
(2003) 03 CAL CK 0009
In the Calcutta High Court
Case No : F.A. No. 273 of 2002

Union of India (UOI)

APPELLANT

Vs

Burma Construction and Others

RESPONDENT

Date of Decision : 17-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(3), Order 41 Rule 5, Order 41 Rule 6

Citation : AIR 2004 Cal 174

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Sadhan Roychowdhury, for the Appellant; Suchit Kumar Banerjee, for the Respondent

Judgement

1. The prayer for stay of operation of the judgment and decree appealed against made by Mr. Sadhan Roychowdhury in this application for stay was opposed by Mr. Suchit Kumar Banerjee, learned counsel appearing for the respondent No. 1. According to him, the Court cannot grant any stay unless the condition contained in Sub-rule (3) Clause (c) of Rule 5 of Order 41 of the CPC (CPC) is complied with. He contended that Sub-rule (3) of Rule 1 of the Order 41, CPC makes it mandatory for the appellant to secure or deposit the money while preferring an appeal against a money decree. He relies on a decision in Himachal Road Transport Corporation Shimla Vs. Sushila Devi and Others, . According to him, Order 27, Rule 8A, CPC refers to Rules 5 and 6 of Order 41, CPC but omits to mention or refer to Order 41, Rule 1(3) CPC. Therefore, Order 41, Rule 1(3), CPC is not subject to Order 27, Rule 8A, CPC even if the appellant is Government, as in the present case. He had also relied on the decision in Jaisingh v. Jagat Ram AIR 1953 Nag 176. According to him, mere allegation of hardship or irreparable loss will not justify grant of interim order as has been pleaded in the present case.

2. Mr. Roychowdhury, however, contended that Rule 1(3) of Order 41, CPC will

not help Mr. Banerjee otherwise the provisions of Order 27, Rule 8A, CPC would become nugatory.

3. In our view, Order 41, Rule 1(3), CPC makes it incumbent on the appellant to deposit or secure the amount of the money decree within the time that may be allowed by the Court or in such manner as the Court may deem fit and proper. This itself left a discretion to the Court which may extend the time or may direct something which it may deem fit and proper in the exigencies of a case. According to Mr. Banerjee, this discretion is not absolute. This was so held in the Himachal Road Transport Corporation Shimla Vs. Sushila Devi and Others, . But the fact remains that non-compliance of Order 41, Rule 1(3), CPC has not been provided for. The enactment is silent with regard to the consequence of non-compliance thereof. But when Order 41, Rule 5 in Sub-rule (5) makes it a condition for grant of stay, in that event, Order 41, Rule 1(3) is to be read along with Order 41, Rule 5 in order to find out the consequence of non-compliance. Such non-compliance will not entitle the appellant to obtain stay. In case we accept the proposition of Mr. Banerjee in respect of money decree, in that event, Sub-rule (3), Rule 1 of Order 41 would satisfy the execution of the money decree whenever an appeal is filed. Such a wide proposition cannot be accepted. It has been made subject to Rule 5 of Order 41 in order to obtain stay, one has to comply with the same. This is the consequence of non-compliance of Order 41, Rule 1(3), CPC. The purpose and object is to secure the respondent's claim and save him from the hazards of delay in execution, as was observed in the Himachal Road Transport Corporation Shimla Vs. Sushila Devi and Others, . But when the appellant is a Government then the legislature thought it fit that such an exigency may not arise there. As such it has granted some benefit to the Government, which is for the people by incorporating Rule 8A in Order 27, CPC. It has made Rules 5 and 6, Order 41 subject to Rule 8A of Order 27, CPC. Order 41, Rule 5 makes the deposit of or security for the money decree under Rule 1 of Sub-rule (3) subject to Sub-rule (5) of Rule 5 of Order 41 and as such it cannot avoid the implication or effect of Rule 8-A of Order 27, CPC. Under Sub-rule (5), the Court shall not make an order staying execution of the decree unless the deposits or security specified under Sub-rule (3) of Rule 1 of Order 41, CPC is complied with. Therefore, Rule 1(3) of Order 41 is subject to Rules 5 and 6 of Order 41 which is again governed by Rule 8-A of Order 27, CPC when the appellant is Government. Such a view was taken by the Allahabad High Court in the case of U. P. Avas Evam Vikas Parishad v. Satya Prakash 1997 AIHC 3266. In the said decision, it was held that where a Government is the appellant, it is not necessary that in every case it has to comply with Rule 1(3) of Order 41, CPC or that the stay would be refused under Order 5, Sub-rule (3) or Sub-rule (5) of Order 41, as the case may be. It depends on the discretion of the Court. Normally, it will respect the provision of Rule 8-A of Order 27, CPC. Therefore, it is not always necessary to secure or deposit in an appeal against a money decree by the appellant when the Government is the appellant. Similar view was taken by the Allahabad High Court in State of U. P. v. Akhilesh Kumar 1997 (15) LCD

1076; U. P. State Industrial Development Corporation v. Brahma 1997 All CJ 877 and Bharat Immunological and Biological Corporation Ltd. v. Rameshwari Devi 1998 (32) All LR 134.

4. Mr. Banerjee had pointed out that Order 41, Rule 1, CPC deals with the form of appeal. Therefore, Sub-rule (3) being within the scope relating to the form of appeal, without such deposit the appeal would not be in form and as such the appeal would not be maintainable. Such a proposition is too wide to accept, particularly when the form of the appeal is provided for in Sub-rules (1) and (2). The deposit though incorporated in Rule 1 (3) but it cannot be treated to be a part of the form of the appeal. It is a condition without providing for any consequence for default. In the absence of such deposit, it cannot be said that the appeal is not in form or that it is not maintainable, particularly when the consequences are provided for in Sub-rules 3(c) and (5) of Rule 5 of Order 41 to the extent that notwithstanding anything contained in Rule 5, Sub-rule 1(3), no stay would be granted if there is failure to deposit in terms of the Rules 1(3) of Order 41, thereby making the said provision subject to Sub-rule (5) of Rule 5 of Order 41, CPC.

5. So far as the observation that casual mentioning of the ground will not help the appellant to secure a stay order, as was held in the decision in Joy Sen (supra), we are unable to persuade ourselves to agree with the same. If it is shown from the materials on record that there are every likelihood of suffering irreparable loss and injury, the same would suffice to entitle the Court to exercise its discretion depending on the facts and circumstances of each case.

6. Having regard to the facts and circumstances of the case, we grant stay of operation of the judgment and decree appealed against on condition that in case the appeal fails, the appellant shall pay the decretal dues in terms of the award within three months from the date of the decision in the appeal. In default the decretal amount viz. the amount of the award made rule of Court will carry an interest in addition calculated from this date till the date of realization at the rate of 9% per annum simple.

7. Service upon the other respondents is dispensed with. Since the respondent No. 1 has appeared, service of notice of appeal is dispensed with. Let the appeal be treated ready as regards service.

8. Let the records be called for by a special messenger at the cost of the appellant to be deposited within three weeks. Let the notice of arrival of records be served within two weeks after the records arrive and are examined and found complete. Let the paper books, typewritten or cyclostyled, be prepared out of Court within four weeks from the service of notice of arrival of records on the learned Counsel for the appellant.

All other formalities are dispensed with.

Liberty to mention.

Urgent xerox certified copy, if applied for, be supplied to the parties within 7 days.

Rajendra Nath Sinha, J.

9. I agree.