

19.07.2023

ASR 1.

**IN THE HIGH COURT AT CALCUTTA
COMMERCIAL CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)**

FMAT 305 of 2023

**M/s Aei Engineering Industries Pvt. Ltd. & Ors.
Vs.
M/s Linear Merchants Pvt. Ltd. & Anr.nr.
With
CAN 1 of 2023**

**Mr. Satadeep Bhattacharya
Mr. Dhruv Surana
Ms. Muskan Bengani
Mr. Jai Kumar Surana**

.....for the appellants

**Mr. Arjun Mookherjee
Mr. Hera Nafis**

.....for the respondent no. 1

We formally admit the appeal.

As the point involved is very short, we have heard out the appeal after dispensing with all formalities:

The appellants are aggrieved by an ex parte ad interim order passed by the learned court below restraining them from operating their bank account without leaving a balance representing the claim of the respondent/plaintiff, i.e. Rs. 25,00,000/ (rupees twenty five lakhs)

Mr. Bhattacharya, learned Advocate appearing for the appellant submitted that there was no occasion for the court to pass the order ex parte when the suit had been filed on 17th March, 2022 and the respondent/plaintiff had taken numerous

adjournments to comply with the procedure for prosecution of the suit.

He said on 22nd June, 2023 there was no cause for passing the order ex parte.

He also points out that the learned judge merely narrated the case of the respondent/plaintiff in the plaint and proceeded to pass the interim order without any supporting reason.

Mr. Arjun Mookherjee, learned Advocate appearing for the respondent no. 1 made very forceful submissions before this court. He placed the impugned judgement and order where the learned judge had narrated the facts of the case and also recorded the findings arrived at by him. Although the learned judge was unable to draw his own conclusion, prima facie, from the facts of the case, nevertheless, learned counsel tried to submit that the ultimate finding reached by the learned judge pointed to an affirmation on his part of the plaint case.

More importantly, he showed us ***Skyline Education Institute (Pvt.) Ltd. -Vs.- S.L. Vaswani & Ors. Reported in AIR 2010 SC 3221 (2010) 2 SCC 142.*** On the basis of this judgement he contended that once the court of first instance exercised its discretion to grant or refuse to grant an injunction the appellate court would normally not interfere with that exercise of discretion just because it held a different opinion.

***Rahul S. Shah -Vs.- Jinendra Kumar Gandhi
& Ors. Reported in AIR 2021 SC 2161 – (2021) 6***

SCC 418 also cited by learned counsel is a most interesting case which in paragraph 42 directed the courts to follow some directions, one of which was that the court may in appropriate cases under Section 151 of the Code of Civil Procedure, demand security to ensure satisfaction of any decree.

If the Supreme Court direction is to be obeyed a liberal view of Order 38 Rule 5 of the Civil Procedure Code is to be taken.

From this perspective was the impugned order restraining the respondent from operating their bank account valid?

Ordinarily, in a money suit before the decree, the plaintiff is not entitled to attach the assets of the defendant and cause it to be sold to realize its claim. We may do so only after obtaining the decree. An exception to this rule is when the defendant commits acts of insolvency by alienation of his properties to defeat the rights of any decree holder.

In those circumstances, the court passes an order of attachment or a restraint order to prevent such disposition. To obtain such an order some details have to be provided of the acts of insolvency committed by the defendant. In this case no details are available in

the impugned order. Merely on the averments made in the plaint the impugned order has been passed.

We are bound by the law laid down by the Supreme Court in *Skyline*. But in that case the circumstances in which the appellate court can intervene were not in issue. Those circumstances are when the order of injunction passed by the learned court below or the order refusing to pass such an order is so grossly erroneous or unreasonable that it could be called perverse, the appellate court may intervene. In those circumstances, the appellate court is within its power to substitute the order of the learned court below by its own order.

We are not for a moment saying that the impugned order is perverse but even short reasons in support of the finding of the learned judge would have been much appreciated.

The interlocutory application was moved after much passage of time after filing of the suit. It should have been made upon hearing the respondent.

We also to take into account the dictum of the Supreme Court in the case of *Rahul S. Saha*.

Considering all the above circumstances, we set aside the impugned judgement and order.

We direct the learned court below to hear out the interim application afresh in the presence of the respondents upon hearing them and by a reasoned

order within three months from date. The learned court would be a liberty to pass any interim order if it deems fit and proper before exchange of affidavits until further orders to the contrary are passed by it. The appellant shall only be permitted to withdraw from the subject bank account on which injunction was granted by the learned court below an amount every month not exceeding the average withdrawal of the appellant from that account every month. The average shall be arrived at by taking into account the monthly withdrawal in the past one year from the date of the proposed withdrawal.

All points are kept open before the learned court below.

The appeal FMAT 305 of 2023 and the connected application CAN 1 of 2023 are disposed of by this order.

(I. P. Mukerji,J.)

(Biswaroop Chowdhury,J)