

CASE NO.:
Appeal (civil) 922 of 2002

PETITIONER:
B.P. Agarwal & Anr

RESPONDENT:
Dhanalakshmi Bank Ltd. & Ors

DATE OF JUDGMENT: 25/01/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the order passed by the Division Bench of the Kerala High Court. By the impugned order the High Court in exercise of jurisdiction under order XLI Rule 1(3) of the Code of Civil Procedure, 1908 (in short the \021CPC\022) directed the appellant to deposit a sum of Rs.5,00,000/- in trial court within a particular time. Appellants question the correctness of the order on the ground that the High Court could not have referred to Order XLI Rule 1(3) in the absence of any application for stay.

2. Learned counsel for the respondents on the other hand supported the order of the High Court.

3. Undisputedly, in the present case there was no application for stay filed. A few decisions of this Court being relevant need to be noted.

4. In Kayamuddin Shamsuddin Khan v. State Bank of India [1998 (8) SCC 676] the dispute related to Order XLI 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 XLIII Rule 5(5). In paragraphs 6 and 8 this Court observed as follows:

\0236. The learned counsel for the respondent has invited our attention to sub-rule (3) of Rule 1 of Order XLI in the Code of Civil Procedure, as amended in the State of Maharashtra, which reads as under:

\023(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.\024

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.\024

5. Similarly, in *Devi Theatre v. Vishwanath Raju* [2004 (7) SCC 337] it was inter alia observed as follows:

\0235. The learned counsel for the appellant submits that appeal lies from every decree passed by any court exercising original jurisdiction. The jurisdiction of the court in first appeal extends to examine the questions of facts as well as that of law. It is though true as pointed out by the learned counsel for the respondent that under Order 41 Rule 11 CPC it would be open for the court to dismiss the appeal in limine at the time of admission but even examining the matter from that point of view we find that the court while considering the question of admission of appeal filed under Section 96 CPC, may admit the appeal if considered fit for full hearing having prima facie merit. Otherwise, if it finds that the appeal lacks merits, it may be dismissed at the initial stage itself. But admission of the appeal, subject to condition of deposit of some given amount, is not envisaged in the provision as contained under Section 96 read with Order 41 Rule 11 CPC. The deposit of the money would obviously have no connection with the merits of the case, which alone would be the basis for admitting or not admitting an appeal filed under Section 96 CPC. Further, imposition of condition that failure to deposit the amount would result in dismissal of the appeal compounds the infirmity in the order of conditional admission.

6. It is a different matter, in case the appellant prays for stay of the execution of the decree or for any order by way of an interim relief during the pendency of the appeal; it is open for the court to impose any condition as it may think fit and proper in the facts and circumstances of the case. Otherwise imposing a condition of deposit of money subject to which an appeal may be admitted for hearing on merits, is not legally justified and such order cannot be sustained.\024

6. In the instant case there is no direction that in case of non-payment, the appeal is to be dismissed. In the absence of any application for stay the High Court could not have passed the order impugned. The direction for deposit as given accordingly stands vacated.

7. The appeal is allowed but without any order as to costs.