2025 INSC 1190

REPORTABLE

IN THE SUPREME COURT OF INDIA
EXTRAORDINARY APPELLATE JURISDICTION

Petition for Special Leave to Appeal (C) No.19767 of 2025

LIFESTYLE EQUITIES C.V. & ANR. ...PETITIONER(S)

VERSUS

AMAZON TECHNOLOGIES INC. ...RESPONDENT

J U D G M E N T

J.B. PARDIWALA J.,

For the convenience of exposition, this judgment is divided into the following parts:-

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1. Our Order dated 24.09.2025 passed in the instant petition reads thus:

> *"1. Exemption Application is allowed.*
> *2. Heard Mr. Mukul Rohatgi and Mr. Gaurav Pachnanda, the learned Senior counsel appearing for the petitioners and Dr. Abhishek Manu Singhvi, Mr. Neeraj Kishan Kaul and Mr. Arvind Nigam, the learned Senior counsel appearing for the respondent.*
> *3. We are of the view that there is no good reason for us to interfere with the impugned Judgment and Order passed by the High Court.*
> *4. The Special Leave Petition is, accordingly, dismissed.*
> *5. In view of the dismissal of the Special Leave Petition, no orders are required to be passed on the application for intervention/impleadment and the same stands disposed of.*
> *6. However, reasons to follow by a separate Order."*

2. This petition arises from the judgment and order passed by the High Court of Delhi, dated 01.07.2052 in the CM Application No. 26455 of 2025 filed in the RFA(O.S.)(COMM) No.11 of 2025 by which the application filed by the respondent herein (judgment debtor-original defendant) under Order XLI Rule 5(1) and Rule 5(3) of the Civil Procedure Code, 1908, (for short, "**the CPC**") respectively came to be allowed, and thereby the Court stayed the operation of the judgment and money decree dated 25.02.2025 passed by a learned Single Judge in the suit instituted by the petitioner herein. In short, the Division Bench of the High Court granted stay of the execution of the money decree suffered by the respondent herein without insisting for the deposit of the decretal amount.

3. For the sake of convenience, the petitioners herein shall be referred to as the original plaintiffs and the respondent herein shall be referred to as the original defendant.

A. FACTUAL MATRIX

4. The plaintiffs along with its subsidiaries and licensees claim to be engaged in the business of manufacturing, distribution and sale of a wide range of products including garments, apparels, footwear for men, women and children, furniture, textiles, watches and other lifestyle/personal care products under the trademark Beverly Hills Polo Club (hereinafter referred to as, "**BHPC**").

5. The plaintiff No. 1 is an Amsterdam based company and is the proprietor of the BHPC trademark and claims to hold exclusive rights for its use and commercialisation. The BHPC trademark consists of a distinctive look featuring a charging Polo pony with a mounted rider wielding a raised polo stick (mallet) symbolising the sport of Polo.

6. The plaintiff no. 2 is the licensee of the said trademark pursuant to the Master License and Licensing Service Agreement dated 20.05.2008.

7. The plaintiffs instituted Civil Suit (COMM) No. 443 of 2020 in the Delhi High Court, *inter alia*, seeking permanent injunction and damages against the defendant for the alleged infringement of their registered trademark BHPC.

8. It is the case of the plaintiffs that they are the rightful proprietors of the BHPC Mark which enjoys extensive goodwill and recognition in the domestic and international markets. The plaintiffs instituted the suit contending that the defendant has been unlawfully using a mark identically or deceptively similar to the plaintiffs' trademark, thereby violating their statutory and common law rights.

9. In such circumstances referred to above, the plaintiffs prayed for the following reliefs:

> *"a. Decree for permanent injunction restraining die Defendants, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees affiliates, subsidiaries, licensees, and agents from selling, offering for sale, advertising, directly or indirectly dealing in any products or reproducing or using in any manner whatsoever, the Infringing Logo Mark or any other trade mark or logo/device, which is identical to and/or deceptively similar to, or is a deceptive variant of, and/or includes the Plaintiffs' well known Logo Mark amounting to infringement of the Plaintiffs' registered trade marks as disclosed in the Plaint.*
>
> *b. Decree for permanent injunction restraining the Defendants, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licensees and agents from selling, offering for sale, advertising, directly or indirectly dealing in any products or reproducing or using in any manner whatsoever, the infringing Logo Mark or any other trade mark or logo/device, which is identical to and/or deceptively similar to or imitation of, or is a deceptive variant of, and/or includes the Plaintiffs' artistic Logo Mark amounting to infringement of the Plaintiffs' copyright in the said logo.*
>
> *c. Decree for permanent injunction restraining the Defendants, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licensees and agents from selling, offering for sale, advertising, directly or indirectly dealing in any products or using in any manner whatever, the infringing Logo Mark or any other mark or logo/device, which is identical to, or is a deceptive variant of and/or deceptively similar to and/or includes the Plaintiff's well known Logo Mark amounting to passing off of the goods/services*

and/or business of the Defendants for those of the Plaintiffs, dilution of goodwill and unfair competition.

d. A decree for delivery up of all products and material including stationery, visiting cards, hill boards, brochures, promotional material, letter-heads, cash memos, sign boards, sign posts, leaflets, cartons, or any other items of whatsoever, bearing the infringing Logo Mark and/or any other mark, logo or device which may be identical and/or deceptively similar, or is a deceptive variant of and/or includes the Plaintiff's well-known Logo Mark.

e. A decree for damages amounting to Rs. 2,00,05,000/- (Rupees Two Crores and Five Thousand only) or any such amount as found due in favour of the Plaintiffs. The Plaintiffs submit that the valuation of damages is an approximate figure only, and the Plaintiffs undertake to pay further Court fees as may be determined by this Hon'ble Court upon the damages that the Plaintiffs are able to prove in the course of trial.

f. An order for rendition of accounts of profits in favour of the Plaintiffs and against the Defendants to ascertain the profits made by Defendants through sale of its apparel products or any other products which bear the infringing Logo Mark. The Court fees as and when the accounts of profit are determined precisely and accurately in the course of trial, and upon disclosure of profits made by the Defendants.

g. An order awarding costs of this suit to the Plaintiffs;

h. Any other and further relief(s) as this Hon'ble Court may deem fit and proper to meet the ends of justice."

10. It appears from the materials on record that in the suit filed by the plaintiffs there were three defendants including the respondent herein

as the original defendant No. 1. The plaint computed the damages claimed from all the defendants to the tune of Rs. 2,00,05,000/- (Rupees Two Crore and Five Thousand Only), or such other amount as the court would find it to be payable.

11. It further appears that the defendant No. 1 was proceeded *ex parte vide* Order dated 20.04.2022. Of the remaining two defendants, the suit was decreed against the defendant No. 2 for Rs. 4,78,484/- *vide* the Order dated 02.03.2023. The very same order deleted the defendant No. 3 from the array of parties.

