

M/S. MALWA STRIPS PVT. LTD.

v.

M/S. JYOTI LTD.

(Civil Appeal No. 7410-7411 of 2008)

DECEMBER 18, 2008

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

*Code of Civil Procedure, 1908 – O. XLI r. 1(3), 5(1) and (3) – Appeal against money decree – Stay of execution of decree pending appeal, even though judgment debtor not depositing decretal amount – Held: Not justified – While granting stay of execution of decree, sufficient cause must be shown – High Court did not arrive at the conclusion that it would cause undue hardship to judgment debtor if ordinary rule to direct payment of decretal amount or part of it and/or directly through judgment debtor to secure the payment is granted – Hence, judgment debtor directed to deposit the sum and furnish security therefor.*

**Appellant filed a summary suit under order 37 CPC against the respondent claiming certain sum. Respondent filed application for leave to defend the suit. Application was allowed subject to the deposit of the admitted amount within the specified period. Respondent did not deposit the amount and the trial court decreed the suit in favour of appellant. Respondent filed appeal. He also filed application for stay of the decree passed by trial court. High Court stayed the operation and execution of the decree in its entirety. Hence the present appeal.**

**Allowing the appeals, the Court**

**HELD: 1.1. The decree passed by the trial judge is a money decree. A conditional leave to defend was granted. The said condition has not been fulfilled. Thus, leave to defend would be deemed to have been refused. [Para 3]**

**1.2. In the instant case, High Court failed to notice the**

A provisions of sub-rule (3) of Rule 1 of Order XLI CPC. The  
appellate court 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  
B 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  
C should be cogent and adequate. [Para 11] [1304-D-E]

1.3. High Court 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  
D 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  
E respondent under Order XII Rule 6 of the Code, therefore,  
there is no justification at all as to why an order of stay  
of the nature was passed by the High Court. Even if sub-  
rule (3) of Rule 1 of Order XLI CPC is not mandatory, the  
purpose for which such a provision has been inserted  
F should be taken into consideration. An exceptional case  
has to be made out for stay of execution of a money  
decree. 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 decretal  
G amount or a part of it and/or directly through the  
judgment debtor to secure the payment of the decretal  
amount is granted. A strong case should be made out for  
passing an order of stay of execution of the decree in its  
entirety. [Para 12] [1305-A-C]

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1.4. Having regard to the facts and circumstances of the instant case, the respondent is directed to deposit a sum of Rs.35 lakhs within the period. Respondent shall furnish adequate security for the rest of the decretal amount within the said period. In the event the respondent fails to comply with the order, the decree shall be executable at once. [Para 13] [1305-C-E]

*Rajasthan State Electricity Board and Anr. vs. Ram Deo and ors. AIR 1999 Rajasthan 264; Kayamuddin Shamsuddin Khan vs. State Bank of India 1998 (8) SCC 676; Sihor Nagar Palika Bureau vs. Bhabhlubhai Virabhai and Co. 2005 (4) SCC 1; B.P. Agarwal and Anr. vs. Dhanalakshmi Bank Ltd. and ors. 2008 (3) SCC 397, referred to.*

**Case Law Reference:**

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|-------------------------------|---------------------|----------------|
| <b>AIR 1999 Rajasthan 264</b> | <b>Referred to.</b> | <b>Para 9</b>  |
| <b>1998 (8) SCC 676</b>       | <b>Referred to.</b> | <b>Para 10</b> |
| <b>2005 (4) SCC 1</b>         | <b>Referred to.</b> | <b>Para 11</b> |
| <b>2008 (3) SCC 397</b>       | <b>Referred to.</b> | <b>Para 11</b> |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7410-7411 of 2008.

From the final Judgment and Order dated 27.3.2008 and 12.5.2008 of the High Court of M.P. Bench at Indore in I.A. No. 1624 of 2008 in Civil First Appeal No. 152 of 2008 and I.A. No. 4211 of 2008 respectively.

Shiv Sagar Tiwari for the Appellant.

Kamini Jaiswal for the Respondent.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

2. Appellant is a company incorporated and registered under the Companies Act, 1956 (for short, "the said Act"). It is engaged in manufacturing of copper strips and copper foils etc. It has its registered office at 17-20, Industrial Area No.2, AB Road, Dewas, Madhya Pradesh. Respondent is also a company registered and incorporated under the said Act. It has its registered office at Nanubhai Amin Marg, Industrial Area,

- A Vadodara. Respondent used to place orders for supply of copper rods strips and foils from time to time with the appellant. Allegedly, the payments used to be made towards the said supply from time to time. Appellant, inter alia, on the premise that a sum of Rs. 49,03,908.29 was owed to it by the
- B respondent filed a Summary Suit under Order XXXVII of the Code of Civil Procedure, 1908 (for short, "the Code"). An application for leave to defend the suit was filed by the respondent. Appellant contended that as the respondent raised a defence only as regards the rate of interest and not the principal amount, its application should be dismissed. By an
- C order dated 23.08.2007, the application for leave to defend the suit was allowed, subject to the condition that the respondent shall make payment of undisputed and admitted amount of Rs.22,64,789.52. Such deposit was to be made by 22.9.2007. Respondent obtained extension of time to deposit the amount.
- D However, as the said amount was not deposited, the trial court passed a judgment on or about 14.11.2007 decreeing the suit in favour of the appellant. Respondent preferred an appeal thereagainst. An application for stay of the said judgment and decree passed by the trial Court was also filed. By reason of
- E the impugned judgment, the High Court stayed the operation and execution of the decree in its entirety. While doing so, the High Court opined:

F "We are conscious of the fact that usually money decrees are not stayed in appeal. At the same time, it is not a universal principle of law that the stay can never be granted in cases relating to money decree. The Court has discretion to grant a stay keeping in view all facts and circumstances of the case, including the manner in which the trial of the suit was conducted and the impugned decree was passed.

