
(1990) 02 CAL CK 0056

In the Calcutta High Court

Case No : Appeal No. 323 of 1988 and Suit No. 922 of 1979

Shaw Wallace and Co. Ltd.

APPELLANT

Vs

Nepal Food Corporation and Another

RESPONDENT

Date of Decision : 27-02-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5(1), Order 41 Rule 5(3)

Citation : (1991) 1 CALLT 233

Hon'ble Judges : Bimal Chandra Basak, J;Amarabha Sengupta, J

Bench : Division Bench

Advocate : P.C. Sen, for the Appellant;B.K. Bachawat and R.P. Mitra, for the Respondent

Judgement

Bimal Chandra Basak, J.—This is an application for stay in an appeal preferred against an judgment and order passed by the Trial Court. We shall shortly set out the facts of this case. However, as we are not hearing the appeal on merits at this stage, we shall not go into the facts in details.

2. This suit was filed by the plaintiff Nepal Food Corporation a body corporate established under the appropriate laws of Nepal and carrying on business at Kathmandu, Nepal, against one U.P.T. Imports Exports Ltd., a company incorporated under the appropriate laws of Thailand and Shaw Wallace & Company Ltd., an existing company within the meaning of the Companies Act, 1956 (the appellant herein). In this suit, the plaintiff prayed for a decree for Rs. 1,26,3/8,951.06 p : The said suit was filed for recovery of the said amount, inter alia, on the ground that the plaintiff delivered to the defendant No. 1, U.P.T. Imports Exports Ltd., certain quantity of Nepal parboiled rice on board a vessel for carriage to the port of Penang, Malayasia, The said vessel was owned by the defendant No. 1. A Bill of Lading in respect thereof was issued by the appellant herein (the defendant No. 2) for and on behalf of and as an agent of the defendant No. 1 duly authorised in that behalf. The goods were not delivered to the consignee, but it was delivered to some other person without production of

the relevant Bills of Lading. Written Statement was filed. The suit was contested and, ultimately, by a judgment and decree dated 9th September, 1987, the learned trial Judge held that the plaintiff was entitled to a decree for damages equal to the value of the said goods which amounts to Rs. 1,05,32,459.22 p. It was further decreed that the plaintiff was also entitled to interim interest and interest on judgment at the rate of 9% on the said amount of Rs. 1,05,32,459.22 p. on and from the date of the institution of the suit until payment. The learned Judge did not grant any interest for the period from 4th December 1978 to 3rd December 1979. It is to be pointed out that 4th December, 1978 is the date of the Bill of Lading and 3rd December, 1979 is the date of the institution of the suit.

3. Being aggrieved by the same, an appeal was preferred and this stay petition filed. The first prayer, according to the practice and procedure of this Court, was for leave to file Memorandum of Appeal without certified copy of the decree and judgment appealed from upon usual undertaking. This is the prayer which is made in view of the provisions of the CPC and our Rules which require that the Memorandum of Appeal must be accompanied by certified copy of the decree or order appealed from. However with the leave of the court, such memorandum of appeal may be filed without certified copy upon certain undertakings being given in accordance with the age-old practice of this premier High Court in India. In this connection we may refer to various decisions of this Court including that of the Division Bench of this Court in the case of Angur Bala v. Rathindra Nath Mitra in Consolidated Appeal Nos. 393 of 1975 and 7 of 1976 delivered on 13th April, 1976. It is unfortunate that persons not acquainted with the practice of this court and the law laid down regarding the same, under a misconception about such practice have failed to appreciate the same. Shortly speaking, such leave is given to prefer such appeal in the case of urgency where without waiting for the certified copy an appeal has to be preferred to obtain a stay. However, as in this particular case, such memorandum of appeal was filed without such certified copy on 13th May, 1988, that is, about eight months after the decree was passed. After the affidavits were filed, this stay petition has now come up before us for final hearing. We may point out that no interim or ad interim order has yet been passed by the appeal court in this matter.

