2016 eGLR_HC 10006013

Before the Hon'ble MS H N DEVANI, JUSTICE the Hon'ble MR G B SHAH, JUSTICE

MANIBHAI AND BROTHERS Vs. BIRLA CELLULOSIC

CIVIL APPLICATION No: 11793 of 2015 , Decided On: 22/01/2016

(A) Arbitration & Conciliation Act, 1976 - Sec. 34 - Civil Procedure Code, 1908 (5 of 1908) - Order XLI, Rule 5, Sec. 151 - Abritration - Award - District Court dismissed objection against award - In first appeal award amount directed to deposited and amount deposited - Application to withdraw award amount - Maintainability - Held, application allowed subject to imposing condition for providing security towards withdrawal of the amount - Application allowed accordingly

Cases Reffered to :
1. State of Gujarat v. Central Bank of India, Ahmedabad, 1987 (1) GLR 437
2.Sihor Nagarpalika Bureau v. Bhabhlubhai Virabhai & Co., 2005 (4) SCC 1
3.Nirmalendu Sekhar Karmakar v. The Basumati Corporation Ltd., 1992 (2) CALLT 194 (HC)
4.Forward Construction Company v. Prabhat Mandal, AIR 1986 SC 391
5.Shri Rakesh Madan v. Rajasthan Financial Corporation, 159 (2009) DLT 539
6. A. Toshand Sons India Ltd. v. N. N. Khanna, AIR 2006 Delhi 251
7. Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee, 1990 (2) SCC 437
8. P.S.L. Ramanathan Chettiar v. O.R.M.P.R.M. Ramanathan Chettiar, AIR 1968 SC 1047
9. Kanpur Jal Sansthan v. Bapu Constructions, 2015 (5) SCC 267
10. State of Gujarat v. Central Bank of India, Ahmedabad, 1987 (1) GLR 437
11. Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation, 2009 (8) SCC 646
12. K. K. Velusamy v. N. Palanisamy, 2011 (11) SCC 275

Mr. Kamal Trivedi, Sr. advocate with Mr. Paresh M. Dave,Advocate with Mr. Dhaval Shah, Advocate For the Applicant(s) No. 1 Mr. Devan Parikh, Sr. Advocate with Mr. Nisarg Desai, Advocate for NANAVATI ASSOCIATES, Advocate for the Respondent(s) No. 1

MS. HARSHA DEVANI, J. 1. Rule. Mr. Nisarg Desai, learned Advocate for Nanavati Associates, learned Advocates for the respondent, waives service of notice of Rule on behalf of the respondent.

2. Having regard to the lengthy arguments advanced by the learned Counsel for the respective parties, the matter was taken up for final hearing.

3. By this application, the applicant seeks permission to withdraw from the District Court, Bharuch the amount of Rs. 3,06,35,000/- deposited by the respondent herein and interest accrued thereon

subject to such terms and conditions that may be deemed fit by this Court.

4. The application has been filed in the backdrop of the following facts.

4.1. The applicant - M/s. Manibhai & Brothers is a partnership firm which is engaged in the business of construction activities as Civil Works Contractors. The respondent - M/s. Birla Cellulosic had awarded a contract to the applicant for construction of a Weir/Bridge across river Kim. Various disputes arose between the parties in respect of the contract and ultimately, the matter was referred to the sole arbitration of Honble Mr. Justice D. A. Desai (Retired) who rendered the final award on 18th August, 2002 whereby the respondent herein was directed to pay the applicant an amount of Rs. 2,04,03,021/- with 12% running interest from 1st November, 1998 till payment. The award came to be challenged by the respondent before the learned Additional District Judge, Bharuch by filing objections under Sec. 34 of the Arbitration and Reconciliation Act, 1996 (hereinafter referred to as "the Act"). By a judgment and order dated 25th April, 2012, the learned 4th Additional District Judge, Bharuch, dismissed the objection application. The respondent carried the matter in appeal before this Court being First Appeal No. 3176 of 2012, which came to be admitted by an order dated 6th August, 2013. The Court while admitting the appeal also considered the stay application filed by the respondent and directed the respondent to deposit an amount of Rs. 1,10,00,000/- with accrued interest at the rate of 12% perannum and to furnish a solvent security to the satisfaction of the learned District Judge for the remaining amount. Pursuant to the said order, the respondent deposited an amount of Rs. 3,06,35,000/- which comprises of the principal amount being Rs. 1.10 crores and interest thereon with the District Court. Thereafter, the applicant herein moved an application before the District Court, Bharuch for withdrawal of the amount so deposited by the respondent. The said application filed came to be allowed by an order dated 28th February, 2014 whereby the learned 2nd Additional District Judge, Ankleshwar directed that the amount of Rs. 3,06,35,000/- lying with the District Court, in the F.D.R. in the name of Nazir, be paid with accrued interest to the applicant after proper verification. It was further directed that the amount should be paid after production of a Bank guarantee of Rs. 4,00,00,000/- and solvent security to the satisfaction of the District Judge should also be furnished. It was also ordered that the Bank guarantee should be extended till the final disposal of the appeal. Being aggrieved, the respondent challenged the aforesaid order before this Court by way of a writ petition being Special Civil Application No. 3476 of 2014. Before this Court, the learned Counsel for the applicant had sought permission to withdraw the application made before the learned District Judge to enable the applicant to file an application for withdrawal of the amount in the pending first appeal. By a judgment and order dated 28th January, 2015, such permission was granted to the applicant and the writ petition came to be disposed of by observing that once the application (Exh. 8) is withdrawn, the order impugned before the Court would not survive. That the petition has, therefore, become infructuous. It was further observed that the said order shall not operate as a bar to the respondent to move an appropriate application for withdrawal of the amount in pending First Appeal No. 3176 of 2012 and at that stage, the right of the petitioner (the respondent herein) to resist the application shall also remain open. Thereafter, the applicant has moved the present application seeking the relief noted hereinabove.

