

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (STAMP) NO.30842 OF 2022
WITH
INTERIM APPLICATION NO.18314 OF 2023
IN
SECOND APPEAL (STAMP) NO.30842 OF 2022

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M/s. Sky Communication & Anr.	Appellants/Applicants
V/S	
Bharat Sanchar Nigam Limited & Anr.	Respondents

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Mr. Satyajeet P. Dighe for the Appellants/Applicants.
None for Respondents.

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CORAM: SANDEEP V. MARNE, J.
DATE : JANUARY 24, 2024.

P.C.:

1 This Appeal is filed by the Appellants quite unnecessarily, despite succeeding in the suit to the extent of refund of amount of Rs.1,05,117/-. The decree of the Trial Court directing refund of Rs.1,05,117/- has been unsuccessfully tested by the Defendants before the Appellate Court. Admittedly, the Appellants did not file Appeal challenging the decree dated 17 October 2008. Upon being enquired with Mr. Dighe, the learned Counsel appearing for the Appellants as to why the Appellants have instituted the present Appeal, he would submit that the Trial Court did not grant interest on the amount of Rs.1,05,117/- which is the reason

why the present Appeal is filed. Mr. Dighe however fairly admits that the Appellants did not challenge the decree dated 17 October 2008 to the extent of non-award of interest by the Trial Court. Furthermore when Appeal was filed by Defendant-BSNL before the District Court challenging the decree dated 17 October 2008, the Appellants did not file cross-objection in the said Appeal. Thus the Appellants acquiesced in non-award of interest by the Trial Court vide decree dated 17 October 2008, Mr. Dighe would rely upon provisions of Order XLI, Rule 33 of the Civil Procedure Code, 1908 (**the Code**) in support of his contention that the Appellate Court has power to award relief to the Respondent in Appeal even if the Respondent had not challenged the decree of the Trial Court. According to Mr. Dighe, following the provisions of Order XLI, Rule 33 of the Code, the Appellate Court could have *suo moto* awarded interest to the Appellants. However perusal of the order passed by the Appellate Court would indicate that the prayer for award of interest was not even orally pressed by the Appellants before the First Appellate Court. Therefore no occasion arose for the First Appellate Court to consider the provisions of Order XLI, Rule 33 of the Code. Therefore reliance of Mr. Dighe on the judgments of the Apex Court in ***Mahant Dhangir & Anr. vs. Madan Mohan & Ors.***, (2010) 10 SCC 464 and ***Pralhad & Ors. vs. State of Maharashtra & Anr.*** (2010) 10 SCC 458 is misplaced. In absence of filing of their own Appeal as well as in absence of filing of cross-objections, Appellants would have atleast urged before the First Appellate Court that the interest be awarded under the provisions of Order XLI, Rule 33 of the Code.

2 Even if the conduct of the Appellants is not seeking interest before the First Appellate Court is to be momentarily ignored, in my view no case is made out for award of interest in favour of the Appellants in the Second Appeal. The averments in the plaint would indicate that the Plaintiffs raised grievance about wrongful deduction of amount of Rs.1,05,117/- on 5 April 2006. The exact date of deduction/recovery of Rs.1,05,177/- is unknown. Immediately after issuance of notice dated 5 April 2006, the suit was instituted on 13 April 2007 and the same came to be decreed on 17 October 2008. Therefore the period during which interest is sought is also negligible.

3 I am therefore of the view that no question of law is involved in the Appeal. The Second Appeal is accordingly rejected.

4 In view of the disposal of the Second Appeal, the Interim Application does not survive and the same is accordingly disposed of.

(SANDEEP V. MARNE, J.)

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signed by
SUDARSHAN
RAJALINGAM
KATKAM
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