4. In support of this stay petition, Mr. Sen has submitted that having regard to the amount involved and averments made in paragraphs 110 and 111 of the petition, such stay should be granted; otherwise, it will cause loss and injury to the appellant. Mr. Sen has further submitted that the Court while granting stay has no doubt to consider the provisions of sub rule (3) of Order 41 Rule 5 of the Code of Civil Procedure, but, in the facts and circumstances of the case, the Court should consider the decretal amount involved and such averments in its stay petition. It is further submitted that the Court is not bound to secure the amount of interest. He has also drawn our attention to the concluding portion of sub-clause (c) of sub-rule (3) of Order 41 Rule 5 of the CPC and submitted that the Court must also take into consideration that, ultimately, the decree may not be enforceable.

5. On behalf of the respondent-decree holder, Mr. Bachawat has submitted that no case has been made out for suit stay in view of the provisions of sub-rule (3) of Order 41 Rule 1 and sub-rule (3) of Order 41 Rule 5 of the Code of Civil Procedure, which is mandatory. In any event, the Court should direct that the entire money be deposited" in Court so that his client can obtain the benefit of the decree obtained. In support of his contentions, Mr. Bachawat has relied on the following Division Bench judgments of this Court: Srinibas Prosad Singh v. Kesho Prosad Singh 15 CWN 475 (DB) and Sm. Bibhabati Debi and Others Vs. Ramendra Nabayan Roy and Another . He has also relied on a decision of the Madras High Court reported in G. Sundaram Chettiar Vs. P.A. Valli Ammal, So far as the nature of security to be furnished, by way of example, he has relied on three decisions of the Supreme Court P.S.L. Ramanathan Chettiar and Ors. v. O.R.M. P.RM, Ramanathan Chettiar AIR 1968 SC 1947 ; Mehta Teja Singh & Co. v. Grindlays Bank Ltd. (1982) 2 SCC 199 and Central Bank of India Vs. State of Gujarat and Others, .

6. In Reply, Mr. Sen has relied on a Special Bench decision of this Court-In the goods of Brij Coomaree v. Ram Rik Das, 5 CWN 781 .

7. At the outset, we set out herein below the relevant provisions of Order 41 Rule 1 sub-rule (3) and Order 41 Rule 5 sub-rule (3) of the CPC :

"Order 41 Rule 1 sub-rule (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 41 Rule 5 sub-rule (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."

8. Before dealing with the respective submissions made by the parties we shall at first consider the cases cited before us . In the case of Srinibas Prosad Singh v. Kesho Prosad Singh (Supra), it was a hearing of a Rule issued against the decree holder to show cause why the execution of the decree of the Subordinate Judge against the judgment debtors should not be stayed pending the hearing of as appeal preferred by the petitioner to the High Court against the said decree. This Rule was issued upon an application under Order 41, Rule 5 of the Code of Civil Procedure, 1908, stay of execution of the decree of the court below. At the time the Rule was issued, the Appeal Court also made an order under sub-rule (4) of that Rule for stay of execution pending the hearing of the application. Referring to Order 41 Rule 5 of the Code, the Court observed that each of these three

elements is an essential pre-requisite to the grant of an order for stay of execution, and it is the duty of the Court to satisfy itself that each of these conditions has been fulfilled before an order is made in favour of the judgment debtor. The Court pointed out that the first question, therefore, was whether the petitioners have satisfied the Court that substantial loss may result to them unless the execution is stayed. The Court came to the conclusion that the appellant had not satisfied the Court to that effect. It is to be pointed out that the said case related to the management of the Court of Wards. The Division Bench observed that it was not appreciated why the decree holder should be kept out of the fruits of his decree if he is prepared to furnish security to do so. It was stated that the policy of the Legislature was that the decree holder is to be allowed to reap the fruits of his decree unless sufficient cause is established for stay of execution. In this context it was observed as follows :-

"It may be conceded that in many cases whereupon presentation of an appeal to this Court, an application for stay of execution is made on the allegations that substantial loss will otherwise result to the judgment-debtor, the decree-holder does not challenge the truth of the allegation and is very often content to allow execution to be stayed if sufficient security is furnished. Where, however, as here, the decree-holder challenges the allegations of possible substantial injury to the judgment-debtor, it is the duty of the Court to scrutinise the matter."