5. Mr. Kamal Trivedi, Senior Advocate, learned Counsel for the applicant submitted that the respondent herein had preferred the appeal before this Court under Sec. 37 of the Act, therefore, the provisions of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") would be applicable. This application would, therefore, be governed by Rule 5 of Order XLI of the Code. Reference was made to the decision of the Supreme Court in the case of Kanpur Jal Sansthan v. Bapu Constructions, 2015 (5) SCC 267, wherein it has been held that whatever may be the status of the award under the Act in respect of any other statute, but when it is challenged in an appeal under

Sec. 37 of the Act, the underlying principle of the Code of Civil Procedure is applicable. The Court further observed that Order XLI, Rule 5, in principle, is applicable to an appeal preferred before the High Court for there is no provision in the Act prohibiting the appellate Court not to take recourse to the underlying principles of the Code of Civil Procedure as long as they are in consonance with the spirit and principles engrafted in the Act. As regards the validity of the order impugned before it, the Court found that the High Court had directed for deposit of the money and withdrawal of 50% of the same without furnishing security and the remaining half after furnishing security. The High Court had not given any justifiable reason for permitting such withdrawal. The Court, ultimately, without commenting on the merits of the grounds sought to be urged before it, only modified the order to the effect that the respondent shall furnish the security for the entire amount to the satisfaction of the District Judge concerned within a period of six weeks. It was pointed out that therefore, the Supreme Court has upheld the order passed by the High Court permitting withdrawal of the amount but only modified the conditions imposed by the High Court. It was submitted that the applicant is ready and willing to abide by any terms and conditions that may be imposed and that there is nothing strange for a party to make an application of this nature, which is in consonance with the principle that the party should enjoy the fruits of his decree which is also the purpose behind the direction to deposit the amount. According to the learned Counsel, the present application is in the nature of an application under Sec. 151 of the Code whereby the applicant has invoked the inherent powers of the Court and is not a review application, nor is it an application for execution of the decree. It was submitted that the execution of the decree having been stayed by the order dated 6th August, 2013 passed by this Court, the execution of the decree stands suspended. Reliance was placed upon the decision of the Supreme Court in the case of P.S.L. Ramanathan Chettiar v. O.R.M.P.R.M. Ramanathan Chettiar, AIR 1968 SC 1047, wherein the Court, inter alia, observed that the real effect of deposit of money in Court as was done in that case was to put the money beyond the reach of the parties pending the disposal of the appeal. The decree-holder could only take it out on furnishing security which means that the payment was not in satisfaction of the decree and the security could be proceeded against by the judgment-debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment-debtor. It was submitted that, therefore, if the applicant is permitted to withdraw the amount deposited by the respondent subject to furnishing such security as the Court may deem just and proper, it would not be in satisfaction of the decree. Reference was made to the reasons set out in Paragraphs 4 and 5 of the memorandum of application to submit that for the said reasons, the applicant may be permitted to withdraw the amount subject to any terms and conditions.