G We are prima facie of the view that a case for stay of execution of the decree is made out by the appellant on the facts on record. We do not, however, wish to express any opinion on the merits and demerits of the case at this stage, which, in our opinion, will be gone into

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at the time of hearing of the appeal. For the purpose of grant of stay, we are of the view that a ground for stay, as contemplated under O.41 R.5 CPC is made out. We are, therefore, inclined to stay execution of the decree pending appeal." A

Appellant is, thus, before us. B

3. Mr. Shiv Sagar Tiwari, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error of law in passing the impugned judgment insofar as it failed to take into consideration that the defendant – respondent had raised no substantive and bona fide defence and that in view of the matter it was not a case where the execution of the decree should have been stayed. C

4. Ms. Kamini Jaiswal, learned counsel appearing on behalf of the respondent, on the other hand, would urge that compound interest was not payable and in any event a suit under Order XXXVII of the Code being not maintainable, the manner in which the judgment and decree passed by the learned trial judge being wholly unsustainable, the High Court could not be said to have committed any error of law in passing the impugned judgment. D

5. The decree passed by the learned trial judge is a money decree. A conditional leave to defend was granted. The said condition has not been fulfilled. Leave to defend, therefore, would be deemed to have been refused. Correctness of the said order had not been questioned. E

The Parliament, by reason of Section 87 of Act 104 of 1976 inserted sub-rule (3) in Rule 1 of Order XLI of the Code, which is to be in the following effect: F

"(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." G

6. An explanation was also added to sub-rule (1) of Rule 5 of Order XLI. In terms of sub-rule (1) of Rule 5 of Order XLI, H

A an appeal shall not operate as a stay of proceedings. It is for the Appellate Court who may, for sufficient cause, order stay of execution of such decree. The explanation appended to the said sub-rule reads as under:

B "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 of 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 contrary, be acted upon by the Court of first instance."

D 7. In terms of sub-rule (5) of Rule 5 of Order XLI, the court shall not make an order staying the execution of the decree 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.

E 8: We will proceed on the assumption that although the word 'shall' has been used in Order XLI Rule 1 (3) of the Code, the same is not mandatory in character, and, thus, may be read as directory.

F 9. In *Rajasthan State Electricity Board and Anr. vs. Ram Deo & ors.* [AIR 1999 Rajasthan 264], after noticing some of the aforementioned decisions as also the legislative history of the said provision, a learned Single Judge of the Rajasthan High Court held as under:

G "19. After close scrutiny of the aforesaid observations, I am of the opinion that in view of the provisions of Sub-Rule (5) of Rule 5 of Order 41 CPC it cannot be held that appeal against the ' decree for payment of money is not maintainable, if filed without making compliance of the provisions contained in Sub-Rule (3) of Rule 1 of Order 41 CPC and it is the duty of the Registry to see that on application under Order 41 Rule 5 CPC seeking stay of money decree the appellant has to incorporate a note in

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regard to his readiness and willingness to comply with the directions under Sub-Rule (3) of Rule 1 of Order 41 CPC. If the appeal is preferred against the decree for payment of money without any stay application under Order 41 Rule 5 CPC then in that event, it is the duty of the appellant to incorporate a note in the memo of appeal in respect of his readiness and willingness to comply with the directions issued by the Court under Sub-Rule (3) of Rule 1 of Order 41 CPC."

10. We may, however, notice that although the provisions of sub-rule (3) of Rule 1 of Order XLI have been held not to be mandatory, this Court in *Kayamuddin Shamsuddin Khan vs. State Bank of India* [(1998) 8 SCC 676] opined that non-compliance of a direction to deposit the decretal amount or part of it or furnish security therefor would result in the dismissal of the stay application but not the entire appeal, stating:

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

11. To the same effect is the decision of this Court in *Sihor Nagar Palika Bureau vs. Bhabhlubhai Virabhai & Co.* [(2005) 4 SCC 1], 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

- A 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 & anr. vs. Dhanalakshmi Bank Ltd. & ors.* [(2008) 3 SCC 397]

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

- E 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.

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

13. We, therefore, having regard to the facts and circumstances of this case direct the respondent to deposit a sum of Rs.35 lakhs within a period of four weeks from date. Respondent shall furnish adequate security for the rest of the decretal amount within the same period. Appellant shall be entitled to withdraw a sum of Rs.30 lakhs out of the said deposited amount without furnishing any security and the rest amount on furnishing security. In the event the respondent fails to comply with the order, the decree shall be executable at once.

14. The appeals are allowed with the aforementioned directions. No costs.

N.J.

Appeals allowed.