9. In this context it was further observed as follows :

"To put the matter briefly, it is competent to the Court, to accomplish the ends of justice, to allow execution to proceed and take security for restitution from the judgment-creditor under Rule 6 or stay execution and take security from the judgment-debtor under Rule 5. For each alternative, however, the burden is upon the judgment-debtor to show sufficient cause,"

10. In the facts of the case, the Court held that no sufficient ground has been made out for stay of execution of the decree and, accordingly, it was held that the first element essential for grant of stay of execution had not been established.

11. The next question considered by the Court was regarding cl. (c) of Order 41, Rule 5(3) that is the provision regarding security. In this context it was observed as follows :-

"In the first place, it is the well-settled practice of this Court that when security is offered for stay of execution, it is not accepted unless its legal validity is reasonably free from doubt. It is perfectly true that security has to be furnished to the satisfaction of the Court. But, when the Court accepts a security, it does so far the possible benefit of the decree-holder, and it would, in my opinion, be obviously unreasonable to accept a security, the validity of which is by no means free from doubt and the enforcement of which may lead to protracted litigation."

12. Accordingly, the Court held that the application for stay of execution ought to be refused. But it was made clear that if the decree-holder applies to execute the

decree, the Court will require security from him under Rule 6 of Order 41 of the Code.

13. In the case of Sm. Bibhabati Debi and Others Vs. Ramendra Nabayan Roy and Another the Division Bench was considering an application for stay of execution under Order 41, Rule 5 of the CPC read with Section 151 of the Code. This arises out of the famous Bhowal Case. In this case it was pointed out that the provisions of Order 41, Rule 5, sub-rule (1) must be read with the conditions in sub-rule (3) and each of three conditions mentioned thereof must be taken to be necessary ingredients before stay of execution may be granted. Reference in this connection was made to the decision of Srinibash Prasad Singh v. Kesho Prosad Singh (supra) referred to above. It was pointed out that the policy of the Legislature is that the decree-holder should be allowed to reap the fruits of the decree unless sufficient cause is made out. Accordingly, the prayer for stay of execution was refused and it was directed that the execution will proceed, and the amount for security was also- provided if the execution is proceeded with.

14. In the case of G. Sundaram Chettiar v. P. A. Valli Ammal (supra) a Division Bench of the Madras High Court pointed out that the provision that an order for stay of execution cannot be made unless the security has been given for the due performance of such decree or the order as made will ultimately be binding upon him, is mandatory.

15. In the case of Luchminarayan Bogla (supra) it was a Special Bench decision of this Court. In that case it was a probate suit in which issue of probate to the plaintiff was directed against which the appeal was preferred and the stay petition was made. In that case the Court pointed out that the principle which underlines all orders for the preservation of property pending litigation is this that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of the litigation and not obtain merely a barren success. We must point out that in that case the facts were different and, accordingly, we need not refer to the order which was ultimately passed.