6. Mr. Devan Parikh, Senior Advocate, learned Counsel for the respondent, with all the vehemence at his command, made a three-pronged attack opposing the application. It was firstly submitted that an application of this nature is not maintainable; secondly, that it is not sufficient for the applicant to show that the application is maintainable but to also show as to why the relief prayed for should be granted; and thirdly, that the application is ex-facie and clearly in the nature of a review application seeking review of the order dated 6th August, 2013 made by this Court on the stay application filed by the respondent. It was submitted that since the provisions of the Code are applicable to an appeal under Sec. 37 of the Act, the stay application made by the respondent would be one under Rule 5 of Order XLI of the Code. It was submitted that any amount deposited under Rule 5 of Order XLI is not in furtherance of a decree and that if the Court is satisfied that there is sufficient cause, it may order stay of the execution of the decree. However, such discretion has to be exercised on the basis of the principles known to law and that under Rule 5 of Order XLI of the Code, the Court has to go into the question of prima facie case. It was submitted that Sec. 151 of the Code would not be attracted in this case because all the issues would be required to be decided at the stage of granting stay and nothing remains to be done thereafter.

6.1. Reliance was placed upon the decision of the Supreme Court in Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee, 1990 (2) SCC 437, for the proposition that if a matter is governed by an express provision of law, the Court cannot give a go-by to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction. Therefore, it cannot be invoked to override bar of review under Sec. 362 of the Code of Criminal Procedure, 1973. If there had been changes in the circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of Court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of power to reconsider the same materials to arrive at a different conclusion is in effect a review. It was argued that under the Code, there is a specific provision made under Rule 5 of Order XLI, and hence, resort cannot be made to the inherent powers under Sec. 151 as the same would amount to review of the order passed by this Court under Rule 5 of Order XLI. According to the learned Counsel, to state that there is a residuary power left under Sec. 151 of the Code after the Order XLI, Rule 5 stage is not correct and amounts to an indirect review because the same facts and same aspects are required to be considered while exercising discretion under Sec. 151 of the Code. It was argued that the reasons stated in Paragraphs 4 and 5 of the application could have very well been pointed out to the Court at the stage of hearing of the application under Rule 5 of Order XLI of the Code. It was contended that there are no changed circumstances nor had undue hardship been pleaded, and hence, there is clearly no room for invoking Sec. 151 of the Code.

6.2. Reference was made to Rule 4 of Order XXXIX of the Code to point out that where the legislature so intends, an express provision is made for variation of an order of injunction. Referring to the second proviso to Rule 4, it was pointed out that the same provides that an order of injunction having been passed after giving to a party an opportunity of being heard, shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in circumstances or unless the Court is satisfied that the order has caused undue hardship to that party. It was submitted that even in the context of an interim order, when the legislature intended that it could be varied, express powers have been given to do so and the circumstances under which it could be varied. It was argued that Rule 5 of Order XLI of the Code is a complete Code in itself, and hence, there is no question of invoking Sec. 151 of the Code. It was submitted that whenever the Court while exercising powers under Rule 5 of Order XLI permits the other side to withdraw the amount, it is exercising powers under Rule 5 of Order XLI alone and not under Rule 5 of Order XLI read with Sec. 151 of the Code. According to the learned Counsel, the power to withdraw the amount is contemplated under Order XLI Rule 5 of the Code, and hence, the question of resorting to the inherent powers of the Court under Sec. 151 of the Code would not arise. It was argued that exercise of discretion under Sec. 151 of the Code would be on points which were urged at the time when the application under Order XLI, Rule 5 came to be decided, and therefore, in effect and substance, such an application is are view of the exercise carried out under Rule 5 of Order XLI. Therefore, such an application cannot be made once that stage is gone.

6.3. Reference was made to the decision of a learned Single Judge of the Delhi High Court in the case of A. Toshand Sons India Ltd. v. N. N. Khanna, AIR 2006 Delhi 251, for the proposition that the amount deposited to avoid execution keeps the amount beyond the reach of the decree-holder and is not a payment to the decree-holder in terms of Order XXI, Rule 1 of the Code. That the deposit of the decretal amount by a judgment-debtor as a condition for obtaining stay of execution of a decree cannot be treated at par with payment to the decree-holder. Reference was made to another decision of a learned Single Judge of Delhi High Court in Shri Rakesh Madan v. Rajasthan

Financial Corporation, 159 (2009) DLT 539, for the proposition that the principle of res judicata applies also as between two stages in the same litigation to the extent that a Court whether a trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding. That without any change in circumstances or without any case of undue hardship having been made out, the Court is not competent to, in the same facts, grant an interlocutory injunction which was declined earlier. The attention of the Court was further invited to Paragraph 20 of the said decision wherein the Court referred to the decision of the Supreme Court in Forward Construction Company v. Prabhat Mandal, AIR 1986 SC 391, wherein it was held that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have decided as incidental or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action. It was emphatically argued that if on an interim application, the Court takes a view, it then cannot take a different view except under changed circumstances. It was submitted that all issues are to be raised and decided at the stage of the stay application and that it is not permissible for the applicant to now seek withdrawal of the amount deposited by the applicant as the stage for making such request has gone.