12. In such circumstances, the respondent before us is the only defendant now contesting the litigation.

13. It appears that upon institution of the suit by the plaintiffs the following Order dated 12.10.2020 came to be passed:

> *"1. Allowed, subject to all just exceptions.*
> *2. Original documents, if any, be filed within two weeks of the resumption of the normal functioning of the Court.*
> *3. Application is disposed of.*
>
> *I.A. 9256/2020 (under Order XI Rule 1 (4) Commercial Courts Act)*
>
> *1. Additional documents, if any, be filed within 30 days.*
> *2. Application is disposed of.*
> *Signing Date:13.10.2020 07:06:56 This file is digitally signed by PS to HMJ Mukta Gupta CS(COMM) 443/2020 I.A. 9254/2020 (under Order XXXIX Rule 1 and 2 CPC)*
>
> *1. Plaint be registered as a suit.*
> *2. Issue summons in the suit and notice in the application to the defendants.*

3. Learned counsel for the defendant No.2 and defendant No.3 accept summons in the suit and notice in the application.

4. Summons in the suit and notice in the application be now issued to defendant No.1 on the plaintiff taking steps through email and whatsapp, returnable before this Court on 2nd February, 2021.

5. Written statement and reply affidavit along with affidavit of admission/denial be filed within 30 days of the receipt of summons in the suit and notice in the application.

6. Replication and rejoinder affidavit, along with affidavit of admission/denial, be filed within three weeks thereafter.

7. Case of the plaintiff is that the plaintiff is a brand-owner of "BEVERLY HILLS POLO CLUB" which was established by its predecessors in the year 1981. The first registration for the trademark "BEVERLY HILLS POLO CLUB" was applied on 3rd December, 1992 and thereafter the plaintiff has number of registrations for the said mark. The mark of the plaintiff is a device mark, that is, and the plaintiff is the owner of the registered trademark and the copyright thereof.

8. Grievance in the present suit of the plaintiff is limited to defendant No.1 which is a group company of defendant No.3 but not working as an intermediary but is selling its own brand, copying the logo of the plaintiff as….. It is thus claimed that by infringing the plaintiff's device mark as also the copyright in the logo, the defendant No.1 is selling its goods representing them to be as the plaintiff's brand. Learned counsel further states that defendant No.2 is selling the products of the defendant No.1 under the impugned logo mark by listing the same on the platform of defendant No.3.

9. None appears on behalf of defendant No.1 despite advance notice however, learned counsel for defendant No.3, that is, Amazon Seller Service Pvt. Ltd. enters appearance and states that in an earlier suit filed by the plaintiff being CS(COMM) 1015/2018 Lifestyle Equities C.V. and Ors. vs. Amazon Seller Services Pvt. Ltd., vide order dated

16th July, 2018, this Court had already directed the defendant No.3 to take down the URLs wherein the brand/logo/device mark of the plaintiff is copied including those mentioned in the plaint and as and when the plaintiff gives any further information in this regard. Learned counsel for the defendant No.3 states that since the defendant No.3 is covered by the said order of this Court dated 16th July, 2018, no fresh suit is maintainable and the plaintiff was only required to intimate the same to the defendant No.3 and hence the present suit is mala fide.

10. Learned counsel for the defendant No.2 states that the defendant No.2 has already taken down the listing and will further investigate into the matter and take down any further listing which is either on the defendant No.3's platform or any other platform.

11. Case of the plaintiff is that in the earlier suit, that is, CS (COMM) No.1015/2018, the plaintiff had impleaded parties who were selling their products on the defendant No.3's listing by infringing the plaintiff's device mark and the copyright and in the earlier suit the defendant No.1 was not a party and in the present suit, not only does the plaintiff seek delisting of the brand of the defendant No.1 from the defendant No.3's platform but also seeks the relief of injunction against the defendant No.1 which is infringing and diluting the plaintiff's mark by selling its products on a much cheaper rates representing to be that of the plaintiff.

12. Considering that the defendant No.1 is a separate entity, this Court is prima facie of the view that the present suit would be maintainable. From the averments in the plaint as also the documents filed therewith, this Court finds that the plaintiff has made out a prima facie case in its favour and in case no ex-parte ad-interim injunction is granted, the plaintiff would suffer an irreparable loss. Balance of convenience also lies in favour of the plaintiff. Consequently, till the next date of hearing, defendant No.1 and defendant No.2, their Partners, Directors, Proprietors, Shareholders, Affiliates, Licensees,

> *Agents etc. are restrained from selling, offering for sell, advertising, directly or indirectly dealing in any products or reproducing or using in any manner whatsoever the infringing logo mark which is identically/deceptively similar to the plaintiff's logo mark "BEVERLY HILLS POLO CLUB". In the meantime, defendant No.3 is directed to take down the products of the defendant No.1 with the infringing logo within 72 hours of the URLs being provided by the plaintiff. 13. Compliance under Order XXXIX Rule 3 CPC be made within one week.*"

14. Thus, the Court while registering the plaint as a suit noted that the defendant No. 1, i.e., the respondent before us despite an advance notice failed to enter appearance, and accordingly granted an *ex parte ad interim* injunction restraining the defendants, their partners, directors, proprietors, shareholders, etc., from selling, offering for sale, advertising, directly or indirectly dealing in any products which is identically/deceptively similar to the plaintiffs' logo mark "BHPC".

15. The suit ultimately came to be adjudicated *ex parte*, and came to be decreed in favour of the plaintiffs and against the defendant No. 1, i.e., the respondent before us in the following terms:

> *"121. The suit is accordingly decreed as under in favour of Plaintiffs and against Defendant No. 1 in the following terms:*
> *(i) A decree of permanent injunction is granted in terms of paragraphs 64(a), (b) and (c) of the plaint,*
> *(ii) A decree of damages to the tune of $38.78 million as on date Rs. 336,02,87,000.00/- is granted in favour of the Plaintiffs against Defendant No. 1. If the said amount is paid within three months, no interest would be liable to be paid. However, if the same is not paid by the Defendant No.1, interest @ 5% per annum would he payable from the date of this judgment until the full realization of the said amount.*

(iii) A decree of costs to the tune of Rs. 3,23,10,966.60/- along with the Court Fee.
122. The details of the relief granted are summarized below:

S.NO.	*DECREE DETAILS*	*AMOUNT/TERMS*
1	*Compensatory Damages*	
1A	*Lost Royalties*	*USD 33.78 million (Rs.292,70,37,000,00/)*
1B	*Increased Advertising & Promotional Expenses*	*USD 5 million (Rs.43,32,50,000.00/-)*
1C	*Total Compensatory Damages*	*USD 38.78 million (Rs.336,02,87,000.00/)*
2	*Costs*	*Rs.3,23,10,966.60/- along with the Court Fee.*
3	*Grand Total (Damages + Costs)*	*Rs.339,25,97,966.60/- + Court Fee*

123. Decree sheet be drawn up in the above terms.
124. The suit along with all pending applications, if any are disposed of."

16. The defendant being dissatisfied with the judgment and money decree passed by the learned Single Judge of the High Court challenged the same by filing RFA (O.S.) (COMM) No. 11 of 2025.

17. In the appeal filed by the defendant, an application was filed under Order XLI Rule 5(1) and Rule 5(3) of the CPC respectively, seeking stay of the operation of judgment and money decree passed by the learned Single Judge referred to above.

18. The Division Bench of the High Court after hearing the decree-holders and the judgment-debtor allowed the stay application in the following terms:

> *"181. We, therefore, dispose of the present application by staying the operation of the impugned judgment dated 25 February 2025, passed by the learned Single Judge, insofar as it awards damages of Rs. 336,02,87,000/-, and costs of Rs. 3,23,10,966.60/-.*
> *182. This shall, however, be subject to an undertaking being furnished by the appellant Amazon Tech to comply with the impugned judgment, in the event of its failing in the present appeal, to be furnished with the Registry of this Court within a period of two weeks from pronouncement of the present judgment.*
> *183. CM Appl 26455/2025 stands flowed to the aforesaid extent.*
> *184. Observations and findings contained in the present judgment, we clarify, are only intended to be prima facie and for the purposes of disposing of the present application. They shall not be binding on Court while deciding the present appeal."*

19. In such circumstance referred to above, the original plaintiffs/decree-holders are here before us with the present petition.