16. In the case P.S.L. Ramanathan Chettiar and Ors., v. O.R.M. P.R.M. Ramanathan (supra) the passages relied upon by Mr. Bachawat, learned Counsel appearing on behalf of the respondents, are set out herein below :-

"On principle, it appears to us that the facts of a judgment-debtor"6 depositing a sum in court to purchase peace by way of stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. He can if he likes take the money out in terms of the order, but so long as he does not do it, there is nothing to prevent the judgment-debtor from taking it out by furnishing other security, say, of immovable property, if the court allows him to do so and on his losing the appeal putting the decretal amount in court in terms of Order 21, Rule 1 C.P.C. in satisfaction of the decree." (para 12)

"The real effect of deposit of money in court as was done in this case is to put

the money beyond the reach of the parties pending the disposal of the appeal. The decree-holder could only take it out on furnishing security which means that the payment was not in satisfaction of the decree and the security could be proceeded against by the judgment-debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment debtor" (para 13)

17. In the case of M/s. Teja Singh and Company v. Grindlays Bank Limited (1982) 2 SCC 199 the Supreme Court granted Special leave and disposed of the appeal by making the following order :-

"2. It is true that the appeal is directed against an order passed by the High Court, which is of an interlocutory nature. We, however, find it somewhat difficult to appreciate that the High Court should have granted stay of a money decree, and that too, by requiring the appellant before it (respondent herein).-Grindlays Bank Ltd.-to deposit only a part of the decretal amount. We, therefore, direct that the respondent shall deposit in the High Court, within four weeks from today, the balance of the decretal amount which we are told is about Rs. 1,10,000/- (Rupees one lakh and ten thousand). The appellant -M/s. Mehta Teja Singh and Co., will be at liberty to withdraw the said amount on furnishing Bank guarantee to the satisfaction of the Prothonetary of the High Court."

We should point out that in that case no notice was given to the respondent, but an order was; passed and the appeal was disposed of ex parte.

18. In the case of the Central Bank of India Vs. State of Gujarat and Others, , the passages relied upon are set out hereinbelow :

"In the absence of an order of stay the decree was executable and the judgment-debtor deposited the decretal dues in the Executing Court. Once the decretal dues had come into the executing court there was indeed no justification for the direction to refund the same to the judgment-debtor. On the other hand, the High Court could in its discretion either direct payment of the amount to the decree-holder subject to terms safeguarding the interest of the judgment-debtor in the eventuality or reversal of the decree or direct the amount to be deposited or invested on terms of interest so that on the disposal of the First Appeal appropriate directions could be given." (para 5)

"In the impugned order which in the setting of the matter appears to be long one, the High Court has referred to many aspects which perhaps were not necessary but we do not propose to go into the same. We allow the appeal, reverse the order of refund and direct that the amount shall be paid to the decree-holder subject to the condition that in the event of the decree of the trial court being reversed the appellant Bank would redeposit the amount in the executing court within two weeks of the date of the reversal along with 18 per cent of interest on the amount from the date the money is withdrawn till the date of depositing. The appellant is a nationalised bank and we see no justification to demand any security from it.. There will be no order for costs." (para 6)

DECISION

19. In our opinion before granting stay of operation of a decree appealed against, three conditions as laid down in sub-rule (3) of Order 41 Rule 5 must be satisfied. A decree holder is entitled to reap the benefits of his decree. Merely because an appeal has been preferred against a decree it does not amount to a stay and no stay should be granted as a matter of course. Merely because an appeal has been filed or an application for stay has been made does not mean that stay of execution of the decree is to be granted automatically. The question of "reasonable cause" in sub-rule (1) of Rule 5 of Order 41 may confer some discretion on the Court but the conditions laid down in sub-rule (3) are not a matter of discretion. These are mandatory provisions and cannot be dispensed with. These are "reconditions" that is, condition precedent to the grant of stay. If any of these conditions are not fulfilled, the Court cannot and should not direct any stay. Only if the Court finds that the conditions specified in clauses (a) and (b) have been satisfied that the Court then consider the question of security under clause (c). Furnishing of security is mandatory but what security is to be furnished is a matter of discretion of the Court to be exercised judicially upon consideration of the facts and circumstances of the case. Further, depending on the facts of the case, while protecting the interest of the decree-holder, the interest of the judgment-debtor is also to be protected if the decree-holder is allowed to realise the decretal amount. In that even the Court should see that in the event the decree is set aside, on the question of restitution the interest of the appellant is secured. For this purpose, the Court may pass such order as it thinks fit. However, the three conditions laid down in sub-section (3) are mandatory and accordingly we shall consider the same in the facts and circumstances of this case.

