

SUPREME COURT OF INDIA

Sihor Nagar Palika Bureau

Vs.

Bhabhlubhai Virabhai and Company

C.A.Nos.2799-2800 of 2005

(R.C.Lahoti CJI. and G.P.Mathur JJ.)

21.04.2005

JUDGMENT

R.C. Lahoti CJI., J.

1. Leave granted.

2. The appellant is a statutory body constituted under and governed by the provisions of the *Gujarat Municipality Act, 1963*. It discharges several public utility functions. In the years 1993-94, the respondent was given a contract for collection of octroi on behalf of the appellant on the terms and conditions set out in the contract. The contract was terminated by the appellant. The respondent filed a civil suit alleging wrongful termination/breach of contract by the appellant and seeking inter alia a decree for recovery of damages. The suit ended in a money decree being passed in favour of the respondent and against the appellant.

3. The appellant preferred a First Appeal which is pending in the High Court of Gujarat. Therein, the appellant moved an application under Order XLI Rule 5 of the Code of Civil Procedure seeking stay on the execution of the decree. On 19.9.2003, the High Court admitted the appeal for hearing both the parties on merits and granted a stay subject to the condition that the appellant shall deposit in the court an amount of Rs. 8,78,925/- with 8 per cent interest on or before 4.11.2003.

4. The appellant moved an application seeking variation of the order dated 19.9.2003. In a detailed application filed by the appellant, it was pointed out that the appellant was facing financial difficulty on account of abolition of octroi and was badly in need of money for carrying out its multifarious public utility services and activities. The appellant offered to furnish security to the satisfaction of the Trial Court and appealed to the Court to suitably modify its earlier order so as to dispense with the requirement as to deposit of the amount and instead permit solvent security being furnished. By order dated 4.11.2003, the Court declined the appellant's prayer but at the same time extended the time for making deposit by eight weeks from the date of the order and further allowed liberty to the respondent to withdraw the amount deposited by the appellant, subject to its furnishing a security to the

satisfaction of the Trial Court. Feeling aggrieved, the appellant has filed this appeal by special leave.

5. On 3.1.2004 while issuing notice to the respondent this Court directed the execution of decree against the appellant to remain stayed subject to the appellant furnishing security of immovable property to the satisfaction of the Trial Court in place of depositing the decretal amount in cash as directed by the High Court. During the course of hearing, it was pointed out by the learned counsel for the appellant that the order dated 30.1.2004 has been complied with by the appellant and statement in that regard has been made on affidavit in this Court.

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 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 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.

7. In the Memo of Appeal filed by the appellant in the High Court, very many pleas have been raised. One of the grounds taken is that the decree has been passed by the Trial Court without availability of any legal evidence amounting to proof in favour of the respondent and hence the decree is ex-facie erroneous. The grounds urged in favour of the prayer for stay set out for the consideration of the High Court as an Appellate Court have been briefly noticed hereinabove. We do not propose to deal with the merits of the pleas so urged lest it should prejudice the hearing of the appeal in the High Court. Suffice it to observe that a case for grant of stay was made out even in the opinion of the High Court and the dispute which survived lay in a narrow compass : Whether to insist on deposit in cash or permit a security being furnished?

8. In the facts and circumstances of the present case and having taken into consideration the respectively submissions made by the learned counsel for the parties in very many details, we are satisfied to hold that the High Court ought to have permitted furnishing of security instead of insisting on deposit in cash of the amount as directed by the High Court. It is not the case of the respondent that in the event of the appeal being dismissed the decretal amount may not be recovered from the appellant. On the other hand, the appellant has made out a prima facie strong case for the hearing of the appeal on its merits and further a case that public interest would be better served by the amount being retained by the appellant during the pendency of the appeal. While making these observations, we should not be understood

as having made any observation touching the merits of the case amounting to pre-judging any of the issues arising for decision in the appeal and ex abundanti cautela we clarify that the appeal shall be heard by the High Court on its own merits uninfluenced by anything said in this order. The appellant has already furnished security of immovable property to the satisfaction of the Trial Court pursuant to the order dated 31.2.2004 passed by this Court.

9. The appeals are allowed. The impugned orders of the High Court are set aside and instead the interim order dated 30.1.2004 passed by this Court is substituted in place thereof. No order as to the costs.