B. SUBMISSIONS ON BEHALF OF THE PLAINTIFFS

20. Mr. Mukul Rohatgi and Mr. Gaurav Pachnanda, the learned Senior Counsel appearing for the plaintiffs submitted that the Division Bench of the High Court committed an egregious error in granting the benefit of unconditional stay of the execution of money decree. It was vehemently submitted that the impugned judgment and order passed by the Division Bench of the High Court is in gross violation and flagrant disregard of the mandatory provisions of Order XLI Rule 5(1) and Rule 5(3) of the CPC respectively.

21. Mr. Rohatgi vehemently submitted that impugned judgment and order is erroneous on all counts. According to the learned Senior Counsel, the High Court is not correct in saying that there was no valid service of summons to the defendant.

22. The learned Senior Counsel vehemently submitted that Order XLI Rule 1(3) of the CPC makes it abundantly clear that in an appeal against a decree for payment of amount, the appellant is obliged in law, within the time permitted by the Appellate Court, to deposit the amount awarded or furnish such security in respect thereof as the Court may think fit. He laid much stress on the fact that under Order XLI Rule 5(5) of the CPC a deposit or security, is a condition precedent for an order by the Appellate Court staying the execution of the decree.

23. In other words, according to the learned Senior Counsel the provision is mandatory in character. With a view to fortify the submissions noted aforesaid, the learned Senior Counsel placed strong reliance on the decision of this Court in the case of ***Sihor Nagar Palika Bureau* v. *Bhabhlubhai Virabhai & Co.***, reported in **(2005) 4 SCC 1**.

24. It was vehemently argued that, if according to the defendant it is a case of an *ex parte* decree, i.e., decree passed without service of valid summons, then why the defendant did not prefer any application under Order IX Rule 13 of the CPC? Why defendant thought fit to prefer an appeal against such so called *ex parte* decree?

25. The learned Senior Counsel invited our attention to the second Proviso to Order IX Rule 13 of the CPC. Relying on the same, it was argued that the defendant had the requisite knowledge of the date of hearing and had sufficient time to appear, file its written statement, and to contest

the suit. It was argued that the delivery of the suit papers and the order passed by the High Court dated 12.10.2020 granting *ex parte* injunction subject to compliance of Order XXXIX Rule 3 of the CPC would amount to adequate service of summons in accordance with law. To fortify this submission reliance was placed on the decision of this Court in the case of ***Sunil Poddar and Others* v. *Union Bank of India***, reported in **(2008) 2 SCC 326**, and the decision of the Delhi High Court in the case of ***LT Foods Ltd.* v. *Saraswati Trading Company***, reported in **2022 SCC OnLine Del 3694**.

26. It was also submitted by the learned Counsel that the Division Bench of the High Court committed an egregious error in staying the money decree on mere asking the defendant to furnish an undertaking on oath, that in the event, if the appeal is dismissed the defendant shall deposit the decretal amount. This according to the learned Senior Counsel cannot be termed as adequate security.

27. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his petition the same may be allowed and the impugned judgment and order be set aside, and further the defendant may be directed to deposit the decretal amount with interest in the court below.

C. SUBMISSIONS ON BEHALF OF THE DEFENDANT

28. On the other hand, Dr. Abhishek Manu Singhvi, Mr. Neeraj Kishan Kaul and Mr. Arvind Nigam, the learned Senior Counsel appearing for the defendant, while vehemently opposing this petition submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order.

29. The learned Senior Counsel submitted that all the relevant aspects of the matter could be said to have been looked into by the Division Bench painstakingly, and upon being fully convinced on all aspects, the Division Bench in its discretion thought fit to grant the benefit of stay of the execution of the money decree without insisting for the deposit of the decretal amount with interest or any other tangible security.

30. It was argued that the decision of this Court in ***Sihor Nagar Palika*** (*supra*) upon which strong reliance has been placed on behalf of the petitioner is of no avail in view of the decision of this Court in ***Malwa Strips Pvt. Limited v. Jyoti Limited***, reported in **(2009) 2 SCC 426**.

31. It was pointed that in ***Malwa Strips*** (*supra*), this Court considered ***Sihor Nagar Palika*** (*supra*) and took the view that the word "shall" in Order XLI Rule 5 of the CPC is not mandatory, and if an exceptional case is made out then it is always open for the Appellate Court to grant the benefit of stay of the execution of a money decree without insisting for deposit of the entire decretal amount with interest.

32. It was argued that the Division Bench of the High Court was fully convinced that not only any valid summons was not served upon the defendants and the suit proceeded *ex parte*, but even on other counts, the judgment and decree passed by the Court, *prima facie*, suffers from various legal infirmities.

33. The learned Senior Counsel submitted that the Division Bench of the High Court in its impugned judgment and order has recorded few shocking facts like the plaintiffs enhancing the claim of damages consequently from Rs. 2 crore in the plaint to Rs. 3,780 crore at the stage of written submissions post-trial, and that too without any

amendment and without putting the defendant to notice of such enhanced claim without any basis in the pleadings. It was argued that having regard to the gross perversities and illegalities writ large in the decree and conduct of the suit proceedings, asking the defendant to furnish security or deposit of any particular amount as a pre-condition for stay would be wholly disproportionate and excessive.

34. In such circumstances referred to above, the learned Senior Counsel prayed that there being no merit in the present petition the same may be dismissed.

D. REJOINDER TO THE SUBMISSIONS CANVASSED ON BEHALF OF THE DEFENDANTS

35. Mr. Gaurav Pachnanda, the learned Senior Counsel appearing for the plaintiffs in rejoinder put forward an important submission, which we must take record and deal with the same.

36. The learned Senior Counsel invited our attention to Section 36(3) of the Arbitration and Conciliation Act, 1996 (for short, "**the Arbitration Act**"). He would submit that the second Proviso attached to Section 36(3) of the Arbitration Act is an indication that ordinarily by applying the principles of Order XLI Rule 5 of the CPC, as mentioned in Section 36(3) of the Arbitration Act, the Court would not be empowered to unconditionally stay an arbitration award or a judgment.

37. In the alternative, the learned Senior Counsel sought to argue that, even if it was to be understood that the second Proviso attached to Section 36(3) of the Arbitration Act provides that instead of exercising discretion, the Court must grant unconditional stay in cases of fraud and corruption, the same would lead to a logical inference that the

discretion to grant an unconditional stay under Order XLI Rule 5 of the CPC would be restricted to only cases of fraud or corruption, or grounds that take colour from those two grounds and not cases of an extreme or egregious view on the merits of the adjudication.

E. ANALYSIS

38. Having heard the learned Senior Counsel appearing for the parties and having gone through materials on record, the only question that falls for our consideration is whether the Division Bench of the High Court committed any error in passing the impugned judgment and order?

39. Before adverting to the rival submissions canvassed on either side, we must look into few relevant provisions of law and also look into few decisions of this Court and various High Courts.