20. The first condition is that the Court must be satisfied that a "substantial loss" may result to the party applying for stay of execution unless such order for stay is made. This condition must be fulfilled before any such order for stay can be passed. It is not the absolute right of a judgment-debtor to obtain a stay as an appeal does not amount to stay. Without a stay a decree can be executed. The burden of proof regarding "substantial loss" is on the judgment-debtor. The Court granting stay must be satisfied about such "substantial loss" before it can grant such a stay. Whether there would be such a "substantial loss" much be satisfied on the basis of facts and materials brought before the Court. Therefore, let us first ascertain what materials have been placed before this Court on such matter. The admitted position is that the only averments to that effect are contained in paragraphs 110 and 111 of the petition. We shall set out the said two paragraphs, paragraphs 36 of the affidavit-in-opposition dealing with the same, and the averments made in the affidavit-in-reply filed by the petitioners in answer to such affidavit-in-opposition. The said paragraphs are set out hereinbelow :

PETITION

"Your petitioner states that in the facts aforesaid that unless forthwith restrained by injunction the plaintiff respondent No. 1 threatens and intends to the said decree." (para 110)

"Your petitioner states that it would suffer irreparable and substantial loss and injury unless the execution of the said decree is forthwith stayed and respondent No. 1 is restrained by injunction from enforcing and/or executing the same. Your petitioner's cash liquidity and working capital would be considerably affected unless stay and injunction as aforesaid are granted. Your petitioner has got various facilities from its bankers which are fully utilised. Further, any payment or deposit towards the decretal amount, if required to be made, would result in your petitioner's operating being adversely affected and furthermore your petitioner may have difficulties in embarking upon its expansion plans already under way, particularly in the field of providing service to Oil and Natural Gas Commission and in its consumer products division in which your petitioner was already put in substantial amount of money and effect. Your petitioner has substantial assets and there would be no difficulty in the way of the respondent No. 1 executing the decree and realising the amount if the decree is ultimately upheld." (para 111)

OPPOSITION

"With reference to paragraph 111 of the petition I state that the allegations therein would make it obvious that the appellant has no tangible assets out of which the decretal dues of the respondent No. 1 could be met. The allegations in the said paragraph further make it obvious that the appellant is not in a position and unable to satisfy the decretal dues of the respondent No. 1. Having regard to the amount payable under the decree which is about Rs. 24,80,053/- this Hon"ble Court, it is respectfully submitted, should be pleased to direct the appellant to forthwith secure the decretal dues of the respondent No. 1. It is denied that the appellant would suffer any alleged loss or injury as alleged or at all. It is denied that the appellant is entitled to an order of injunction or that the same should be made or that the said decree should be stayed as alleged or at all. I have no knowledge of the rest of the allegations made in the said paragraph." (para 36)

REPLY

"As to paragraph 36 of the said affidavit I repeat the statements made in paragraph 111 of the petition and I say all allegations to the contrary are hereby denied. I deny that what is stated in paragraph 111 of the petition would make it obvious that the petitioner has no tangible assets out of which alleged decretal dues of Respondent No. 1 can be made or that it would make obvious that the petitioner is not in a position or is unable to satisfy the alleged decretal dues of Respondent No. 1. I deny that having regard to the alleged amount alleged to be payable under the decree or for any other reasons this Hon"ble Court should be pleased to direct the petitioner to forthwith or any time secure the alleged decretal dues of Respondent No. 1. I say that the question of your petitioner

securing the decretal sum does not arise for such decree is bound to be set aside. Without prejudice, I say that further or in the alternative this Hon"ble Court shall be pleased to stay the operation of the said decree upon such terms and conditions as it deems fit and proper." (para 21)

