PETITIONER:

M/S. SARMON PTE LIMITED

Vs.

RESPONDENT:

M/S. UMESH KUMAR KAJARIA & ANR.

DATE OF JUDGMENT11/01/1995

BENCH:

VERMA, JAGDISH SARAN (J)

BENCH:

VERMA, JAGDISH SARAN (J)

BHARUCHA S.P. (J)

CITATION:

1995 SCC Supl. (1) 443 JT 1995 (2) 102

1995 SCALE (1)124

ACT:

HEADNOTE:

JUDGMENT: ORDER

1. Leave granted.

2. The appellant filed a suit on the Original Side of the High Court at Calcutta under the provisions of Order 37 of the Code of Civil Procedure. The two respondents entered appearance upon the summons for judgment taken out by the appellant. On 2nd July, 1991, leave to defend the suit was given to the respondents on condition that they deposited "a sum of Rs. 30 lakhs with the Registrar, Original Side within a month from date either by cash or by a bank guarantee or any real properties within the jurisdiction of this Court to the satisfaction of the Registrar. Original Side failing which there will be a decree for a sum of Rs. 37,63,250.60 against the defendants which will carry interest at the rate of 12 per cent per annum". The respondents having failed to make a deposit as ordered, a decree was passed. respondents were ordered and decreed to pay to the appellant the sum of Rs. 37,73,250.60 with interest thereon at the rate of 12 per cent per annum from the date of decree / till realisation.

3.0n 26th November, 1991, an order was passed by a Division Bench of the High Court upon an appeal filed by the second respondent against the order of conditional leave to defend. Time to make the deposit was extended by 3 weeks after the vacation, in default whereof the appellant was at liberty to execute the decree. The respondents failed to make the deposit even within the said extended period and, consequently, the appellant became entitled to execute the decree.

4. A further order was passed in the aforesaid appeal on 19th February, 1992. The second respondent was directed to furnish security in the sum of Rs. 15 lakhs by way of bank guarantee or cash to the satisfaction of the Registrar, Original Side, within two weeks, during which period an unconditional stay of the decree was ordered. If security

as aforestated was furnished, the stay was to continue till further orders. The bank guarantee was required to be, initially, for the period of one year, renewable from year to year atleast three weeks before the date of expiry. In default of renewal, the bank was required to pay the amount covered thereby to the appellant. On 16th March, 1992, a bank guarantee in the aforementioned terms was furnished.

- 5. On 19th March, 1992, a Division Bench of the High Court passed an order in the appeal filed by the first respondent on the order granting conditional leave to defend. The order stated: "In view of the security furnished in term of the earlier order passed in the appeal preferred by the appellant company M/s. Merchants & Traders (P) Ltd, (the second respondent) no further security need be furnished by Umesh Kumar Kajaria (the first respondent) in terms of the order under appeal".
- 6. On 26th April, 1993, upon a special leave petition filed by the appellant against the order passed on 19th February, 1992 in the appeal filed in the High Court by the first respondent, this Court ordered:

"The order which commends to us is to convert the order of the High Court of tile respondents furnishing Bank Guarantee to the tune of Rs. 15 lacs (Rs. fifteen lacs only) to deposit in cash the said sum of Rs. 15 lacs in court to await disposal by the High Court. The High Court on its part is requested not to retain the said sum of Rs. 15 lacs unduly and consider the feasibility of passing it over to the plaintiff-appellant. The High Court is also requested to dispose of the appeal of the respondents expeditiously.

Let the said sum of Rs. 15 lacks be deposited by the respondent in the High Court within two weeks and in order thereon to the above effect be passed within the following two weeks. The appeal is allowed accordingly. Costs to abide by the event.

7. On 29th June, 1992, orders were passed upon applications for stay in, broadly, common terms in the appeals filed in the High Court by the first and the second respondents against the order granting conditional leave to defend. The orders stated that, in view of the fact that the first respondent had furnished a bank guarantee in the sum of Rs. 15 lakhs pursuant to the order dated 19th February, 1992, no further order was required except that the pendency of the appeals would not affect the hearing of the suit, and directions in regard to pleadings and discovery were given. Against the order dated 29th June, 1992, passed in the appeal filed by the first respondent as aforesaid, the present special leave petition was preferred. 8.'It is relevant to mention now what has transpired \after the special leave petition was filed. The bank guarantee which was valid upto 15th March, 1993, and which was to be renewed from year to year, was not renewed by the second respondent and lapsed. On 28th July, 1993, the bank that had issued the bank guarantee, ANZ Grindlays Bank, was directed by the High Court to deposit the amount of the bank guarantee with its Registrar. Upon being informed of the order on 29th July, 1993, the bank deposited the amount with the Registrar on 10th September, 1993.

9.On 15th March, 1994, on this Special Leave Petition, it was ordered that the amount deposited with the Registrar by the bank be paid over to the appellant upon the appellant

furnishing security to the satisfaction of the High Court for refund thereof if the final outcome of the matter so required. Further, the bank was issued notice and required to state on affidavit the circumstances in which the amount of the bank guarantee was paid and whether the bank guarantee was subsisting at the time of payment.

10. The bank has filed an affidavit ex- 105

plaining the circumstances of the payment; it has stated that, notwithstanding the expiry of the one year period mentioned in the bank guarantee on 15th March, 1993, the bank guarantee was valid on the date of payment "because the usual limitation period was available to the beneficiary for enforcing the payment of the guaranteed amount within such period". We accept the explanation given by the bank; no further action as against the bank is required.

- 11. Insofar as this appeal is concerned, it will be seen that each of the two respondents tiled separate appeals in the High Court against the order giving them conditional leave to defend. No appeal against the decree made as aforesaid has been filed by either respondent.
- 12. In the appeal filed by the second respondent the order of the Division Bench of the High Court was modified by this Court on 26th April, 1993. The second respondent was directed to deposit the sum of Rs. 15 lakhs in the High Court instead of furnishing, a bank guarantee in that amount. The failure of the second respondent to deposit the sum of Rs. 15 lakhs in the High Court as ordered by this Court and its failure to renew the bank guarantee as required by the High Court has led to the deposit by the bank of the amount of the bank guarantee, namely, Rs. 15 lakhs, in the High Court. The required deposit of Rs. 15 lakhs in court on behalf of the second respondent, therefore, is satisfied, though not in the manner contemplated either by this Court or by the High Court.
- 13. The liability of the respondents to the appellant as claimed in the suit is joint and several. It is, therefore, appropriate that the deposit of Rs. 15 lakhs as aforesaid be treated as having been made on behalf of both respondents as a condition of stay of the execution of the decree, pending the disposal of the appeals in the High Court. It is now not necessary for this Court to make any further order. It is for the Division Bench of the High Court to consider, upon the appeals, which shall be heard together, whether, having regard to the decree against which no appeal is filed, the merits of the case and the conduct of the respondents as hereinabove set out, leave, to defend the suit should now be given and on terms other than those imposed by the learned Single Judge on the summons for judgment.
- 14. The appeal is disposed of accordingly. There shall be no order as to costs.

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