6.4. The decision of the Calcutta High Court in the case of Nirmalendu Sekhar Karmakar v. The Basumati Corporation Ltd., 1992 (2) CALLT 194 (HC), was cited for the proposition that an interim order cannot be modified except in case of changed circumstances which justify variation, modification or discharge which must obviously be a change occurring subsequent to the passing of the order and the undue hardship that may justify any modification or discharge must also be caused by the order in question. Referring to the order dated 6th August, 2013 and more particularly, Paragraph 5 thereof, it was pointed out that the Court has stayed the award as well as the order of the District Court, and hence, the enforceability of the award goes. Therefore, on facts, no case has been made out for exercise of discretion in favour of the applicant.

6.5. At this stage, the learned Counsel further wanted to refer to the paper-book of the first appeal to refer to the evidence adduced before the Arbitrator and the findings recorded by the Arbitrator, which was strongly resisted by the learned Counsel for the applicant on the ground that the Court while granting the stay has heard the parties on merits and the question of re-arguing the case on merits at this stage does not arise. Dealing with the objection raised by the learned Counsel for the applicant, Mr. Parikh for the respondent submitted that the applicants are clearly wrong in their submission that the respondent cannot argue on merits. It was submitted that the discretion to be exercised by this Court is not automatic as otherwise in all cases where withdrawal of the amount deposited is sought, it becomes a mere formality. The learned Counsel further submitted that he is not in a position to proceed further with the matter without referring to the record of the first appeal. The Court made it clear that while deciding an application for withdrawal of the amount deposited by the judgment-debtor pursuant to an order made on a stay application, this Court is not inclined to enter into the merits of the case in such detail so as to call for the paper-book of the first appeal and the record of the case. The learned Counsel for the respondent, after requesting the Court to record his request to refer to the record of the case, proceeded further with his submissions.

6.6. Reference was made to the decision of the Supreme Court in the case of Sihor Nagarpalika Bureau v. Bhabhlubhai Virabhai & Co., 2005 (4) SCC 1, to submit that in a case of this nature where there is a violation of the principles of natural justice, the Court finds it sufficient to grant security to the judgment-debtor. Referring to the merits of the case, it was submitted that the applicant did not produce any proof of damages before the Arbitrator and the claim statement filed by it was not supported by an affidavit, therefore, this is a case of absolutely no evidence. It was

pointed out that the respondent had applied to the Arbitrator to permit them to cross-examine the person who made the claim statement but the claimant objected to the request on the ground that when they had not examined any witness, the question of cross-examination of any witness would not arise. It was submitted that in a case of no evidence, the Arbitrator goes by the admitted facts whereas in this case, the Arbitrator has gone by part admissions and there is an adjudication where the applicant has not produced any evidence whatsoever. It was further submitted that there is a clause in the contract which provides that the applicant shall not be entitled to loss of profit, despite which the Arbitrator has awarded loss of profit. It was submitted that mobilisation advance of more than Rs. 45,00,000/- was to be returned by the applicant which has not been granted and the counter claim of the respondent has been rejected on the ground that it is not entitled to damages. Various other grounds on the merits of the case were urged before this Court; however, for the reasons that follow, the Court does not deem it necessary to advert to the same in detail. It was contended that, therefore, on the merits of the case also, the other side has no case.

6.7. Lastly, it was submitted that if at all the Court is inclined to entertain the application, the total amount deposited by the respondent, should not be permitted to be with drawn. It was urged that the applicant is clearly wrong in the view that such an application can be decided without going into the merits of the case. It was also submitted that nothing has been pointed out as to the points under which an application under Sec. 151 of the Code can be filed by them, if not on merits. It was, accordingly, urged that the application being devoid of merits, deserves to be rejected.

7. In rejoinder, Mr. Kamal Trivedi, learned Counsel for the applicant submitted that the decisions on which reliance has been placed by the learned Counsel for the respondent would not be applicable to the facts of the present case. As regards the decision of the Supreme Court in case of Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee (supra), it was submitted that the same was rendered in a different set of facts and in the context of the provisions of the Code of Criminal Procedure, 1973 and it would in no manner be applicable to the facts of the present case. It was urged that the present application is not in the nature of a review inasmuch as, it is for the first time that the applicant has applied for withdrawal of the amount upon providing security as may be deemed appropriate by the Court. It was submitted that apart from the fact that the stage of Order XLI, Rule 5 is over, Order XLI, Rule 5 of the Code does not deal with the aspect of withdrawal of the amount deposited by the judgment-debtor. According to the learned Counsel, this application has been filed invoking the inherent jurisdiction of the Court under Sec. 151 of the Code coupled with the permission granted by this Court vide the two orders referred to hereinabove. It was submitted that this Court while considering this application for withdrawal of the amount, would not comment on the merits of the case as it would amount to tinkering with the observations made in the order dated 6th August, 2013. It was, accordingly, urged that the application deserves to be allowed and the applicant be permitted to withdraw the amount deposited by the respondent subject to such terms and conditions that the Court may deem fit.