40. Order XLI Rule 1(3) of the CPC reads thus:-

> *"1. Form of appeal – What to accompany memorandum.-*
>
> *xxx*
>
> *(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."*

41. Order XLI Rule 5 of the CPC reads as under:-

> ***"Order XLI Rule 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."

i. History of the Legislation in Question

42. The Bill No. 27 of 1974, being a Bill to amend the CPC and the Limitation Act, 1963, was introduced in the Lok Sabha on April 8, 1974. The text of the Bill is found published in the Gazette of India, *Extraordinary* dated April 8, 1974, in Part-II, Section 2 at pages 203 to 293.

43. The Statement of Objects and Reasons accompanying the Bill recites in paragraph 5 at page 295 that after carefully considering the recommendations made by the Law Commission in its Twenty-seventh, Fortieth, Fifty-fourth and Fifty-fifth Reports, the Government had decided to bring forward the said Bill for the amendment of the Code of Civil Procedure, 1908, keeping in view, among others, the following basic considerations, namely:

(i) that a litigant should get a fair trial in accordance with the accepted principles of natural justice;

(ii) that every effort should be made to expedite the disposal of civil suits and proceedings, so that justice may not be delayed;

(iii) that the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community who do not have the means to engage a pleader to defend their cases.

44. Clause 90 of the Bill provided for the amendment of Order XLI. In Rule 1 of Order XLI, after sub-rule (2), sub-rule (3) in the following terms was sought to be introduced:

> *"(3) Where the appeal is against an order made in execution of a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."*

(Emphasis supplied)

45. In addition, the following provision was sought to be introduced by way of amendment as sub-rule (1A), after sub-rule (1), in Rule 3 of Order XLI:

> *"(1A) Where the appellant fails to make the deposit or furnish security specified in sub-rule (3) of Rule 1, the Court shall reject the memorandum of appeal."*

46. Sub-rule (5) of Rule 5 of Order XLI, as now enacted, did not find place in the Bill, in the same or any other form.

47. The Notes on Clauses annexed to the Bill point out at page 336 that Rule 1 of Order XLI was being amended by introduction of sub-rule (3) to provide for the deposit, or the furnishing of security for decretal amount by judgment-debtor when the appeal is against an order made in execution of a money decree. As regards amendment of Rule 3 of Order XLI by insertion of sub-rule (1A), it was mentioned that the provision was meant to provide that where the appellant fails to make the deposit of the decretal amount or to furnish security specified in sub-rule (3) of Rule 1, the memorandum of appeal shall be rejected.

48. After the Bill was introduced in Lok Sabha on April 8, 1974, the motion for reference of the Bill to a Joint Committee of the Houses was moved in Lok Sabha on May 2, 1974, and it was adopted. The Rajya Sabha concurred in the said motion on May 14, 1974. The Joint Committee constituted accordingly submitted its Report to Lok Sabha on April 1, 1976. The Report is found published at pages 804/3 to 804/34 in the *Gazette of India, Extraordinary*, Part-II, Section 2 dated April 1, 1976. At page 804/21, the Joint Committee offered its observations in paragraph 65 of the Report with regard to Clause 87 (Original clause

90) of the Bill. The relevant portion from paragraph 65 of the Report of the Joint Committee is extracted hereinbelow:

> *"65. Clause 87 (Original clause 90),—*
>
> *(i) The Committee note that under the proposed new sub-rule (1A) of Rule 3 in Order 41, if the appellant fails either to deposit the amount disputed in the appeal or to furnish security for such amount, the memorandum of appeal shall be rejected. The Committee feel that such a provision will deprive a judgment-debtor having a good case, to pursue the appeal on account of his inability to deposit the disputed amount or to furnish security for such amount."*

49. The Committee is, therefore, of the opinion that in order to see that justice is done to both the parties, the proposed sub-rule might be amended in such a way that neither the judgment-debtor is deprived of his right to pursue the appeal nor the decree-holder is deprived of the remedy. Proposed sub-rule (1A) has been amended to provide that stay of execution of the decree will not be granted unless the deposit is made or security is furnished and has been transposed as sub-rule (5) of Rule 5.

50. Be it stated that the Committee made no specific recommendation in regard to sub-rule (3) of Rule 1 of Order XLI proposed to be inserted by original Clause 90 of the Bill. In other words, the Committee recommended no change in the form or content of sub-rule (3) which was proposed to be inserted by way of amendment in Rule 1 of Order XLI. However, the Bill reported by the Committee incorporated a material change in the said sub-rule which will be presently noticed.

51. The Code of Civil Procedure (Amendment) Bill, 1974 (Bill No. 27B of 1974) as reported by the Joint Committee is found published in the *Gazette of India, Extraordinary*, Part-II, Section 2, dated April 1,

1976 at pages 804/35 to 804. At page 804/111, Clause 87 finds place and the relevant portions of the said clause are reproduced hereinbelow:

> *"87. In the First Schedule, in Order 41,—*
> *(i) Rule 1,—*
>
> *xxx*
>
> *(b) after sub-rule (2), the following sub-rules shall be inserted, namely:*
>
> *"(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit."*
>
> *(ii)*
>
> *xxx*
>
> *(iii) in rule 5,—*
>
> *(a)*
>
> *xxx*
>
> *(b)*
>
> *xxx*
>
> *"(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."*
>
> (Emphasis supplied)

52. The Bill having been considered and passed by both the Houses of Parliament was enacted into the Code of Civil Procedure (Amendment) Act, 1976 (No. 104 of 1976). The Act received the assent of the President of India on September 9, 1976, and it was published in the *Gazette of India, Extraordinary*, Part-II, Section-1, dated September 10, 1976. The material amendments, namely, the insertion of sub-rule (3) in Rule 1 and sub-rule (5) in Rule 5 of Order XLI were duly enacted and stood inserted in the CPC by Section 87 of the Amendment Act, which is to

be found at page 1337 of the Gazette, and they came into force on and with effect from February 1, 1977.

53. The substance of the legislative history set out hereinabove is that Clause 90 of Bill No. 27 of 1974 stood materially altered as per clause 87 of Bill No. 27B of 1974, as reported by the Joint Committee, in the following respects:

> *"(1) In sub-rule (3) of Rule 1 of Order 41, the provision relating to the requirement of the appellant depositing the amount disputed in the appeal or furnishing such security in respect thereof as the Court may think fit in cases where the appeal is against an order made in execution of a decree for payment of money was substituted by the provision requiring such deposit being made or security being furnished where the appeal is against a decree for payment of money.*
>
> *(2) Sub-rule (1A) of rule 3 of Order XLI requiring the Court to reject the memorandum of appeal where the appellant fails to make the deposit or furnish security specified in sub-rule (3) of Rule 1 of Order 41, was deleted.*
>
> *(3) Sub-rule (5) was added in Rule 5 of Order 41 providing that where the appellant fails to make the deposit or to furnish the security, the Court shall not make an order staying the execution of the decree."*
>
> (Emphasis supplied)

54. These changes are also found reflected in the Code of Civil Procedure (Amendment) Act, 1978, and they now find place in the parent Act, namely, the CPC.

ii. Principles required to be followed while Interpreting a Provision of a Statute

55. As the entire debate revolves around the interpretation of the provisions of Order XLI Rule 5(1) and Rule 5(3) of the CPC respectively, we must

discuss the well settled principles required to be followed while interpreting a provision of a statute.

