

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
IA NO. GA/1/2023
With
CS/7/2022
In
APOT/381/2023
MADHUKAR NOWLAKHA
-Versus-
SURENDRA SINGH BENGANI

BEFORE

The Hon'ble Justice I.P. MUKERJI

-And-

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 16th October, 2023

Mr. Abhrajit Mitra, Sr. Adv.
With Mr. Ayan Dutta,
Mr. Bimalendu Das &
Mr. Somrik Das, Advs.
...for the appellant

Mr. Rohit Banerjee with
Mr. Virendra Shigh Bengani, Advs.
...for respondent.

Order in terms of the prayer (a) of the stay petition.

We admit the appeal. Dispensing with all formalities, we propose to hear out the appeal today.

The appellant is aggrieved by a judgement and order dated 13th September, 2023 made by a learned single judge of this Court.

Mr. Abhrajit Mitra, learned senior advocate appearing for the appellant, points out that the respondent has not been able to make out a case to justify an order of attachment before judgement. Secondly, he submits that the provision in the impugned judgement and order that in default of the appellant furnishing security for Rs.43,00,000/-, there would be an "automatic decree" in favour of the respondent for the above sum, is flawed. While passing an order in an attachment before judgement application, a decree could not have been made. Whatever may have been the nature and extent of default, at best the interim order of attachment could be confirmed.

Mr. Rohit Banerjee, learned advocate appearing for the respondent, took us through the impugned judgement and order where the learned judge has specifically observed that a fund of Rs.50,00,000/-

had been transferred from the account of the respondent to that of the appellant and that the latter was unable to demonstrate the application of that fund for the benefit of the respondent. On that basis, the learned judge held that the respondent had been “reasonably able to demonstrate a sum of Rs.43,00,000/- as remained unpaid.”

Thereafter the learned judge observed that he could permit the appellant to stand trial only if he secured Rs.43,00,000/-.

Mr. Banerjee also relied upon the judgement reported in *Rahul S. Shah vs. Jinendra Kumar Gandhi* (2021) 6 SCC 418. In paragraph 42.7 of this judgement, the Supreme Court has held as follows :-

“42.7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.”

Even without reference to the above Supreme Court judgement, the above judgement and order of the learned single judge can prima facie be justified on the principle that when a defendant is practically without defence, he may be allowed by the court out of mercy to defend a suit upon furnishing of security as laid down in the judgement of *Mechalac Engg. vs. Basic Equipment Corporation* reported in AIR 1977 Supreme Court 577.

At this stage Mr. Mitra shows us the records of the proceeding in the suit (CS/248/2021) brought by A First Merchant Pvt. Ltd. against Surendra Singh Bengani. He says that the plaintiff, A First Merchant Pvt. Ltd. is fully controlled by the appellant, who is its alter ego.

Apparently, in that suit the plaintiff obtained an order of attachment restraining the respondent from operating its bank account. Learned counsel submits that there is no balance in that account. He

says that because of this, out of this Rs.43,00,000/-, Rs.30,00,000/- should be deducted and that his client should be allowed to secure only Rs.13,00,000/-.

In our view, it cannot be done in that way. Both relate to different matters. But considering the fact that the appellant was deprived in the other suit of security for his claim, some benefit should be given to them, in this suit by recovering the security.

Considering all aspects of the matter, we dispose of this appeal by directing the appellant to deposit Rs.15,00,000/- with Mr. Bimalendu Das and Mr. Virendra Singh Bengali, the respective learned advocates on record for the parties, who are appointed as Joint Special Officers. A demand draft or banker's cheque for Rs.15,00,000/- shall be handed over to the Joint Special Officers, who shall open an account and create a short term deposit jointly for the said sum with State Bank of India, Kolkata High Court Special Branch, earning the highest rate of interest. Such deposit shall be to the credit of the suit.

All our observations are prima facie.

We expedite the hearing of the suit.

Order for cross discovery by 4th December, 2023; inspection forthwith. Judges' Brief of Documents is to be prepared by 20th December, 2023.

The respondent/plaintiff may thereafter mention the suit for hearing before the appropriate court.

The appeal and the stay application are disposed of.

As affidavits have not been called for, allegations contained in the application are deemed not to be admitted.

(I.P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)