial of the suit was conducted and the impugned decree was passed.

We are prima facie of the view that a case for stay of execution of the decree is made out by the appellant on the facts on record. We do not, however, wish to express any opinion on the merits and demerits of the case at this stage, which, in our opinion, will be gone into at the time of hearing of the appeal. For the purpose of grant of stay, we are of the view that a ground for stay, as contemplated under Order 41 Rule 5 CPC is made out. We are, therefore, inclined to stay execution of the decree pending appeal.

Appellant is, thus, before us.

3. Mr. Shiv Sagar Tiwari, learned Counsel appearing on behalf of the appellant would submit that the High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that the defendant - respondent had raised no substantive and bona fide defence and that in view of the matter it was not a case where the execution of the decree should have been stayed.

4. Ms. Kamini Jaiswal, learned Counsel appearing on behalf of the respondent, on the other hand, would urge that compound interest was not payable and in any event a suit under Order XXXVII of the Code being not maintainable, the manner in which the judgment and decree passed by the learned trial judge being wholly unsustainable, the High Court could not be said to have committed any error of law in passing the impugned judgment.

5. The decree passed by the learned trial judge is a money decree. A conditional leave to defend was granted. The said condition has not been fulfilled. Leave to defend, therefore, would be deemed to have been refused. Correctness of the

said order had not been questioned.

The Parliament, by reason of Section 87 of Act 104 of 1976 inserted Sub-rule (3) in Rule 1 of Order XLI of the Code, which is to be in the following effect:

(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.

6. An explanation was also added to Sub-rule (1) of Rule 5 of Order XLI. In terms of Sub-rule (1) of Rule 5 of Order XLI, an appeal shall not operate as a stay of proceedings. It is for the Appellate Court who may, for sufficient cause, order stay of execution of such decree. The explanation appended to the said sub-rule reads as under:

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.

7. In terms of Sub-rule (5) of Rule 5 of Order XLI, the court shall not make an order staying the execution of the decree 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.

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.

9. In Rajasthan State Electricity Board and Another Vs. Ram Deo and Others, after noticing some of the aforementioned decisions as also the legislative history of the said provision, a learned Single Judge of the Rajasthan High Court held as under:

19. After close scrutiny of the aforesaid observations, I am of the opinion that in view of the provisions of Sub-rule (5) of Rule 5 of Order 41 CPC it cannot be held that appeal against the ' decree for payment of money is not maintainable, if filed without making compliance of the provisions contained in Sub-rule (3) of Rule 1 of Order 41 CPC and it is the duty of the Registry to see that on application under Order 41 Rule 5 CPC seeking stay of money decree the appellant has to incorporate a note in regard to his readiness and willingness to comply with the directions under Sub-rule (3) of Rule 1 of Order 41 CPC. If the appeal is preferred against the decree for payment of money without any stay application under Order 41 Rule 5 CPC then in that event, it is the duty of the appellant to incorporate a note in the memo of appeal in respect of his readiness

and willingness to comply with the directions issued by the Court under Sub-rule (3) of Rule 1 of Order 41 CPC.

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*, opined that non-compliance of a direction to deposit the decretal amount or part of it or furnish security therefore 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.

11. To the same effect is the decision of this Court in *Sihor Nagar Palika Bureau Vs. Bhabhlubhai Virabhai and Co.*, wherein it was held:

6. Order XLI Rule 1(3) of the CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the Appellate Court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit. Under Order XLI Rule 5(5) a deposit or security, as abovesaid, is a condition precedent for an order by the Appellate Court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the Appellate Court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the Appellate Court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course, a discretionary power and is meant to be exercised in appropriate cases.

To the same effect is the decision of this Court in *B.P. Agarwal and Another Vs. Dhanalakshmi Bank Ltd. and Others*, The High Court in this case failed to notice the provisions of Sub-rule (3) of Rule 1 of Order XLI.

The appellate court, indisputably, has the discretion to direct deposit of such amount, as it may think fit, although the decretal amount has not been deposited in its entirety by the judgment debtor at the time of filing of the appeal. But while granting stay of the execution of the decree, it must take into consideration the facts and circumstances of the case before it. It is not to act arbitrarily either way. If a stay is granted, sufficient cause must be shown, which means that the materials on record were required to be perused and reasons are

to be assigned. Such reasons should be cogent and adequate.

The High Court, with respect, failed to notice that suit was one under Order XXXVII of the Code. Whether it was maintainable or not may fall for consideration in the appeal. Even assuming that the same was not maintainable, the question which should have been posed by the High Court was as to whether sufficient cause had been made out to reverse the decree passed in favour of the appellant. Even a decree could have been passed having regard to the defence raised by the respondent under Order XII Rule 6 of the Code. We, therefore, see no justification at all as to why an order of stay of the nature was passed by the High Court.

12. Even if the said provision is not mandatory, the purpose for which such a provision has been inserted should be taken into consideration. An exceptional case has to be made out for stay of execution of a money decree. The Parliamentary intent should have been given effect to. The High Court has not said that any exceptional case has been made out. It did not arrive at the conclusion that it would cause undue hardship to the respondent if the ordinary rule to direct payment of the decretal amount or a part of it and/or directly through the judgment debtor to secure the payment of the decretal amount is granted. A strong case should be made out for passing an order of stay of execution of the decree in its entirety.

13. We, therefore, having regard to the facts and circumstances of this case direct the respondent to deposit a sum of Rs. 35 lakhs within a period of four weeks from date. Respondent shall furnish adequate security for the rest of the decretal amount within the same period. Appellant shall be entitled to withdraw a sum of Rs. 30 lakhs out of the said deposited amount without furnishing any security and the rest amount on furnishing security. In the event the respondent fails to comply with the order, the decree shall be executable at once.

14. The appeals are allowed with the aforementioned directions. No costs.