8. In the backdrop of the facts and contentions noted hereinabove, the first question that arises for consideration is as to whether an application of this nature is maintainable.

9. As noticed earlier, the order impugned in the appeal is the order passed by the District Court on the application filed by the respondent under Sec. 34 of the Act for setting aside the arbitral award. By the order dated 6th August, 2013, this Court stayed the operation and implementation of the award passed by the Arbitral Tribunal on condition that the respondent deposits with the District Court the amount of Rs. 1.10 crores with the accrued interest at the rate of 12% perannum within the period stipulated therein and to furnish solvent security to the satisfaction of the learned District Judge for the remaining amount. A perusal of the application made by the respondent shows that

while the same does not refer to any specific provision under which it is filed, the same is relatable to Rule 5 of Order XLI of the Code and even in terms of the submissions advanced by the learned Counsel for the parties, the order passed on the stay application was an order under Rule 5 of Order XLI of the Code.

10. At this juncture, it may be germane to refer to the provisions of Rule 5 of Order XLI of the Code which read thus :

"5. Stay by Appellate Court :- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation :- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) Stay by Court which passed the decree :- Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree. On a plain reading of sub-rule (1) of Rule 5 of Order XLI, it is apparent that mere filing of an appeal would not operate as a stay of the proceeding under the decree or order appealed against. However, the appellate Court may for sufficient cause, order stay of execution of such decree. Sub-rule (3) of Rule 5 further provides that no order for stay of execution shall be made unless the Court is satisfied about the factors mentioned therein which inter alia include satisfaction that security has been given by the applicant for due performance of such decree or order as may ultimately be binding upon him. Thus, Rule 5 of Order XLI of the Code makes provision for stay of execution of a decree or order and also provides for the eventualities under which such relief can be granted. Therefore, the Court while staying the execution of the decree would, inter alia, record satisfaction that security has been given by the applicant for due

performance of such decree or order as may ultimately be binding upon him. Reading Rule 5 of Order XLI in its entirety, there is nothing therein which can be read as making provision for withdrawal by the decree-holder of the amount deposited by the applicant towards security. Therefore, this Court does not find any force in the contention raised by the learned Counsel for the respondent that an order permitting withdrawal of the amount deposited pursuant to an order made under Rule 5 of Order XLI of the Code is also made in exercise of powers under the said rule.

11. The question that then arises for consideration is as regards the maintainability of such an application and the power of the Court to grant the same. In this regard, it may be germane to refer to the decision of a Division Bench of this Court in the case of State of Gujarat v. Central Bank of India, Ahmedabad, 1987 (1) GLR 437, wherein the Court in Paragraph 19 of the reported decision has considered the question as to whether there is an established practice that the execution of a money decree should not be stayed unless the judgment-debtor deposits the decretal amount in Court and on such deposit, the successful party be permitted to withdraw the money on furnishing security to the satisfaction of the Court. The Court observed that in a large number of cases where money decree is passed, the Court generally does not grant stay unless the defendant deposits the amount in the Court. But this appears to be a rule of prudence and not a principle of law of universal application. The Court also believed and held that this practice based on rule of prudence should ordinarily be followed by appellate Courts. The practice of not granting stay on the money decree except on condition that the decretal amount be deposited in the Court and the successful party be permitted to withdraw the same on furnishing security to the satisfaction of the trial Court appears to have been well entrenched, and for good reasons. Therefore, the practice of directing the judgment-debtor to deposit the decretal amount and permitting the decree-holder to withdraw such amount subject to furnishing security in that regard appears to be a long-standing practice.

12. Apart from there being a long-standing practice, in the opinion of this Court, the power to permit withdrawal of the amount deposited by the judgment-debtor for stay of execution of the decree or order is traceable to the inherent powers vested in the Court under Sec. 151 of the Code. Under Rule 5 of Order XLI of the Code, the Court makes an order laying down conditions for stay of execution of the decree, one of which may be to deposit the whole or part of the decretal amount. The application for withdrawal of such amount though could be decided simultaneously with an application under Rule 5 of Order XLI, the order passed on such application would always be subject to compliance with the condition for deposit of the amount. Therefore, while the Court is not precluded from passing a consolidated order while deciding an application under Rule 5 of Order XLI of the Code, at the same time, there is no bar against an application for withdrawal being moved after the amount is deposited inasmuch as, such order is an order under Sec. 151 of the Code and not Order XLI, Rule 5 thereof.