56. The well-settled principles required to be followed by a court while interpreting a provision of a statute is that the intention of the legislature is primarily to be gathered from the language used, and consequently, a construction which results in rejection of words as meaningless, has to be avoided. It is not a sound principle of construction to brush aside words or phrase in a statute as being inapposite surplusage if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. The legislature is deemed not to waste its words, or to say anything in vain. [*See*: ***Mithilesh Singh* v. *Union of India***, reported in **(2003) 3 SCC 309**].

57. Similarly, in the case of ***Padma Sundara Rao* v. *State of Tamil Nadu***, reported in **(2002) 3 SCC 533**, it was held that two principles of construction – one relating to *casus omissus*, and the other in regard to reading the statute as a whole appear to be well-settled. Under the first principle, the rule of *casus omissus* cannot be supplied by the court except in the case of clear necessity. The rule of *casus omissus* should not be readily inferred and for that purpose, all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context of the statute and other clauses thereof, so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so, if literal construction of a

particular clause leads to manifestly absurd or anomalous results, which could not have been intended by the legislature. Therefore, if the language is plain, there is no necessity of taking aid of external aid for gathering the real intention of the legislature.

58. Over and above, we should bear in mind the following well-known rule of interpretation of the statute reiterated by this Court in the case of ***Union of India* v. *Deoki Nandan Agarwal***, reported in **1992 Supp (1) SCC 323**:

> *"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Legislature the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the Legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the Constitutional harmony and comity of instrumentalities."*
>
> (Emphasis supplied)

59. Applying the aforesaid principles, if we read the plain language of Order XLI Rule 1 sub-rule (3) of the CPC, we get the clear intention of the legislature that deposit of the decretal amount, or giving security thereof is not a condition precedent for maintaining a money appeal, and the court is vested with the discretion to grant time for depositing such amount and giving security before disposal of the appeal, and at the same time, the Appellate Court has also the power to extend the

time by taking aid of Section 148 of the CPC. On the other hand, a less grave consequence for non-compliance of such condition, was envisaged, namely, to disentitle the appellant to the benefit of stay of execution of the decree as provided in Rule 5(5) of Order XLI.

60. The aforesaid view has been expressed by this Court in the case of ***Kayamuddin Shamsuddin Khan* v. *State Bank of India***, reported in **(1998) 8 SCC 676**, wherein it has been held as follows:-

> *"6. The learned counsel for the respondent has invited our attention to Sub-rule (3) of Rule 1 of Order XLI in the CPC, as amended in the State of Maharashtra, which reads as under:*
>
> *"(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit:*
>
> *Provided that the Court may dispense with the deposit or security where it deems fit to do so for sufficient cause."*
>
> *7. The submission of the learned counsel for the respondent is that the High Court was right in giving the direction regarding the deposit of Rs 75,000 as per the aforesaid provision and since the appellant has failed to comply with the same the appeal has been rightly directed to be dismissed. We, however, find that the only consequence for non-compliance with the direction given under Sub-rule (3) of Rule 1 of Order XLI is as provided in Sub- rule (5) of Rule 5 of Order XLI which reads as under:*
>
> *"(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."*

61. It may be apposite to observe that this Court in the aforesaid decision was dealing with the interpretation of Order XLI Rule 1(3) of the CPC,

as amended in the State of Maharashtra, where the appellate Court has power to dispense with making deposit or security in fit and proper cases.

62. In ***Malwa Strips*** (*supra*) this Court interpreted Order XLI Rule 1(3) of the Code as provided in the Central legislation, i.e., the CPC, and held that the said provision although couched with the expression "shall" yet must be read as directory and not mandatory. It quoted with approval the ratio laid down in ***Kayamuddin*** (*supra*).

63. In view of the law declared by this Court in ***Kayamuddin*** (*supra*) and ***Malwa Strips*** (*supra*), there is no escape from the conclusion that the obligation under Order XLI Rule 1(3) is not mandatory but directory in nature, and failure to comply with the same shall not result in rejection of the appeal, but would disentitle the appellant the benefit of stay of execution of the money decree.

64. The provisions of Order XLI Rule 5 of the CPC govern the question of grant or refusal of stay of execution of the decree by the appellate court. A mere reading of the provision makes it clear that it does not make any distinction between a money decree and other decrees. The powers of the Appellate Court to order stay of execution of the decree are not fettered in any way if there is "sufficient cause" for passing such an order. Even with regard to money decrees, the discretion of the court is circumscribed by the same limitations imposed under the provisions of Order XLI Rule 5. There is no reason why decrees for payment of money should receive a consideration different from the other decrees in the matter of stay pending appeals. In suitable cases, where the court is satisfied that substantial loss may result to the applicant, if no stay is granted or there are any exceptional

circumstances, the court may grant stay as prayed for either with or without any condition whatsoever. Otherwise, in the absence of any exceptional circumstance, money decree ordinarily would not be stayed unconditionally from its execution by the appellate court pending the final disposal of appeal on its own merits.

65. Mere filing of an appeal would not operate as stay of execution of decree, but the Appellate Court may, for "sufficient cause", order stay of execution of decree. The other relevant part of the rule is contained in sub-rule (3) of Rule 5 of Order XLI. As per the provisions of sub-rule (3) of Rule 5 of Order XLI, the Court has to see;
    (1) whether there will be substantial loss to the party applying for stay;
    (2) whether the application has been made without unreasonable delay; and
    (3) whether security has been given by the applicant for due performance of the decree.

66. Thus, the provisions of the Rule are very clear and they do not make any distinction between money decrees and other types of decrees.

67. This Court in ***Sihor Nagar Palika*** (*supra*), observed the following as regards the power of the Appellate Court to stay the decree in first appeal:-

> *"Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the*

decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases."

(Emphasis supplied)

68. In ***Atma Ram Properties (P) Ltd.* v. *Federal Motors (P) Ltd.***, reported in **(2005) 1 SCC 705**, this Court while deciding a litigation arising from the Delhi Rent Control Act, 1958 observed as under:-

"6. The order of eviction passed by the Rent Controller is appealable to the Rent Control Tribunal under Section 38 of the Act. There is no specific provision in the Act conferring power on the Tribunal to grant stay on the execution of the order of eviction passed by the Controller, but sub-section (3) of Section 38 confers the Tribunal with all the powers vested in a court under the Code of Civil Procedure, 1908 while hearing an appeal. The provision empowers the Tribunal to pass an order of stay by reference to Rule 5 of Order 41 of the Code of Civil Procedure, 1908 (hereinafter "the Code" for short). This position was not disputed by the learned Senior Counsel appearing for either of the parties.

xxx

8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to

the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

9. […]In our opinion, while granting an order of stay under Order 41 Rule 5 CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal insofar as those proceedings are concerned. Thus, for example, though a decree for payment of money is not ordinarily stayed by the appellate court, yet, if it exercises its jurisdiction to grant stay in an exceptional case it may direct the appellant to make payment of the decretal amount with interest as a condition precedent to the grant of stay, though the decree under appeal does not make provision for payment of interest by the judgment-debtor to the decree-holder. Robust common sense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record — all these

provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. […]"

(Emphasis supplied)

69. In ***Malwa Strips*** (*supra*), this Court after looking into the decision in ***Sihor Nagar Palika*** (*supra*) observed as under :-

