IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 3748 OF 2018
IN
FIRST APPEAL (ST) NO. 28199 OF 2018

The Secretary to the Central Government, New Delhi and Ors.	}	**Applicants**
versus		
M/s. Dolly Enterprises	}	**Respondent**

Mr. Kevic Setalvad-Senior Advocate and Mr. S. D. Shetty and Mr. Arsh Misra I/b. M/s. M.V.Kini and Co. for the applicants.

Mr. Mr. Gaurav Joshi-Senior Advocate with Mr. Chirag Mody with Mr.Munaf Virjee I/b. M/s. ABH Law LLP for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.
DATE :- OCTOBER 30, 2018

P.C. :-

1. On this civil application for stay, which is placed on our board, the prayer of the applicants is that the decree dated 19th June, 2017 along with a preliminary decree dated 29th March, 2016 in Special Civil Suit No. 58 of 2013 is under challenge.

2. Mr. Kevic Setalvad learned senior counsel appearing in support of this application would submit that post admission of this appeal, this court should bear in mind the language of Order

XLI Rule 5 of the Code of Civil Procedure, 1908 and there is still a discretion in this court not to insist on a substantial amount being deposited. In fact, in this case, the preliminary decree dated 29th March, 2016 directs payment of Rs.1,39,00,000/-. Out of this sum, an amount of Rs.1,22,81,765/- has been paid. Thereafter, Mr. Setalvad invites our attention to the quantum of pre-litigation interest. He would submit that the same has been calculated from 1st August, 2006 to 27th June, 2013. The rate of interest applied is of 18%. That is not realistic at all. Assuming that the appellants/applicants have not raised some specific question in the cross examination, which is fairly searching, but still, there is no material to take this rate of interest into consideration and apply it to the transaction in question. Though it may be a commercial transaction, still, the court should not have granted the interest at 18%. Mr. Setalvad would submit that added to that is the grant of a sum of Rs.2,75,00,000/- as compensation for loss of profit. Even on that count, there is no legally admissible evidence placed on record. The other claims are compensation towards mental agony and incidental expenses, where as well, the court has proceeded on pure guesswork. Such a decree being brought before this court and challenged, that too in a suit filed in the year 2013, though the claim is stated to be outstanding or due and payable from 2006, would enable the applicants to seek an unconditional stay of execution and enforcement of the decree pending disposal of this appeal.

3. On the other hand, Mr. Joshi learned senior counsel appearing for the respondents would submit that the plaintiff who brought the suit styled as Special Civil Suit No. 58 of 2013 and subsequently converted into Commercial Suit No. 8 of 2016 has not been called upon by even the court below to satisfy it with regard to the plea now raised and for the first time before us. That the claim was beyond limitation or was time barred was not even the defence of the appellants/applicants. Apart therefrom, there was an admission of liability and to the extent of Rs.1,39,00,000/-. The admitted dates are in the judgment itself and in that regard, our attention is invited to the judgment and decree, wherein, it is stated that the amount of Rs.1,39,00,000/- was due and payable by the end of June, 2006. For that sum also, a suit had to be brought and when that sum was also not paid in full for good 5 years after institution of the suit, then, the interest and at the rate granted is justified. If this is not a reasonable measure to denote the loss of profit and mental agony, then, Mr.Joshi would ask us as to what else would be brought in by a contractor, who has satisfactorily completed the work. This is nothing but harassing a party like the respondent-plaintiff and

forcing him to litigate for recovery of the sum, which is legitimately due and payable. For all these reasons, he would submit that no stay and that too of a money decree should be granted.