21. Peculiarly enough the relevant paragraphs in the petition are affirmed as "true to my knowledge" by the deponent who has affirmed this affidavit and who has described himself as "Group Legal and Corporation Manager" of the Appellant Company. Like affidavits affirmed on behalf of the State, it is proper that an affidavit be affirmed on behalf of the company on the basis of the records when it relates to the affairs of the Company. It is stated before us that such knowledge is based on the records of the Company and not any independent personal knowledge. However, such averments are not verified as based on the records of the Company. As a matter of fact, no reference is made to or any reliance is placed on any record of the Company. In any view of the matter let us examine the value of the averments made therein as it is. We have set out paragraphs 110 and 111 of the petition. Paragraph 110 does not say much. The only averment made, if any, is in paragraph 111. Accordingly let us now analyse the same. A plain reading of the averments show as follows :

(a) The first averment is that the petitioner "would suffer irreparable and substantial loss and injury unless the execution of the said decree is forthwith stayed and the respondent No. 1 is restrained by an injunction from enforcing and/or executing the same."

Apart from stating that it would suffer "irreparable and substantial loss and injury" no particular is given. It is merely a bare statement and no reliance can be placed on the same.

(b) The second averment is that the petitioner's "cash liquidity and working capital would be considerably affected unless stay and injunction as aforesaid are granted."

This statement is absolutely and totally vague, to say the least. What is "cash liquidity" and what is "working capital" have not been specified. In any event, how they would be "considerably" or otherwise affected unless the stay and injunction is granted, has not been specified.

(c) The third averment is to the effect that "petitioner has got various facilities from its bankers which are fully utilised."

This is also absolutely and totally vague. What are those "facilities" and what is meant by "fully utilised" have not also been clarified. Further, how any "utilisation" of such "facility" stands in the way of the decree being executed or how the same would result to substantial loss and injury has not been stated.

(d) The fourth averment is to the effect that "any payment or deposit towards the decretal amount, if required to be made, would result in the petitioner's operating being adversely affected and further more, the petitioner may have

difficulties in embarking upon its expansion plans, already under way, particularly in the field of providing service to Oil and Natural Gas Commission and in its consumer products division in which the petitioner was already put in substantial amount of money and effect."

This is the vaguest of all. How payment or deposit towards the decretal amount, would result in petitioner's "operating" being adversely affected has not been clarified and, in any view of the matter, that is totally irrelevant. Obviously, payment of decretal dues in any case would adversely affect the judgment-debtor as he will be out of pocket but that by itself cannot and does not amount to "substantial loss and injury" within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of C.P.C. Further what are the "difficulties" in embarking upon its "expansion plans" has not been specified. What is the "expansion plan" has not been disclosed. However, we do not think that merely because payment of the decretal dues might prevent the expansion of the business of the judgment-debtor should not certainly be a ground for depriving the decree-holder from reaping the fruits of the decree which it has obtained in its favour. It cannot certainly be said that the expansion of the business of the judgment-debtor is more important than payment of the decretal dues of the decree-holder. So far as the alleged "difficulties" regarding providing service to Oil and Natural Gas Commission is concerned, our comments are similar. What is the nature of the "consumer products division" and what is the "substantial amount of money and effect" have been kept deliberately vague. In any event, no case has been made out for any "substantial loss and injury" within the meaning of the first condition of sub-rule (3) of Rule 5 of Order 41.

(e) The fifth sentence is to the effect that petitioner has "substantial assets" and there would be no difficulty in the way of the respondent No. 1 executing the decree and realising the amount if the decree is ultimately upheld.

What are the "substantial assets" has not been stated. In any event, the fact that there would be no difficulty in realising the decretal amount if ultimately the decree is upheld by the appeal court is not certainly sufficient for obtaining the stay of the execution of the decree.

