

OC-12-13

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
[Commercial Division]

AO-COM/33/2024
WITH CS-COM/562/2024
IA NO: GA-COM/1/2024

SURENDRA KUMAR GOYAL
VS
SKIPPER LIMITED

APOT/377/2024

SURENDRA KUMAR GOYAL ALSO KNOWN AS
SURENDER AGARWAL
VS
SKIPPER LIMITED

BEFORE:

The Hon'ble JUSTICE SOUMEN SEN
AND

The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 2nd December, 2024.

Appearance:

Mr. Debnath Ghosh, Sr. Adv.
Mr. Arijit Bardhan, Adv.
Mr. Sarosij Dasgupta, Adv.
Mr. Biswaroop Mukherjee, Adv.
Ms. Saheli Bose, Adv.
...for the appellants

Mr. Anirban Ray, Sr. Adv.
Mr. Sayantan Bose, Adv.
Mr. Shounak Mukhopadhyay, Adv.
Ms. Manisha Das, Adv.
Ms. Priyanka Gope, Adv.
...for the respondents.

The Court: The appeal is arising out of an order passed on 27th September, 2024 in an application for judgment and decree upon admission of sum of Rs.63,92,425.50 along with further interest at the rate of 24% per annum from 1st November, 2023 till realisation or in the alternative, a direction upon the defendant to furnish security of sum of Rs.63,92,425.50. The claim

is arising out of supply of PVC pipes and fittings of various specifications to the defendant on the basis of oral orders placed by the defendant.

We have read the judgment of the Learned single Judge carefully. It appears that in the mediation proceeding the appellant had agreed to pay a sum of Rs.25,00,000/-. Although, confidentially is attached to the mediation proceeding it appears that in the pending proceeding there is a candid disclosure on the part of the defendant to pay Rs.25,00,000/- which however the plaintiff did not accept. The reason for a reduced claim as it appears from the impugned order is that the plaintiff had supplied expired, solvent and defective material, to the defendant which de hors the business agreement entered into between the parties. Notwithstanding such defence, the appellant had agreed to pay a sum of Rs.25,00,000/- as full and final settlement. We feel that the defendants should be given liberty to prove that for the rest of the claims the appellant may have a defence at the trial. The learned single Judge in paragraph 28 of the judgment observed that Court is not inclined to pass judgment and decree upon admission. The learned Single Judge however allowed security directed the defendant to secure a sum of Rs.38,63,500/- relying upon Order XXXVIII Rule 5 of the Code of Civil Procedure and in exercise of power under Section 151 of the Code of Civil Procedure. A question arises whether the plaintiff was able to fulfil the conditions under Order XXXVIII Rule 5 of the Code of Civil Procedure. The learned Single Judge has recorded that although the claim of the plaintiff against the defendant was for a sum of Rs.2,69,29,072.72 admittedly payments have been made by the

appellant defendant from time to time and the plaintiff claims on reconciliation of account of that sum of Rs.38.63,506.60/- is due and payable by the defendant to the plaintiff. This fact itself shows that the defendant is not insolvent. Moreover there was no material available before the learned Single Judge to show that any of the conditions under Order XXXVIII Rule 5 stand fulfilled. In exercising power under Section 151 of the Code of Civil Procedure to direct security relying upon the judgment in **Rahul S. Shah** reported in **(2021) 6 SCC 418** it has been seen whether the money claim is impeachable and the defendant would not have the means to pay such amount in the event of a decree being passed in favour plaintiff. It is also trite law when specific provisions have been made in the Code of Civil Procedure for specific reliefs. Ordinarily the court shall not invoke its inherent power. It has to be exercised ex debito justitiae. Even if we apply the principle laid down in Rahul S. Shah reported in (2021)6 SCC 418, it could have been for a sum of Rs.25,00,000/- and the rest should stand to trial and hence the Court could not have directed security of the entire sum even in exercise of power under Section 151 of the Code of Civil Procedure. However, there was no cross objection with regard to furnishing of security. Hence we modify the interim order by directing the defendant to secure a sum of Rs.25,00,000/- with the learned Registrar, Original Side within two weeks from date. In default, the said amount shall be immediately executable. On receipt of the said amount, the learned Registrar, Original Side shall invest the same in a suitable interest bearing fixed deposit

account yielding highest returns with a nationalised bank with auto renewal till the disposal of the suit.

Both the appeal and applications are disposed of.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

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