(2014) 08 BOM CK 0070

In the Bombay High Court

Case No : Civil Application No. 1424 of 2014 in First Appeal No. 631 of 2012 alongwith Civil Application No. 656 of 2012 in First Appeal No. 631 of 2012

The United India Insurance Co. Ltd. APPELLANT

Vs

Nitin Popat Nalawade RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 37 Rule 37, Order 41 Rule 1, Order 41 Rule 1(3), Order 41 Rule 3
Motor Vehicles Act, 1988 — Section 147(1), 149(1), 149(7)

Citation : (2015) 1 ALLMR 517

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Amol Gatne, Advocate for the Appellant; A.M. Gokhale, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Dhanuka, J.—Learned counsel appearing for the respondents in Civil Application No. 1424 of 2014 waive service. Learned counsel appearing for the respondents in Civil Application No. 656 of 2012 waives service. Rule, returnable forthwith. Heard the learned counsel appearing for the parties.

2. By civil application no. 1424 of 2014, the applicant seeks modification of the ad-interim order passed by this court on 18th April, 2012 in Civil Application No. 656 of 2012 ex-parte. By the said ad-interim dated 18th April, 2012 this court has granted ad-interim stay in terms of the prayer (b) of the civil application No. 656 of 2012 thereby granting stay of the execution application and implementation of the impugned order and judgment dated 18th July 2011 passed by MACT in favour of the claimant.

3. The learned counsel appearing for the insurer submits that under Order 41 Rule 3 of the Code of Civil Procedure, the discretion is granted to the appellate

court to pass an order of deposit and/or to provide security while granting stay of the decree of the trial court. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in case of Malwa Strips Pvt. Ltd. Vs. Jyoti Ltd., and particular paragraph 11. paragraph 11 and 12 of the said judgment reads thus :-

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 decreetal 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 decreetal amount or a part of it and/or directly through the judgment debtor to secure the payment of the decreetal amount is granted. A strong case should be made out for passing an order of stay of execution of the decree in its entirety.

4. Learned counsel appearing for the insurer also invited my attention to the findings rendered by the tribunal and some part of the evidence recorded by the tribunal in support of his submission that finding rendered by the Tribunal are perverse and contrary to the evidence led by the witness examined by the Tribunal. It is submitted that considering these findings and having the same found perverse, this court granted unconditional stay on 18th April, 2012 which shall be confirmed.

5. Learned counsel appearing for the applicant (claimant) on the other hand submits that the judgment relied upon by the learned counsel appearing for the insurer in case of Malwa Strips Pvt. Ltd. (supra) is the case wherein the Supreme Court was considering a money decree in a civil suit. The provisions of the Motor Vehicle Act, 1988 were not considered by the Supreme Court in case of Malwa Strips Pvt. Ltd. (supra) Learned counsel placed reliance on section 147(1) and also sections 149(1) and 149(7) in support of his submission that once a decree is passed by the MACT against the insurer, it is duty of the insurer to satisfy such decree and/or judgments. It is submitted that the provisions under Order 41 Rule 3 which provides for a discretion cannot be read in isolation and particularly when the decree is passed under the provisions of Motor Vehicles Act 1988.

6. In so far as findings rendered by the MACT and the evidence recorded before the tribunal is concerned, it is submitted that the findings are rendered in favour of the claimant which are subject matter of the appeal and thus at this stage at the stage of considering the stay application, this court is not hearing the first appeal finally. The entire record will have to be considered at the time of final hearing of the appeal.

7. I am not hearing the first appeal finally and thus at this stage it will not be possible to come to any final conclusion as to whether the learned tribunal has rendered any perverse finding or not.

8. A perusal of the order passed by this court on 18th April, 2012 makes it clear that the said order was passed ex-parte. Be that as it may, the said order is an ad-interim order passed by this court. I have heard the learned counsel appearing for the parties at length on the issue of continuation of the ad-interim

order and for modification thereof.

9. In my view the discretion granted to the appellate court under order 41 rule 3 is discretion which has to be exercised after satisfying various criteria let down therein. The provisions of the Motor Vehicles Act which is a social welfare legislation in my view has to be considered while exercising such discretion under order 41 rule 3 and in particular the provisions of section 147(1) and section 149(1) and sub-section 7 by the Court. In my view, the provisions of Motor Vehicles Act will have to read with provisions of Order 41 Rule 3 while exercising such discretion.

10. A perusal of the record prima facie indicates that no such discretion can be exercised in this case for granting unconditional stay.

11. I, therefore, pass the following order :-

(a) Insurer is directed to deposit entire decreetal amount before the MACT within six weeks from today.

(b) Ad-interim order passed by this court on 18th April, 2012 is modified to the extent that the insurer deposits the decreetal entire amount with MACT within six weeks from today. If such amount is deposited, the same shall be invested in a fixed deposit of a nationalized bank initially for a period of three years and shall be renewed till disposal of the first appeal.

(c) Both the civil applications are disposed of in the aforesaid terms. No order as to costs.

(d) It is made clear that the amount directed to be deposited shall be inclusive of the interest till the date of deposit and also the cost.

(e) It is made clear that if the amount as directed is not deposited within the time prescribed, stay granted by this court shall stands vacated without further reference to court.