22. It is clear that very vague, carefree and matter of course attitude has been taken in paragraph 111 of the stay petition which is in effect the sole paragraph in support of the stay. This has not been remedied or improved in the reply filed. As pointed out by the Division Bench of this Court referred to earlier, the averments in the stay petition have not been allowed to go uncontested. We would have expected that in such a case at least in the affidavit-in-reply, which is filed as a matter of right according to the practice and procedure of this Court, the applicant for stay would have improved the position by giving better particulars and placed all relevant materials if their stay petition is bona fide. Not only that they have not done so, but they have taken an attitude which is surprising, to say the least. They have not bothered to disclose any material in support of their contention so far as the first condition of Order 41 Rule 5(3) is

concerned. They have not bothered to refer to any fact and figure regarding their balance sheet or Profit and Loss Account. They have not even, according to the practice of this Court, craved reference to the same. They have taken the matter for granted as if by mere filing of the stay application, they are entitled to a stay as a matter of right. This is totally a misconceived approach. Not only that, in their Reply, they have bodily stated as follows :

"I say that the question of your petitioner's securing decretal sum does not arise for such a decree is bound to be set aside."

This is surprising, to say the least. Therefore, in our opinion, one of the pre-requisites and pre-conditions for grant of such stay as contemplated in Clause (a) of sub-rule (3) of Rule 5 of Order 41 has not been complied with in the facts and circumstances of the case. Accordingly, this application is to be dismissed on this ground alone.

23. However, as other points have also been argued before us, we shall deal with the same. The second condition is that the application must have been made without unreasonable delay. We are not satisfied regarding the same in the present case. As pointed out, the decree was passed on 9th September 1987 and the stay petition, with a prayer for leave to file memorandum of appeal without certified copy, was made only on 13th May, 1988, that is, about eight months after the decree was passed. This prayer for leave to file memorandum of appeal without the certified copy of the decree upon usual undertaking, as we have pointed out earlier, follows the age old tradition and practice of this High Court providing for some relief to the proposed appellant where there is some urgency in the matter. If the appellant has to wait for the certified copy which is required to be filed along with the memorandum of appeal, irreparable loss may be caused. As we have stated earlier, this aspect of the matter has been discussed in details in various judgments of this Court including the judgment of a Division Bench of this Court in the case of Angur Bala Mallik (*supra*) in which I was a party. The appellant can wait for the certified copy and prefer an appeal in the usual course after the certified copy was obtained but in case of urgency, he is entitled to file such appeal, without such certified copy with such leave and undertaking according to the practice of this Court. However, in the present case they have not chosen to prefer such appeal with such leave to file Memorandum of Appeal without the certified copy soon after the decree was passed but waited for a long time before filing such appeal and that also without the certified copy. Accordingly, in our opinion, in the present case, the second condition has not also been satisfied. We are not satisfied that the application has been made without unreasonable delay. Accordingly the second pre-requisite for grant of stay is also absent in the facts and circumstances of this case.

24. The third question is regarding the security to be furnished by the applicant for the due performance of such decree as may ultimately be binding upon him. At this stage, this Court is not bound to embark upon the examination of the merits of the decree appealed from. As a matter of fact it would not be proper on

our part to go into the merits at this stage as it might prejudicially affect the consideration of the appeal as such. In our opinion, the question of any such security would not arise in the facts and circumstances of the case because the two earlier conditions have not been satisfied. However, in spite of the fact that the applicant did not satisfy the first two tests laid down in sub-rule (3) of Rule 5 of Order 41,"having regard to the amount involved, we shall give an opportunity to the judgment-debtor to pay the decretal amount by stages.

25. We accordingly dispose of this application by making the following order :

There will be unconditional stay of the operation of the decree appealed from until 15.3.90.

