

01 04.10.23
&
02 Ct. No. 04

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S.A.T. 177 of 2023
With
S.A.T. 178 of 2023
CAN 1 of 2023

Dharamvir Kumar Singh
Vs.
Sarat Kumar Gupta & Ors.

Mr. Gopal Chandra Ghosh,
Mr. Rajkrishna Mondal.
 ... for the appellant.
Mr. Aniruddha Chatterjee,
Mr. Tarak Nath Halder,
Mr. Abir Lal Chakraborty.
 ... for the respondents.

A piquant situation has arisen in the instant case when an interim order was passed by the Division Bench without admitting the appeal and without formulating the substantial question of law being one of the essential ingredients under Section 100 of the Code of Civil Procedure.

The Second Appeal was listed under Order XLI Rule 11 of the Code of Civil Procedure on 19th September, 2023 and the Division Bench after hearing the appellant recorded an admission of the said appeal though without formulating the substantial question of law and further proceeded to pass an interim order in the form of status quo with regard to the possession of the appellant in respect of the suit premises. Subsequently the matter was taken up on 29th September, 2023 and the order would reveal that there was no appearance on behalf of the appellant; only the respondents appeared and submitted before the Court that the interim order could not be passed. However, the Court realized the mistake having crept in the said portion of the order, as the Court was of the view that the notices to the respondents should be given so that

the question of admission of appeal and the continuance of the interim order could be considered in their presence but proceeded to recall the portion of the order dated 19th September, 2023 to the extent of recording admission of appeal.

As a resultant effect on the conjoint reading of both the orders, it leaves no ambiguity in our mind that the formal order of admission of appeal had been subsequently recalled and the appeal as it stands now is deemed to not have been admitted; yet the interim order was allowed to continue.

Section 100 of the Code of Civil Procedure postulates that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to it, if the High Court is satisfied that the case involves a substantial question of law.

This Court find it difficult to understand the intention of the Legislatures in entertaining an appeal and passing an interim order without recording its satisfaction on the involvement of substantial question of law. The expression “*shall lie to the High Court*” has to be read in a meaningful manner in juxtaposition with the expression “*if the High Court is satisfied that the case involves a substantial question of law*”. The word “*lie*” in its grammatical meaning has to be understood akin to maintainability, which, in our opinion, is distinct and different from the concept of entertainability of an appeal. The appeal may be instituted but may not be maintainable unless the later portion of the said Section is eminently found by the High Court on recording its satisfaction over the involvement of substantial question of law. Any other meaning assigned to word “*shall lie*” would frustrate the very purpose of the legislative intent and in our opinion would run counter to the expression “*if the High Court*

is satisfied that the case involves a substantial question of law”.

The cardinal principle of interpretation of a statute is that the Court should not interpret the provision in such a manner which would frustrate the legislative intent, nor should adopt such an interpretation which would make such provision unworkable; rather the duty of the Court in interpreting the statutory provision is such that it would make the provision workable and the manifest intention of the framers of Law should be upheld.

In the above perspective Chapter V Rule 17 of the Appellate Side Rules is also required to be noticed, wherein it is indicated that certain category of appeals shall be admitted and registered and the notices shall be issued without any reference to the Court; whereas the appeals, which are not contemplated therein, are ordinarily placed under Order XLI Rule 11 of the Code as a long drawn precedent bearing in mind that those appeals shall not be registered unless the Court records an admission. Though the word “*admission*” has not been used under Order XLI Rule 11 of the Code, yet the implied intention can be gathered therefrom which bestow power upon the Appellate Court to dismiss the appeal after hearing the appellant or its pleader.

It is no longer *res-integra* in view of the language used in Section 100 of the Code of Civil Procedure that the High Court while embarking its journey on the circumference of Section 100 of the Code to ascertain as to whether the case involves a substantial question of law shall hear out the appellant or its pleader on a day fixed for such purpose. As a corollary the respondent does not have a right of audience at the time of hearing for the purpose of ascertaining the involvement of substantial question of law, as it is

restricted between the Court and the appellant or his Counsel. Equally we cannot overlook the provisions contained in Order XLI Rule 5 of the Code of Civil Procedure, which enables the Court to pass an ex parte interim order of stay of the execution proceeding pending the hearing of the said application.

The question often arises whether the Court shall invoke the power conferred under Order XLI Rule 5 of the Code for staying the execution proceeding without admitting the appeal or recording its satisfaction over the involvement of substantial question of law therein.