13. Before proceeding further, it may be apposite to refer to the following decisions of the Supreme Court on the scope and amb it of the powers of the Court under Sec. 151 of the Code.

13.1. In Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation, 2009 (8) SCC 646, the Supreme Court on the question of inherent jurisdiction of this Court held thus :

"132. Sec. 151 of the Code of Civil Procedure does not confer any extraordinary jurisdiction on this Court. It saves the inherent power of all the civil Courts i.e. from the trial Judge to this Court. Thus, where a matter has expressly been provided for in the body of the Code, ordinarily inherent power shall not be resorted to.

133. The underlying principle of Sec. 151 of the Code ordinarily would apply where the area is grey. It indisputably confers incidental powers. It confers power on a Court to do something which in absence of any provision contrary thereto would lead to advancement of justice and prevent in justice."

13.2. In K. K. Velusamy v. N. Palanisamy, 2011 (11) SCC 275, the Supreme Court held thus :

"12. The respondent contended that Sec. 151 cannot be used for reopening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that Sec. 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Sec. 151 has been explained by this Court in several decisions [See Padam Senv. State of U.P., Manohar Lal Chopra v. Seth Hiralal, Arjun Singh v. Mohindra Kumar, Ram Chand and Sons Sugar Mills(P) Ltd. v. Kanhayalal Bhargava, Nain Singh v. Koonwarjee, Newabganj Sugar Mills Co. Ltd. v. Union of India, Jaipur Mineral Development Syndicate v. C.I.T., National Institute of Mental Health & Neuro Sciences v. C. Parameshwara and Vinod Seth v. Devinder Bajaj]. We may summarise them as follows :

(a) Sec. 151 is not a substantive provision which creates or confers any power or jurisdiction on Courts. It merely recognises the discretionary power inherent in every Court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Sec. 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the Court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner in consistent with such provisions. In other words the Court cannot make use of the special provisions of Sec. 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the Court being complementary to the powers specifically conferred, a Court is free to exercise them for the purposes mentioned in Sec. 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the Court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the Court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a Court, should not however by treated as a carte blanche to grant any relief.

(f) The power under Sec. 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona

fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of Court."

14. Thus, in the above decisions, it has inter alia been held that as the provisions of the Code are not exhaustive, Sec. 151 of the Code recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances. The inherent power of the Court being complementary to the powers specifically conferred, the Court is free to exercise them for the purposes mentioned under Sec. 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

15. As noticed hereinabove, Order XLI, Rule 5 of the Code does not make any express provision for withdrawal of the amount by the decree-holder. Since withdrawal of the amount deposited by the judgment-debtor can be allowed only provided the decree-holder furnishes sufficient security, it need not be stated that such order can be passed only on a request made by the decree-holder. Such request or application for withdrawal, therefore, would not be one under Rule 5 of Order XLI of the Code, inasmuch as, the said rule provides for stay by the appellate Court and lays down the circumstances and the manner in which the execution of a decree could be stayed. Sub-rule (3) of Rule 5 provides for the factors in respect of which the Court should be satisfied for the purpose of staying the execution of the decree, one of which is that the security has been given by the applicant for due performance of such decree or order as may ultimately be binding upon him. There is no express provision in Rule 5 of Order XLI of the Code which permits the decree-holder to apply for withdrawal of the amount that may be directed to be deposited as a pre-condition for stay of execution of the decree.

16. It is a well-settled principle of law that a money decree ordinarily should not be stayed. Rule 5 of Order XLI of the Code provides for stay of execution of a decree and provides for a condition that the judgment-debtor should furnish security for due performance thereof. However, the decree-holder is then deprived of the benefit of the fruits of the decree during the pendency of the appeal. Therefore, as a principle of prudence, presumably to ensure that the decree-holder is not deprived of the fruits of the decree as well as to ensure that the decree does not stand executed despite the stay having been granted under Rule 5 of Order XLI, the Courts have evolved a principle which is very much in consonance with Sec. 151 of the Code, whereby the decree-holder is permitted to withdraw the amount subject to furnishing security in respect thereof. As held by the Supreme Court in P.S.L. Ramanathan Chettiar v. O.R.M.P.R.M. Ramanathan Chettiar (supra), on a judgment-debtors depositing a sum in the Court to purchase peace by way of stay of execution of the decree on terms that the decree-holder can draw it out on furnishing security, does not pass title to the money to the decree-holder. The real effect of deposit of money in Court is to put the money beyond the reach of the parties pending disposal of the appeal. The decree-holder could only take it out on furnishing security which means that the payment was not in satisfaction of the decree and the security could be proceeded against the judgment-debtor in case of his success in the appeal. Pending the determination of the same, it was beyond the reach of the judgment-debtor. Therefore, withdrawal of the amount deposited by the judgment-debtor by the decree-holder on furnishing security appears to be a well-settled practice.

