**(2008) 06 CAL CK 0052**

**In the Calcutta High Court**

**Case No :** F.M.A.T. No. 3376 of 2006 with C.A.N. 7328 of 2006

Union of India (UOI) APPELLANT

Vs

Sanjoy Gooptu and Others RESPONDENT

**Date of Decision :** 25-06-2008

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 8A, Order 41 Rule 1(3), Order 41 Rule 5(3)
Constitution of India, 1950 — Article 112, 112(3), 202
Transfer of Property Act, 1882 — Section 100

**Citation :** (2008) 3 CHN 775

**Hon'ble Judges :** Rudrendra Nath Banerjee, J;Bhaskar Bhattacharya, J

**Bench :** Division Bench

**Advocate :** N.C. Roychowdhury and K.K. Maiti, for the Appellant; Swapan Chatterjee, for the Respondent

## Judgement

Bhaskar Bhattacharya, J.—While hearing an application for stay in connection with an appeal preferred against a money decree, a question of law has arisen as regards the applicability of Order XXVII to the provision of Order XLI Rule 1 sub-rule (3) of the Code of Civil Procedure.

2. In the case before us, the Union of India has suffered a money decree and Mr Roychowdhury, the learned senior advocate appearing on behalf of the appellant, has contended that we should not impose any condition of either depositing the decretal amount or giving security thereof for stay of the execution case till the disposal of the appeal in view of the provision contained in Order XXVII Rule 8A of the Code of Civil Procedure.

3. The learned advocate appearing on behalf of the respondent has, however, opposed the aforesaid contention and has submitted that even in a case where the Union of India is the appellant, the Court has every right to ask the appellant to give security of the decretal amount. By disagreeing with the view taken by another Division Bench of this Court on this point, this Bench by an order dated

8th February, 2008 in C.A.N. 4392 of 2007 (Zoological Survey of India and Anr. v. Piscean Enterprise) referred the matter to the Hon?ble Chief Justice for constitution of a Larger Bench for the purpose of deciding the following questions of law:

(a) In an appeal preferred by a Government, whether the Government is entitled to get stay of execution of the decree impugned by taking aid of Order 27 Rule 8A of the Code, even if, the conditions mentioned in Clauses (a) and (b) of Sub-rule 3 of Rule 5 of Order XLI are not complied with?

(b) Whether a money appeal preferred by the Government can be disposed of on merit though till the time of hearing of the appeal, the Government has neither deposited the decretal amount nor has it given security thereof in terms of Sub-rule 3 of Rule 1 of Order XLI of the Code?

(c) Whether for non-compliance of the requirement of Order XLI Rule 1(3) of the Code, an appeal can be dismissed?

4. Mr Roychowdhury, the learned senior advocate appearing on behalf of the appellant submits that apart from the points referred to above, he wants to raise a further point in support of the contention that the Union of India is not required to give any security for maintaining an appeal against the money decree. According to Mr Roychowdhury, Article 112(3)(f) of the Constitution of India having specifically indicated that any sum required for satisfying any judgment or decree or award of any Court or arbitral Tribunal should be charged on the Consolidated Fund of India, the said security guaranteed by the Constitution was the sufficient security for the payment of the decretal dues in the event the appeal fails. Mr Roychowdhury by relying upon the Black?s Law Dictionary, 15th Edition, at page 1215 submits that the word "secured" means "to give security; to assure of payment, performance or indemnity; to guarantee or making certain payment of a debt". According to Mr Roychowdhury, the Constitution having assured the payment of the dues owed by the Union of India by virtue of any money decree, that security is more than sufficient and, therefore, no further security need be given.

5. In order to appreciate the point raised by Mr Roychowdhury, it will be profitable to refer to the provision contained in Order XLI Rule 1 Sub-rule (3):

Order XLI Rule 1(3)

1. Form of appeal ? What to accompany memorandum.-

(1) ...

(2) ...

(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. The aforesaid provision makes it clear that what is required under sub-rule (3) is that the appellant should either deposit the amount in Court or furnish such security as the Court may think fit. In our view, the expression "furnish such security" refers to the security to be furnished as per direction of the Court and not a mere deeming a provision provided in Constitution creating charge of such dues upon the Consolidated Fund of India.

7. Similar provision in respect of dues payable by the State is provided in Article 202 of the Constitution of India; notwithstanding those provisions, the legislature enacted the provision contained in Order XLI Rule 1(3) of the Code with the intention to assure that if the appeal at the instance of any person who has suffered a money decree is ultimately dismissed, the Appellate Court will be in a position to immediately handover the fruit of the decree to the decree-holder. At this stage, it will not be out of place to mention that the word "charged" mentioned in the Articles 112 and 202 of the Constitution of India should not be equated with the provision of "Charge" as provided in Section 100 of the Transfer of Property Act because the definition of charge referred to therein applies only to the immovable property and not to any moveable property and consequently, does not apply to Consolidated Fund of India or the State. The object of those provisions of the Constitution is to specify the liability of the respective Government in the matter of payment of various amount mentioned therein and no doubt, to secure payment from the money reserved in those funds but in order to enforce such charge, the decree-holder is required to first approach the concerned authority and if not paid in spite of such demand, to move the Executing Court whereas the object of Order XLI Rule 1(3) is to assure immediate payment of the decretal dues from the security already in the control of the Appellate or the Executing Court.

7. The legislature was quite conscious that those constitutional safeguards are not sufficient to protect the interest of a decree-holder against the Government and even there is ample scope of raising various disputes as regards the interpretation of a binding decree sought to be executed. If those securities were sufficient, there was no occasion for filing any execution case for realisation of the dues payable by the Government.

8. We, therefore, find that merely because there is a constitutional provision providing creation of charge to secure the payment of dues of the Union Government on the Consolidated Fund of India, such fact cannot absolve the Union of India of its liability of furnishing security or depositing money in the Court in compliance of the provision contained in Order XLI Rule 1(3) of the Code.

9. Since already a reference has been made giving reasons in detail, without repeating those, we refer the following additional point before the Hon?ble Chief Justice for decision by constitution of a Larger Bench.

Whether the constitutional guarantee for securing the payment of debt arising out of any judgment and decree against the Union of India as provided in Article

 

112(3)(f) of the Constitution of India is sufficient for absolving it of its liability of complying with the mandatory requirement of Order XLI Rule 1 sub-rule (3) of the Code of Civil Procedure?

10. Let the matter be placed before the Hon''ble Chief Justice for appropriate order.

11. Let the interim order granted earlier be extended until the reference is disposed of.

Rudrendra Nath Banerjee, J.

12. I agree.

 