> *"9. In terms of sub-rule (5) of Rule 5 of Order 41, the court shall not make an order staying the execution of the decree 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. We will proceed on the assumption that although the word "shall" has been used in Order 41 Rule 1(3) of the Code, the same is not mandatory in character, and, thus, may be read as directory.*
> *10. In Rajasthan SEB v. Ram Deo [AIR 1999 Raj 264] after noticing some of the aforementioned decisions as also the legislative history of the said provision, a learned Single Judge of the Rajasthan High Court held as under: (AIR pp. 267-68, para 19)*
>
> > *"19. After close scrutiny of the aforesaid observations, I am of the opinion that in view of the provisions of sub-rule (5) of Rule 5 of Order 41 CPC it cannot be held that appeal against the decree for payment of money is not maintainable, if filed without making compliance with the provisions contained in sub-rule (3) of Rule 1 of Order 41 CPC and it is the duty of the Registry to see that on application under Order 41 Rule 5 CPC seeking stay of money decree the appellant has to incorporate a note in regard to his readiness and willingness to comply with the directions under sub-rule (3) of Rule 1 of Order 41 CPC. If the appeal is preferred against the decree for payment of money without any stay application under Order 41 Rule 5 CPC then in that event, it is the duty of the appellant to incorporate a note in the memo of appeal in respect of his readiness and willingness to*

comply with the directions issued by the court under sub-rule (3) of Rule 1 of Order 41 CPC."

11. We may, however, notice that although the provisions of sub-rule (3) of Rule 1 of Order 41 have been held not to be mandatory, this Court in Kayamuddin Shamsuddin Khan v. SBI [(1998) 8 SCC 676] opined that non-compliance with a direction to deposit the decretal amount or part of it or furnish security therefor would result in the dismissal of the stay application but not the entire appeal, stating: (SCC p. 677, para 8)

"8. This would mean that non-compliance with the direction given regarding deposit under sub-rule (3) of Rule 1 of Order 41 would result in the Court refusing to stay the execution of the decree. In other words, the application for stay of the execution of the decree could be dismissed for such non-compliance but the Court could not give a direction for the dismissal of the appeal itself for such non-compliance."

To the same effect is the decision of this Court in Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co. [(2005) 4 SCC 1], wherein it was held: (SCC pp. 2-3, para 6)

"6. Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money

decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases."

To the same effect is the decision of this Court in B.P. Agarwal v. Dhanalakshmi Bank Ltd. [(2008) 3 SCC 397]

12. The High Court in this case failed to notice the provisions of sub-rule (3) of Rule 1 of Order 41. The appellate court, indisputably, has the discretion to direct deposit of such amount, as it may think fit, although the decretal amount has not been deposited in its entirety by the judgment-debtor at the time of filing of the appeal. But while granting stay of the execution of the decree, it must take into consideration the facts and circumstances of the case before it. It is not to act arbitrarily either way. If a stay is granted, sufficient cause must be shown, which means that the materials on record were required to be perused and reasons are to be assigned. Such reasons should be cogent and adequate.

13. The High Court, with respect, failed to notice that suit was one under Order 37 of the Code. Whether it was maintainable or not may fall for consideration in the appeal. Even assuming that the same was not maintainable, the question which should have been posed by the High Court was as to whether sufficient cause had been made out to reverse the decree passed in favour of the appellant. Even a decree could have been passed having regard to the defence raised by the respondent under Order 12 Rule 6 of the Code. We, therefore, see no justification at all as to why an order of stay of the nature was passed by the High Court.

14. Even if the said provision is not mandatory, the purpose for which such a provision has been inserted should be taken into consideration. An exceptional case has to be made out for stay of

> *execution of a money decree. The parliamentary intent should have been given effect to. The High Court has not said that any exceptional case has been made out. It did not arrive at the conclusion that it would cause undue hardship to the respondent if the ordinary rule to direct payment of the decretal amount or a part of it and/or directly through the judgment-debtor to secure the payment of the decretal amount is granted. A strong case should be made out for passing an order of stay of execution of the decree in its entirety."*
>
> (Emphasis supplied)

70. Thus, in ***Malwa Strips*** (*supra*), this Court unequivocally observed that although the word "shall" has been used in Order XLI Rule 5 CPC, yet the same is not mandatory in character. The Court further observed that the purpose for which such a provision has been inserted, should be taken into consideration. An exceptional case has to be made out for unconditional stay of execution of a money decree. Thus, it is necessary to imply that if an exceptional case is made out, the Appellate court has the discretion to stay the execution of the money decree without imposing any condition.

iii. Decisions of various High Courts on the Subject

71. We may now look into few old decisions of various High Courts on the subject. In the case of ***A.A. Khan* v. *Ameer Khan,*** reported in **1949 SCC OnLine Kar 11**, the High Court of Mysore has observed as follows (headnote):-

> *"The court can stay execution of money decrees pending appeal on such security as it deems fit in proper cases in which sufficient cause for a stay has been made out, without requiring in all cases that the decree amount should be deposited in court."*
>
> (Emphasis supplied)

72. Similarly, the Division Bench of the Saurashtra High Court in the case of ***Borough Municipality* v. *Firm Ramji Vashram***, reported in **AIR 1955 Guj 113**, has in terms held that the judgment of the Bombay High Court in the case of ***Dhunjibhoy Cowasji Umrigar* v. *Lisboa***, reported in **ILR 1889 13 Bom 252**, cannot serve as a useful guide for cases under Order XLI Rule 5 of the CPC. It is further observed therein that when the Bombay High Court decided the case of ***Dhunjibhoy*** (*supra*), the provisions of the Civil Procedure Code, 1882, were applicable and therein, there was no provision similar to that of Order XLI Rule 5 of the CPC. The relevant observations read thus:-

> *"6. We are not concerned with sub-rule (4) which deals with ex parte orders for stay of execution pending the hearing of the application. The power of the Court to stay execution of a decree has to be exercised within the four corners of the above Rule. The intention of the Legislature which appears from the language of this rule seems to be that an appeal should not automatically operate as a stay of execution of the decree and no order for stay of execution should be made merely by reason only that an appeal has been preferred from the decree.*
> *7. The reason of the rule appears to be that the rights of the decree-holder having been determined by a competent Court, it is not fair that he should be deprived of the fruits of his decree merely because the judgment-debtor prefers an appeal against the decree. At the same time if execution of the decree is likely to result in substantial loss to the decree-holder, discretion is given to the Court to stay execution provided the other two conditions of sub-r. (3) are satisfied. It is, therefore, impossible to formulate any uniform rule of practice and each case must be decided on its own facts.*
> *8. In the case of money decrees, a Bench of the Bombay High Court decided in Dhunjibhoy Cowasji Umrigar v. Lisboa, 13 Bom 241 (A) that where a decree orders payment of money and an*

appeal is lodged against that decree by the party directed to pay, then on his application execution of the decree should be stayed, so far as it directs payment, on the judgment-debtor lodging the amount in Court, unless the other party gives security for the repayment of money in the event of the decree being reversed.

9. If such security is given by the successful party, then stay of execution should not be granted. This order was made in 1888 under the Code of Civil Procedure of 1882. That Code did not have any provision similar to O. 41 R. 5 of the CPC and the order must be taken to have been passed in the exercise of the inherent power of the Court.