17. In the present case, the application has been vehemently opposed by the respondent on the ground that there is no merit in the case of the applicant, and therefore, it is not entitled to withdraw any amount. In this regard, it may be noted that the arbitral award is in favour of the applicant and

the District Court has also held in favour of the applicant. Therefore, as on date, the applicant has succeeded before two forums. Since the learned Counsel for the respondent has insisted upon adverting to the merits of the case, it may be noted that this Court while staying the operation and implementation of the arbitral award has not directed the respondent - judgment-debtor to deposit the entire amount under the award. The Court has taken note of the fact that an amount of approximately Rs. 50,00,000/- was agreed to be paid by the respondent (original appellant) under different heads. The Court has also noted that the unfinished work amounted to Rs. 6,00,00,000/- and computing the loss of profit at 10% arrived at a figure of Rs. 60,00,000/- and accordingly, ordered the respondent appellant to deposit Rs. 1,10,00,000/- within terest at the rate of 12% per annum. Therefore, though the Arbtirator had awarded a sum of Rs. 2,04,03,021/-, the Court was of the view that to the extent of Rs. 1,10,00,000/-, the applicant could be said to have a reasonable claim. Therefore, it is only to the extent, the Court, after examining the merits of the case, has found the claim of the applicant to be reasonable that it has directed the respondent to deposit such amount. As a necessary corollary, it follows that to the extent the Court did not find merit in the case of the applicant, the Court has not directed the respondent to deposit such amount. The insistence on the part of the learned Counsel for the respondent to address the Court on the merits of the appeal, therefore, is not justified.

18. In this case, the Arbitrator has made an award on 18th February, 2002 and the application made by the respondent under Sec. 34 of the Act for setting aside the award came to be dismissed on 23rd April, 2012. Therefore, though the applicant has succeeded before the Arbitrator as well as in the application made by the respondent under Sec. 34 of the Act, for a period of thirteen years, it has been deprived of the fruits of the decree. Under the circumstances, the Court is of the view that having regard to the fact that by the order dated 6th August, 2013, the respondent has been directed to deposit only such amount to the extent the Court was of the view that there is merit in its claim, the applicant deserves to be permitted to withdraw the amount deposited pursuant to the said order.

19. As regards the contention that the application is barred by res judicata, in the opinion of this Court, the same does not merit acceptance for the reason that the Court at the relevant time when the stay application came to be decided has not entered into the merits of the issue as to whether the applicant was entitled to withdraw the amount so deposited. On the contrary, the Court in the concluding Paragraph of the order has granted liberty to the applicant to move an application for withdrawal of the amount, if otherwise permissible in law reserving liberty to the respondent to resist the application in accordance with law. Therefore, subject to the application for withdrawal of the amount being permissible in law, the applicant was at liberty to move such an application. This fact finds further support in the order dated 28th January, 2015 made by this Court in Special Civil Application No. 3476 of 2014, wherein the order dated 28th February, 2014 made by the District Court permitting the applicant to withdraw the amount deposited by the respondent was subject matter of challenge, wherein the Court, in Paragraph 6 of the said order, while holding that in view of the pendency of the appeal before this Court, the application could be decided only by this Court and not the lower Court, has further observed that that does not mean that the respondent could not have preferred an application for withdrawal of the amount before this Court, which in any case is to be decided in accordance with law. In Paragraph 9 of the said order, the Court has once again observed that the said order would not operate as a bar to the respondent to move an appropriate application for withdrawal of the amount pending First Appeal No. 3176 of 2012 and at that stage, the right of the petitioner (respondent herein) to resist the application shall also remain open.

20. As regards the contention that the application is in the nature of review, one fails to understand the basis of such contention inasmuch as, the earlier application was an application made by the

respondent under Rule 5 of Order XLI of the Code for stay of execution of the arbitral award, which came to be partly allowed. The present application has been made by the applicant (who was the respondent in the earlier application) for withdrawal of the amount deposited by the respondent pursuant to the order made in the above application filed by the respondent. As noted hereinabove, this application can be said to be one under Sec. 151 of the Code as there is no express provision in the Code for withdrawal of the amount deposited by way of security under Rule 5 Order XLI of the Code. Therefore, when the parties who made the applications are different, the nature of the applications is different, and the power exercised by the Court is under different provisions of the Code, the Court does not find any merit in the contention that the present application is an application for review of the order dated 6th August, 2013.