4. After having heard both sides, we have found that the trial court had before it a suit and in which, the respondent-plaintiff was seeking to recover an amount of Rs.9,52,00,000/-. In the judgment, the learned Judge has referred to the fact that this suit was laid by urging that the work of road widening was assigned on the National Highway-17. The contract in that behalf was awarded to the respondent-plaintiff as a successful bidder. The contract work was executed as per site condition inspection and supervision under the guidance of respondent-defendant nos. 3, 4 and 5, who are but the Executive Engineer, Public Works Department (South), Ratnagiri, the Assistant Engineer working in the office of Sub-Divisional Officer, National Highway Sub-Division-3 and Superintending Engineer, Public Works Department, Ratnagiri. Prima facie, these are senior officials who are aware of the site conditions and the estimated time for completion of the work. They are aware of the nature of the work as well. It is very clearly stated in the plaint that the estimates were forwarded and they were revised. Even when the revised

estimates were forwarded to higher authorities, there was nothing heard from them. It has been stated in para 7 of the plaint that the cause of action accrued when defendant no. 3-Executive Engineer intimated by his notice dated 21st January, 2011 in response to the plaintiff's letters/notices of November, 2010, indicating his inability to clear the legitimate dues on the ground that the proposal of the revised estimate has been pending for the formal approval of the office of the Director General (Road Development SS), Ministry of Road and Transport and Highways. It is in these circumstances that the legitimate dues and in terms of the revised estimate, which was later on approved, was calculated at Rs.1,39,00,000/-. Then, the monthly reasonable interest at 18% was worked out, according to the plaintiff-respondent and in regard to that , evidence has been led. There is a reference made to this evidence in the judgment as well. It has been pointed out to us that after the pleadings, issues were drawn and the working has been given in para 27. In para 27, the learned Judge holds that since 30th June, 2006, a sum of Rs.1,39,00,000/- has not been paid by the appellants-defendants to the suit. This huge amount is withheld. On this amount, at least the legitimate grievance could have been made with regard to the loss and sustained. Thereafter, the learned Judge holds that the outstanding bill of Rs.1,39,00,000/-, if it is taken to be reasonable rate of interest, then, from 30th June, 2006 to 30th June, 2007, it comes to about 20,85,000/-. Thus, the foundation prima facie appears to be that if this sum was paid in time, that could have been a mitigating factor. Having not paid this sum in time that the other claims have arisen.

5. We have made it clear to both sides that for the present, we are not taking into consideration the disputed claims and under the head "mental agony" and "incidental expenses". Even if we omit a substantial part of the sum of Rs.2,75,00,000/- awarded as damages/compensation for loss of business, still, a substantial amount is due and payable. We have seen the working which is provided on a rough sheet by Mr. Setalvad. We find that the amount of Rs.1,39,00,000/-, which was due and payable, has been withheld for a substantial period. This being a money decree, we have gone by the language of Order XLI Rule 5 of the Code of Civil Procedure, 1908. As far as that provision is concerned, it is evident that the same enables grant of stay by the appellate court. 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. There is a power conferred in the court, which has passed a decree and which can also stay the execution. However, it has to be satisfied in terms of Sub-Rules (3) and 4 of Rule 5 and in any event by Rule 5 of Order XLI, it is clear that the court has, in terms of the prior Sub-Rules, a power to determine as to whether substantial loss has resulted to the party applying for stay of execution and that application has been made without unreasonable delay and that security has been given by the applicant for due performance of such decree or order ultimately binding upon him. If all these factors are taken into consideration by treating each one of them as relevant and germane, then, we find that considering the delay in filing this appeal, the nature of the contract, the claims and the overall manner in which the matter will have to be approached, interest of justice would be satisfied if we grant a conditional stay of execution and enforcement of the decree under challenge. Hence, we pass the following order:-

(i) On the appellants' depositing a sum of Rs.4,00,00,000/- in the trial court within a period of 12 weeks from today, there would be a stay of execution and enforcement of the decree under challenge till the decision of this appeal.

(ii) In the event this amount is not deposited within the time stipulated above, the decree shall become enforceable and executable and it would be open for the decree holder to then recover the sums under the decree in accordance with law.

(iii) for a period of 12 weeks from today, no further steps in execution shall be taken by the executing court only to enable the applicants to comply with this order and direction.

(iv) In the event the decree holder desires to withdraw the sum deposited, it can make an application to the trial court in that behalf and the trial court shall allow withdrawal of the amount by the decree holder on the condition that the decree holder furnishes security to the extent of 50% of the amount in the form of a Bank Guarantee of a Nationalised Bank and for the balance, an undertaking to bring back that amount with such interest awarded by the higher court in the event the appellants succeed in the appeal.

6. With the aforesaid directions, the civil application is disposed of.

(B. P. COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**