10. But after the enactment of O. 41 R. 5 in the Code of 1908 the discretion of the Court is very much limited and has to be exercised within the limits prescribed by the rule, and in a proper case where substantial loss is likely to result to the judgment-debtor if a decree for payment of money is executed, the Court can stay execution of the decree even before the judgment-debtor deposits the amount in Court. The above decision therefore cannot serve as an useful guide for the cases under O. 41 R. 5."

(Emphasis supplied)

73. In the case, ***Movie Enterprises* v. *M.S. Periasamy Mudaliar***, reported in **1952 SCC OnLine Kar 14**, the High Court of Mysore has observed as under (headnote):

"Order 41, rule 5, cannot be read as imposing any limitation that the decrees for payment of money should receive a consideration different from the other decrees in the matter of stay pending appeal. Therefore, there could be no restriction on the discretion of the court for staying a decree for payment of money in suitable cases where the court is satisfied that substantial loss will result to the applicant if no stay is made. In this view, it cannot be contended that a decree directing payment of money should not be stayed unless the decree amount is lodged into court."

(Emphasis supplied)

74. In ***Borough Municipality*** (*supra)*, the Saurashtra High Court referred to the Bombay High Court decision in the case of ***Dhunjibhoy*** (*supra*). We must look into this decision of ***Dhunjibhoy*** (*supra*).

75. In the case of ***Dhunjibhoy*** (*supra*), the Bombay High Court had observed that no stay of execution of money decree should be granted without asking the judgment debtor to deposit the decretal amount. In ***Dhunjibhoy*** (*supra*) the Bombay High Court held that:

> *"A party appealing against a decree, which directs him to pay money, may obtain stay of execution of-decree, so far as it directs payment, on his lodging the amount in court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted."*

76. The case of ***Dhunjibhoy*** (*supra*) was decided by the Bombay High Court on August 31, 1888, under the provisions of the Civil Procedure Code, 1882. In that Code, there was no provision similar to Order 41 Rule 5 of the CPC. Therefore, the order must be taken to have been passed by the court in exercise of its inherent powers. On the other hand, the facts and circumstances of the present case are governed by the provisions of the CPC, wherein there is an express provision regarding grant or refusal of stay of execution of decree. Hence, it is not permissible to the court to have recourse to the inherent powers of the court. This distinction makes a world of difference between the two situations.

77. It may also be noted that in ***Dhunjibhoy*** (*supra*), the suit was for injunction restraining the defendant from erecting a building which

will interfere with the free access of light and air through certain windows in the plaintiff's house. The plaintiff had obtained a decree in respect of the windows and had also obtained a decree for compensation by way of damages for the injury done to the windows. The decree also directed the defendant to pay the plaintiff's costs of the suit. The defendant had filed an appeal and a question arose regarding the execution of the decree so far as it related to costs. It is in this context, i.e., where the prayer was for recovery of the amount of costs awarded by the trial court, the aforesaid observations were made by the Bombay High Court.

78. Thus, it cannot be said as a principle of universal rule that in all cases of money decree, the defendant should be directed to deposit the amount in court and then only the question of stay be considered.

79. The decisions of the High Court of Mysore in ***A.A. Khan*** (*supra*) and ***Movie Enterprises*** (*supra*) have been followed by the Rajasthan High Court in the case of ***Bansidhar* v. *Pribhu Dayal***, reported in **1952 SCC OnLine Raj**.

80. Then the question is: Is there an established practice that the execution of 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. We do observe that in a large number of cases where a money decree is passed, this Court generally does not grant stay unless the defendant deposits the amount in court. But this appears to be a rule of prudence and not a principle of law of universal application.

We also believe and hold that this practice based on the rule of prudence should ordinarily be followed by appellate courts. The practice of not granting stay in money decrees 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. [*See*: ***Central Bank of India* v. *State of Gujarat***, reported in **(1987) 4 SCC 407**]

81. Hence, the term "sufficient cause" occurring in Order XLI Rule 5 of the CPC has got to be interpreted and understood in the light of the aforesaid discussion. After all, what is "sufficient"? One may again turn to Black's Law Dictionary. "Sufficient" means "adequate-enough" as much as may be necessary-equal or fit for end proposed-and that which may be necessary to accomplish an object.

iv. Meaning and Import of "sufficient cause" under Order XLI Rule 5 of the CPC

82. Having regard to the case law discussed above and for reasons to be recorded, we are inclined or rather persuaded to take the view that the benefit of stay of execution of a money decree may be granted by the Appellate Court unconditionally, if it:
    i. is egregiously perverse;
    ii. is riddled with patent illegalities;
    iii. is facially untenable; and/or
    iv. such other exceptional causes similar in nature.

83. The aforesaid factors would bring the case within the purview of "exceptional case" for the purpose of granting benefit of unconditional stay of the execution of money decree.

84. We are at one with the submission canvassed on behalf of the defendant that in contradistinction to Order XLI, the word "deposit" does not figure in Rule 1(3), Rule 5(5) and Rule 5(3) respectively.

85. Under Rule 5(3) sub-clause (c) – security has to be furnished for "due performance" of the decree. We find it difficult to read any mandate for direction to deposit the decretal amount.

86. As noted above, the provision under Order XLI Rule 5(3) of the CPC provides for satisfaction regarding sufficient cause as a pre-condition for granting benefit of stay of execution of decree. It casts an obligation upon the court to record its satisfaction for stay of execution such decree. Therefore, security can be in the shape of property, bond, or by undertaking from the appellant to abide by the decree, seeking stay of execution.

87. However, there is no provision under Order XLI Rule 5 of the CPC imposing a mandate to deposit cash security as the only mode of security for execution of the decree.

v. Service of Summons and Irregularity in the Service of Summons

88. At this stage, we must deal with one submission canvassed on behalf of the petitioners that in view of the second Proviso to Order IX Rule 13 of the CPC, the defendant could be said to have had the requisite "knowledge" of the date of hearing and sufficient time to appear. It was sought to be argued vehemently that the delivery of suit papers and the order granting *ex parte* injunction dated 12.10.2020 could be said to be valid service of summons. In this regard, strong reliance was sought to be placed on the decision of this Court in the case of ***Sunil Poddar***

(*supra*) and the Delhi High Court judgment in the case of ***LT Foods*** (*supra*) respectively referred to above.

89. We do not find any merit in the aforesaid submission, for the simple reason that the second Proviso to Order IX Rule 13 of the CPC would come into play only when there is "irregularity" in the service of summons (for instance, the publication in wrong newspaper, no acknowledgment on duplicate summons being received etc).

90. This has been well explained by this Court in its decision in ***Basant Singh* v. *Roman Catholic Mission***, reported in **(2002) 7 SCC 531**. In the case in hand, the High Court has noted that *prima facie* there was nothing on record to establish valid service of "summons". If that be so, the second Proviso would not come into play. This proposition is again well explained by this Court in its decision ***Sushil Kumar Sabharwal* v. *Gurpreet Singh & Ors.***, reported in **(2002) 5 SCC 377**.

91. In the aforesaid context, the reliance placed on behalf the petitioners, on the decision in ***Sunil Poddar*** (*supra*) is of no avail. The undisputed facts in the said case were that the parties had already filed their pleadings before the civil court much prior to the case being transferred to the DRT. The parties were also aware of the transfer of the suit to the DRT. Despite such knowledge the party concerned consciously avoided service of summons in those proceedings. The decision in ***Sunil Poddar*** (*supra*) is distinguishable on the facts.