21. In the opinion of this Court, permitting withdrawal of the amount would also not amount to modifying the stay order as by virtue of this order the respondent has not been asked to pay any additional sum nor are the terms of stay order granted by the Court in any manner being modified. All that is being done is that in view of a long settled practice, the applicant is being permitted to withdraw the amount deposited by the respondent in compliance with the stay order subject to the applicant furnishing security as directed by the Court. By adopting this course of action, the respondent judgment debtor is not in any manner prejudiced inasmuch as against withdrawal of the amount the applicant would be required to furnish such security as the Court deems fit. The only consequence is that instead of money lying in the deposit with the bank, the decree-holder gets to enjoy the same, subject of course, to furnishing security for withdrawal of the amount.

22. Insofar as the decisions on which reliance has been placed by the learned Counsel for the respondent are concerned, in Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee (supra), the controversy involved related to a matter under the provisions of the Code of Criminal Procedure wherein a review is expressly barred under Sec. 362 thereof. Insofar as it is held therein that if a matter is covered by an express letter of law, the Court cannot give a go-by to the statutory provision and instead evolve a new provision in the garb of inherent jurisdiction is concerned, in the light of what is held by this Court hereinabove, the said decision would not be applicable to the facts of the present case.

22.1. The decision of the Delhi High Court in the case of A. Tosh and Sons India Ltd. v. N. N. Khanna (supra) also does not carry the case of the respondent any further as the controversy involved therein related to the adjustment of the money which was released in favour of the decree-holder in execution proceedings.

22.2. The decision of the Delhi High Court in Shri Rakesh Madan v. Rajasthan Financial Corporation (supra) was rendered in the context of Rules 1 and 2 of Order XXXIX of the Code as to whether a second application for the same relief was maintainable under the said provision. In Forward Construction Company v. Prabhat Mandal (supra) which finds reference in that decision, what is held is that an adjudication is conclusive and final not only to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have decided as incidental or essentially connected with the said matter of litigation and every matter coming within the legitimate purview of the original matter. In the opinion of this Court, while it is permissible for the Court to entertain a request for withdrawal of the amount deposited by the judgment-debtors imultaneously at the time when an application under Rule 5 of Order XLI of the Code is being considered, the same would not operate as a bar to a subsequent application for withdrawal if such request was not made or considered while hearing the application under Rule 5 of Order XLI of the Code. In the facts of the present case, apart from the fact that no such application was made when the stay application was decided, this Court while deciding the stay application has expressly

reserved liberty to the applicant to file such application.

22.3. The decision of the Calcutta High Court in Nirmalendu Sekhar Karmakar v. The Basumati Corporation Ltd. (supra) also relates to modification of an interim order. The facts of the said case were quite gross inasmuch as, the matter was listed for judgment and the learned Single Judge instead of rendering the judgment, modified the order without any justification.

22.4. Insofar as the decision of the Supreme Court in the case of Sihor Nagarpalika Bureau v. Bhabhlubhai Virabhai & Co. (supra) is concerned, if the respondent was of the opinion that it ought to have been permitted to furnish security instead of insisting on deposit in cash as directed by the Court, it ought to have taken up such contention at the relevant time and placed reliance upon that decision. That stage having gone, the respondent cannot be permitted to contend that if an application for withdrawal had been made at the relevant time, they would have cited this decision and requested the Court to permit them to furnish security and not deposit the amount.

23. In the light of the above discussion, this Court is of the view that the application deserves to be allowed subject to imposing conditions for providing security towards withdrawal of the amount.

24. The application, therefore, succeeds and is accordingly allowed in the following terms.

24.1. The applicant is permitted to withdraw the entire amount presently lying with the District Court, Bharuch in Fixed Deposit in the name of the Nazir, on condition that a Bank guarantee of a nationalised bank should be given to the extent of the amount with drawn and such Bank guarantee should be kept alive till further order of the Court. The applicant shall also furnish security in the nature of immovable property to the satisfaction of the District Judge, Bharuch. The Bank guarantee may be kept in the custody of the Court below. In the event the Bank guarantee expires, it should be renewed before expiry and notice of renewal should be given to the learned Advocate for the appellant. In the event the Bank guarantee is not renewed in advance, as indicated herein, the concerned Court will invoke the Bank guarantee before its expiry. Rule is made absolute accordingly with no order as to costs.

25. At this stage, the learned Counsel for the respondent has requested that this order be stayed for a period of four weeks for the purpose of enabling the respondent to approach the higher forum. The request is strongly opposed by Mr. Paresh Dave, learned Counsel for the applicant. Having regard to the facts and circumstances of the case, the request is turned down.

Appeal Allowed