(2016) 08 DEL CK 0117

In the Delhi High Court

Case No : RFA No. 536 of 2016.

Unity Infra-projects Limited - Appellant @HASH Neptune Systems Private Limited

Date of Decision : 04-08-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3 (5), Order 41 Rule 1 (3), Order 41 Rule 5

Citation : (2016) 9 ADDelhi 31

Hon'ble Judges : Siddharth Mridul, J.

Bench : Single Bench

Advocate : Mr. Jawahar Raja, Mr. Ashish Sharma and Mr. Minmay Kanojia, Advocates, for the Appellant; Mr. J.P. Sengh, Sr. Advocate with Mr. Ankur Singhal, Ms. Sara Ansal and Ms. Manisha Mehta, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J. (Oral)—CM. 27761/2016 (Stay)

The present application under Order 41, Rule 5 of the Code of Civil Procedure, 1908 (in short ''the Code'') essentially seeks stay of execution of the judgment and decree dated 18.05.2016 impugned in the accompanying appeal.

2. By way of order of even date the trial court disposed of an application under Order 37, Rule 3 (5) of the Code filed on behalf of the appellant - Unity Infra-projects Limited (hereinafter referred to as ''Unity''). The said application was instituted on behalf of Unity in a suit being CS No. 69/2016 instituted on behalf of the respondent - Neptune Systems Private Limited (hereinafter referred to as ''Neptune''), against the former for recovery of Rs. 81,97,448/- along with pendente lite and future interest.

3. The facts as are necessary for the determination of the present application are as follows:-

(i) Neptune is in the business of manufacturing of various electrical technologies and is stated to be a well renowned company with tremendous experience in the business.

(ii) Unity is a public limited company and principally operates as a civil contractor in the area of buildings and housing, transportation, water supply and irrigation.

(iii) Unity was awarded a contract for construction of a hospital building, academic block and student''s hostel with associated services under Phase-I for comprehensive redevelopment plan for Lady Hardinge Medical College and Associated Hospital at Connaught Place, New Delhi.

(iv) Unity in turn, admittedly, issued a Letter of Intent dated 08.02.2013 in favour of Neptune for supply of Meter Board and Distribution Board.

(v) It is further an admitted position that Neptune supplied the requisite goods through several tax/retail invoices containing details of the goods during the financial year 2013-14 on credit basis to Unity.

(vi) Admittedly, Unity furnished Form-C to Neptune against the said invoices.

(vii) According to Neptune a sum of Rs. 91,97,364/- was payable to it, for goods sold and delivered to Unity, who kept deferring payment thereof on one pretext or the other.

(viii) Eventually, post dated cheques were issued by Unity in favour of Neptune duly signed by the Chairman. The details of the said cheques are as follows:-

S. No.

Cheque No.

Dated

Amount

1.

156256

10.05.2014

Rs. 49,00,000/-

2.

156257

25.05.2014

Rs. 16,25,000/-

3.

156258

10.06.2014

Rs. 15,00,000/-

4.

156259

25.06.2014

Rs. 10,00,400/-

Total

Rs. 90,58,400/-

(ix) It is also an admitted position that upon presentation, Cheque No.156256 dated 10.05.2014 was dishonoured by the payee bank on account of "insufficient funds".

4. The dispute raised on behalf of Unity in the present appeal is in relation to a letter dated 29.05.2014, whereby, Unity purportedly requested Neptune not to deposit the cheques given to the latter towards payment for goods till further instructions, on the assertion that the former, due to internal reasons, could not prevent dishonour of the said Cheque No.156256 dated 10.05.2014 and also extending an apology in that behalf.

5. The entire defence of the appellant is predicated on the assertion that the said letter dated 29.05.2014 is a forgery and has been fabricated by Neptune.

6. It would be pertinent to observe at this stage, that the underlying transaction between the parties resting with the delivery of the subject goods, issuance of the subject cheques and Form-C, as aforesaid, has been unequivocally admitted by Unity.

7. Mr. Jawahar Raja, learned counsel appearing on behalf of the appellant, strenuously urged that in view of their assertion that the disputed letter dated 29.05.2014 was a forgery, Unity was entitled to grant of unconditional leave to defend the said suit bearing CS No. 69/2016

8. Mr. Raja, learned counsel, invites my attention to paragraph 8 of the judgment and decree impugned in the present appeal to urge that the finding arrived at by the trial court exhibits complete non-application of mind and an abject failure to consider their assertion that the said letter dated 29.05.2014 had never been issued by them and was a forgery.

9. On a specific query from the court and after perusal of the application seeking leave to defend filed on behalf of Unity, it emerges that at no stage earlier has it been asseverated on behalf of Unity as is being sought to be done now, that Mr. Narender Pal Singh, who has authored the subject letter, was never an employee of Unity, so as to substantiate their assertion that the said letter dated 29.05.2014 is ex-facie a forgery.

10. Be that as it may, in the facts and circumstances aforesaid, prima facie, I am of the view that the appellant was not entitled to the grant of unconditional leave to defend the said suit bearing CS No. 69/2016, instituted by Neptune.