The Apex Court in unequivocal term answered the aforementioned question in a judgement rendered in case of *Raghavendra Swamy Mutt vs. Uttaradi Mutt* reported in (2016) 11 SCC 235. The Apex Court was considering twin points; firstly whether the Court can admit the appeal under Section 100 of the Code of Civil Procedure without formulating the substantial question of law; secondly whether the Court can pass an interim order in such appeal without admitting the same or formulating the substantial question of law. The enlightening observations of the Apex Court in this regard can be profitably quoted as under:

“23. *The submission of the learned Senior Counsel for the appellant is that Order 41 Rule 5 confers jurisdiction on the High Court while dealing with an appeal under Section 100 CPC to pass an ex parte order and such an order can be passed deferring formulation of question of law in grave situations. Be it stated, for passing an ex parte order the Court has to keep in mind the postulates provided under sub-rule (3) of Rule 5 of Order 41. It has to be made clear that the Court for the purpose of passing an ex parte order is obligated to keep in view the language employed*

under Section 100 CPC. It is because formulation of substantial question of law enables the High Court to entertain an appeal and thereafter proceed to pass an order and at that juncture, needless to say, the Court has the jurisdiction to pass an interim order subject to the language employed in Order 41 Rule 5(3).

24. *It is clear as day that the High Court cannot admit a second appeal without examining whether it raises any substantial question of law for admission and thereafter, it is obliged to formulate the substantial question of law. Solely because the Court has the jurisdiction to pass an ex parte order, it does not empower it not to formulate the substantial question of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. That is not the scheme of CPC after its amendment in 1976 and that is not the tenor of precedents of this Court and it has been clearly so stated in Ram Phal v. Banarasi, (2003) 11 SCC 762. Therefore, the High Court has rectified its mistake by vacating the order passed in IA No. 1 of 2015 and it is the correct approach adopted by the High Court. Thus, the impugned order is absolutely impregnable.”*

The law enunciated by the Apex Court in the above noted decision can be reasonably understood to the effect that though the power conferred upon the Court under Order XLI 41 Rule 5 of the Code can be exercised in passing an ex parte interim order of stay pending the application filed in this regard, but the same has to be understood conjointly with the spirit and soul of Section 100 of the Code of Civil Procedure. It is held that the Court should not pass an interim

order without admitting the appeal or in other words without formulating the substantial question of law, which is fundamental imperative and peremptory in character.

It is thus a cardinal principle of law that the Court may dismiss the appeal provided it does not involve any substantial question of law, but if the Court is satisfied that the case involves substantial question of law, shall formulate the same and proceed to pass an interim protection as warranted on the facts and circumstances of the given case. Simply because the power is conferred under Order XLI Rule 5 (3) of the Code of Civil Procedure, it cannot be exercised unless the Court admits the appeal or formulate the substantial question of law.

There is no other decision cited before us taking contrary view expressed by the Co-ordinate Bench or by a Constitutional Bench or a Larger Bench.

We proceed to apply the ratio of the judgement rendered in case of *Raghavendra Swamy Mutt* (supra) and hold that the interim order passed by the Division Bench without admitting the Second Appeal or formulating the substantial question of law is contrary to the ratio of the decision rendered by the Supreme Court as indicated hereinabove.

We, therefore, decline to extend the interim order passed by the earlier Division Bench.

Having held so, we invited the learned Counsel appearing for the appellant to address us on the involvement of substantial question of law in the instant appeal.

After perusing the concurrent findings returned by both the Courts below and the facts discerned therefrom, we are of the view that the instant appeal involves the substantial questions of law:

- I. Whether a co-owner is entitled to induct a tenant in respect of the premises or a portion thereof without concurrence of the other co-owner and if such tenancy is created whether the said tenancy is validly created and binds the other co-owner?
- II. Whether the co-owner can maintain a suit for eviction against a tenant when the tenancy is created by the other co-owner, who stood firm before the Court in his deposition and proved the execution of the agreement of tenancy and the signature appended thereupon; meaning thereby such co-owner has raised an objection against the eviction of a tenant in respect of the tenanted premises?

We now take up the application, being CAN 1 of 2023, for stay of the execution proceeding, as the appellant contends before us that the decree is likely to be executed and the possession may be taken through execution process pending the instant appeal and, therefore, the Court should stay the execution proceeding until the disposal of the instant appeal.

The learned Counsel appearing for the respondents vehemently opposes the aforesaid submission and contends that there was no authority given to the proforma defendants to create a tenancy in respect of the suit premises in absence of any express or implied authority and both the Courts below have found that there was no such authority given and, therefore, the Court should not stay the execution proceeding. It is further submitted that the said person, who created the tenancy, is not a co-owner and, therefore, such tenancy cannot be valid vis-a-vis the

plaintiff, who instituted the suit for recovery of possession.

Considering the facts pleaded in the plaint and that the appeal has been admitted upon formulation of substantial questions of law, we feel that if the execution proceeding is proceeded with, it would render the instant appeal infructuous on taking possession of the tenanted premises.

Therefore, there shall be an unconditional stay of execution proceeding for a period of eight weeks from date or until further order/orders of this Court whichever is earlier.

The respondents are directed to file affidavit-in-opposition to the application for stay within 11th October, 2023; reply thereto, if any, be filed by 17th October, 2023.

List the application for stay before the appropriate Bench on 18th October, 2023.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)