Let a sum of Rs. 25,00,000/- (Rupees Twenty five lacs) be deposited in cash by the applicant within 15th of March, 1990 with the person specified hereinafter. Upon such deposit being made, it shall be open to the decree-holder to withdraw the said amount upon fulfilment of the conditions specified hereinafter. In case the decree-holder intends to withdraw the amount, some security must be furnished by them to safeguard the interest of the judgment-debtor, in the event the appeal is ultimately allowed. More so, as in the present case, the plaintiff decree-holder is an undertaking carrying on business outside the territory of India and, as would appear from the cause title of the plaint filed by them, they do not have any place of business anywhere in India. Accordingly, we direct that the decree-holder shall be entitled to withdraw the said amount upon furnishing a Bank Guarantee to the satisfaction of the Registrar, Original Side of this Court for the full amount. Upon such cash deposit being made the stay order shall continue till 15th of March, 1990.

If such amount is not deposited within the time specified then the decree shall become immediately executable. If such deposit is made within such time, then the balance of the decretal amount, which would include the interest as directed by the Trial Court, be secured by furnishing Bank Guarantee. However, having regard to the amount involved, we shall allow some time and at certain stages. The decretal amount in this case will include interest. We have seen in this case that the learned Judge has allowed interest at the rate of 9 per cent. More than 12 years have passed since the date of the suit and the interest will be more than the double of the principal amount and that would be roughly about 2 crores 10 lacs at least. For the purpose of this order we shall proceed on the basis that the total decretal amount including interest will be 2 crores. After deposit of the said sum of Rs. 25 lacs the balance sum of Rs. 1.75 crores is to be secured by way of Bank Guarantee in the following manner :

- (i) Rs. 60 lacs by 31st March, 1990 ;
- (ii) Rs. 60 lacs by 15th April, 1990 ; and
- (iii) Rs. 55 lacs by 30th April, 1990.

In default of furnishing any such Bank Guarantee within such period, the whole

of the balance amount then due shall become immediately recoverable and the decree executable.

So far as the cash deposit is concerned, for this purpose the amount is to be deposited with Mr. G. C. Banerjee, Manager, Grindlays Bank p.l.c. Church Lane Branch, Calcutta, who is appointed Receiver without security and without remuneration for this purpose. He shall seek directions regarding such deposit after such deposit is made. In case of such deposit or furnishing Bank Guarantee, intimation is to be given within 48 hours to the Advocate-on-Record for the respondents. The Bank Guarantees are to be renewed at least a month before the expiry of the period of validity. The same shall contain usual conditions including the condition that the demand made by the beneficiary, namely, the Registrar, Original Side of this Court, shall be final and that upon such demand being made, the amount shall become immediately payable to the Registrar, Original Side of this Court. If the decree-holder wants to withdraw the money any amount as secured by Bank Guarantee, they shall provide Bank Guarantee in the manner and on similar terms and conditions, whereupon the Registrar, Original Side shall encash the Bank Guarantee furnished by the Appellant and pay to decree-holder the amount involved.

26. A prayer is made for a certificate under Article 134A read with Article 133 of the Constitution of India. In our opinion, this case does not involve any substantial questions of law which, in our opinion, need be decided by the Supreme Court of India.

27. It was next prayed by Mr. P. C. Sen, learned Counsel appearing on behalf of the applicants, for stay of operation of this order. Having regard to the facts and circumstances of this case and further having regard to the fact that in any event some time has been given to comply with our order and having further regard to the fact that this involves a decree-holder who is a foreign concern which has obtained a decree in this Court, we reject the prayer for stay.

28. The Registrar, Original Side of this Court, is directed to furnish a certified copy of the decree immediately to the parties who have applied for the same.

29. This disposes of this application. Liberty to apply.

30. All parties concerned including the Registrar, Original Side of this Court and the Receiver Mr. G. C. Banerjee of Grindlays Bank p.l.c. Church Lane Branch, Calcutta, are entitled to have a signed copy of this dictated order on the usual undertaking.

Amarabha Sengupta, J.

31. I agree.