11. During the course of submissions made before this court, my attention has been invited to the decisions in Malwa Strips Private Limited v. Jyoti Limited, (2009) 2 SCC 426, Sihor Nagar Palika Bureau v. Bhabhlubhai Virbhai & Co., (2005) 4 SCC 1 and National Thermal Power Corporation Ltd. v. Siemens Atiengesellschaft, 2012 SCC OnLine Del 5686, to urge that this court possesses a discretionary power to stay execution of a money decree in an appropriate case.

12. The Hon''ble Supreme Court in Sihor Nagar Palika Bureau (supra), whilst considering the scope and ambit of Order 41, Rule 1 (3) and Rule 5(5) of the Code held as follows:-

"6. Order 41, Rule 1 (3) 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 41, Rule 5 (5), a deposit or security, as above said, 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 herein above, 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."

13. In Malwa Strips Private Limited (supra), heavily relied upon on behalf of the appellant, Sihor Nagar Palika Bureau (supra) was cited with approval by the Hon''ble Supreme Court of India. In Malwa Strips Private Limited (supra) the Hon''ble Supreme Court while approving the decision in B.P.Agarwal v. Dhanalakshmi Bank Ltd., (2008) 3 SCC 397, held as under:-

"12. The High Court in this case failed to notice the provisions of sub-rule (3) of Rule 1 Order 41. 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."

14. In this regard, the Hon''ble Supreme Court in B.P.Agarwal (supra), made the following observations:-

"4. In Kayamuddin Shamsuddin Khan v. SBI [(1998) 8 SCC 676] the dispute related to Order 41, Rule 1 (3); it was held that if the amount is not deposited, the appeal could be directed to be dismissed. Obviously reference was to Order 41, Rule 5 (5). In paras 6 and 8 this Court observed as follows: (SCC p. 677)

"6. The learned counsel for the respondent has invited our attention to sub-rule (3) of Rule 1 Order 41 in the Code of Civil Procedure, as amended in the State of Maharashtra, which reads as under:

''1. (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: Provided that the court may dispense with the deposit or security where it deems fit to do so for sufficient cause.''

*** 8. This would mean that non-compliance with the direction given regarding deposit under sub-rule (3) of Rule 1 Order 41 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 noncompliance.""

15. A Division Bench of this court in National Thermal Power Corporation Ltd. (supra), in particular, paragraphs 9 and 10 thereof observed as under:-

"9. We may notice that learned senior counsel for the appellant has relied upon the observations of the Supreme Court in Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co., (2005) 4 SCC 1 to contend that court while considering the issue of grant of interim stay under Order 41, Rule 1 (3) and Rule 5(5), CPC, is within its rights to direct furnishing of security instead of deposit of the decretal amount. The relevant observations made in para 6 are as under:-

"6. Order 41, Rule 1 (3) 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 41, Rule 5 (5), a deposit or security, as above said, 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 herein above, 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."

10. Learned senior counsel for the respondent while referring to the same judgment has emphasised that such discretion is to be exercised judicially and not arbitrarily and the Supreme Court itself has opined that ordinarily execution of 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."

16. The relevant provisions of the Order 41 of the Code are extracted herein below:-

Rule 1(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." Rule 5

"5. Stay by Appellate Court. - (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

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 to 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 country, be acted upon by the court of first instance.

(2) Stay by court which passed the decree :- Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing there from, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(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 of or as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the court may make an ex parte

order for stay of execution pending the hearing of the application.

(5) 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, the court shall not make an order staying the execution of the decree."

17. A bare reading of the provisions referred to herein above, insofar as they are relevant to the facts of the present case, shows that a discretion has 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. Further the Appellate Court cannot order stay of execution unless it is satisfied that substantial loss may result to the party applying for stay. Where the appellant fails to deposit the decretal amount or furnish the specified security, the court ought not to stay the execution of the impugned decree.

18. The legal position that inter alia emerges from a conspectus of the aforementioned judicial decisions can be summarised as follows:-

(i) Ordinarily, execution of a money decree is not stayed, inasmuch as, satisfaction of money decree does not amount to substantial loss or irreparable injury and in the event of appeal being allowed, the remedy of restitution is always available to the successful party.

(ii) The power to stay execution of a money decree is a discretionary power, and is meant to be exercised in appropriate cases by the appellate court.

(iii) The discretion has to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case.

(iv) Even if the provisions of Order 41, Rule 1 (3) and Rule 5(5) are considered not to be mandatory, the purpose for which they have been enacted has to be accorded due consideration. An exceptional case has to be made out for stay of execution of a money decree. The Parliamentary intent has to be given effect to.

19. The appellant in the present case refuses to either deposit the decretal amount or furnish security for the due performance of the impugned decree. Further, as has been observed herein above, the present is not a case where the appellant has a good prima facie case so as to warrant the exercise of the discretionary power of this court of absolute stay of execution of the money decree. Even otherwise, the satisfaction of the impugned decree would not amount to irreparable injury on account of the circumstance that the remedy of restitution would always be available to the appellant in the event of his succeeding in the appeal.

20. In view of the foregoing discussion and in the facts and circumstances of the case, in my view, the appellant has been unable to make out a case leave alone an exceptional case, for grant of order of stay of execution of the impugned

decree.

21. The application is devoid of merit and is accordingly dismissed.