92. In the case on hand, the Division Bench in its impugned judgment has *prima facie* noted that there was nothing to indicate whether:

    (a) the plaintiffs had actually served all the documents with their notices under Order XXXIX Rule 3 and;

(b) the defendant was actually made aware with sufficient time of the claim as regards the next date of hearing in the proceedings.

93. In the same manner the decision of the Delhi High Court in ***LT Food*** (*supra*) is also of no avail as the same is distinguishable on the facts.

94. We now proceed to deal with the submission canvassed by Mr. Gaurav Pachnanda, the learned Senior Counsel in rejoinder as noted by us in paras 35 and 36 respectively of our judgment.

vi. Reading of Section 36 of the Arbitration Act and Order XLI Rule 3 and Rule 5 respectively of the CPC

95. At this stage, we need to clarify something important. At the outset, we must state that this litigation has nothing to do with Section 36 of the Arbitration Act. In the present litigation, we are only concerned with Order XLI Rule 3 and 5 respectively, of the CPC. We are referring to Section 36 of the Arbitration Act only for the limited purpose of answering the specific contention raised by Mr. Gaurav Pachnanda. In other words, whether the learned counsel is right in extending the analogy of Section 36 of the Arbitration Act to the present case or rather to the provisions of Order XLI Rule 3 and 5 of the CPC, is inappropriate. For this limited purpose only, we have thought fit to look into the two decisions of this Court one in the case of ***Sepco Electric Power Construction* v. *Power Mech Projects Limited***, reported in **2022 SCC OnLine SC 1243**, and the other, in the case of ***Pam Developments Private Limited* v. *State of West Bengal***, reported in **(2019) 8 SCC 112**.

96. Section 36 reads thus:

> *"36. Enforcement.—(1) Where the time for making an application to set aside the arbitral award*

under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]

Provided further that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.—For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016)"

(Emphasis supplied)

97. Section 36 of the Arbitration Act was substituted *vide* the Arbitration and Conciliation (Amendment) Act 2015 (for short, "**the Amendment Act, 2015**"). Prior to the 2015 Amendment, the mere filing of an application challenging arbitral award under Section 34 of the Arbitration Act was understood in many quarters as a stay of the award in terms of the unamended Section 36 of the Arbitration Act.

98. This "automatic stay" became a subject matter of legal debate as being a great obstacle to the ease of enforcement of arbitral awards. In such circumstances, and with a view to address this lacuna, the Amendment Act, 2015, was introduced in the Arbitration Act. Under the Amendment Act, 2015, the existing provision in Section 36 was wholly substituted. Sub-section (2) of the amended provision provided that the filing of an application to set aside the arbitral award did not by itself render the award unenforceable unless an order was passed by "granting a stay on the operation of the award pursuant to a separate application filed to that effect". Therefore, Section 36(2) of the Arbitration Act contemplated a separate application seeking stay.

99. In ***Hindustan Construction Company & Anr.* v. *Union of India & Ors.***, reported in **(2020) 17 SCC 324**, this Court held that there would be no automatic stay on the enforcement of an arbitral award under Section 36 of the Arbitration Act due to the mere fact that an application to set aside the award under Section 34 had been field before a court. In the said case, the constitutional validity of Section 87 of the Arbitration Act as inserted by Section 13 of the Arbitration and Conciliation (Amendment) Act, 2019 (for short, **"the Amendment Act, 2019"**) was challenged along with repeal of Section 26 of the Amendment Act, 2015 by Section 15 of the Amendment Act, 2019. This Court in the final analysis held as under:

i. The language of Section 36 of the Arbitration Act does not warrant an automatic stay on the enforcement of an arbitral award due to the mere filing of a Section 34 petition.

ii. The legislature, by inserting Section 87 and deleting Section 26 through the Amendment Act, 2019, had subverted the purpose of the Arbitration Act, 1996 and the Amendment Act, 2015, and was contrary to public interest because it sought to revive the pre-2015 Amendment automatic stay regime that was a major cause of delay to the disposal of arbitral proceedings, and thus, the Court declared Section 13 and 15 of the Amendment Act, 2019 as manifestly arbitrary and unconstitutional as being violative of Article 14 of the Constitution.

iii. The ratio in the ***BCCI* v. *Kochi Cricket Pvt. Ltd.***, reported in **(2018) 6 SCC 287**, was the position of law, prevailing at that time and would be used to interpret the applicability of the Amendment Act, 2015, to the arbitral proceedings and proceedings in relation to them.

100. Section 36(3) of the Arbitration Act provides that upon such an application being filed, the court may grant a stay "subject to such conditions as it may deem fit" for reasons to be recorded in writing. In terms of Section 36(3) of the Arbitration Act, the Court is conferred with the discretionary power to grant a stay of an arbitral award. Such discretionary power flows from the usage of the words "may" for grant of stay and the employment of the phrase "such conditions as it may deem fit" for the conditions that may be imposed if a stay was granted. Therefore, in terms of Section 36(3), the court retains its discretionary power to grant a stay of an arbitral award.

101. Further, the first Proviso to Section 36(3) provides that if the arbitral award was for payment of money, the court shall have "due regard" to the provisions for grant of stay of money decree under the CPC.

102. The aforesaid was, the legal position for a period of six years from 2016 to 2021. In 2021, Section 36 of the Arbitration Act was once again amended with retrospective effect from 23.10.2015, *vide* the Arbitration and Conciliation Amendment Act, 2021 (for short, "**the 2021 Amendment**"). The 2021 Amendment, *inter alia*, introduced a second Proviso to Section 36(3) which provided that if a *prima facie* case is made out that either the arbitration agreement/contract which is the basis of the award, or the making of the award was induced or effect by fraud or corruption, the Court "shall" stay the award "unconditionally" pending the disposal of the challenge.

103. As is clear from a plain reading of the second Proviso referred to above, it was provided that if, *inter alia*, the making of the award was induced or effected by fraud or corruption then the court was mandated to stay the award and such a stay was to be unconditional.

104. Mr. Gaurav Pachnanda, the learned Senior Counsel would argue that the courts cannot grant the benefit of unconditional stay of an award in cases other than those covered by the second Proviso to Section 36(3) of the Arbitration Act. In the same manner, according to the learned Senior Counsel, when it comes to staying a money decree unconditionally, the judgment-debtor needs to make out more than a *prima facie* case of fraud or corruption, or something analogous to the same, and it is just not sufficient to point out our serious infirmities in the judgment granting money decree.

105. In the aforesaid context, we must look into the decision of this Court in the ***Sepco Electric*** (*supra*). In the said decision, this Court was dealing with an appeal against a judgment of the Delhi High Court where the learned Single Judge had granted a stay of the arbitral award subject to deposit of 100% of the award amount. This order was passed in an application filed under Section 9 of the Arbitration Act which was heard together with an application under Section 36(3) of the Act in a connected petition. This decision was affirmed in appeal by this Court which held that there were no grounds made out for interfering with the judgment below.

106. This Court, while considering the contention of the appellant therein observed that a court may grant an unconditional stay if it is appropriate to do so. While so observing, this Court stated that unconditional stays were covered by the second Proviso to Section 36(3). The relevant portions of the judgement are extracted below:

> *"The power under subsection (3) of Section 36 to grant stay of an award is coupled with the duty to impose conditions which could include the condition of securing the award by deposit in Court, of the amount of the Award. It may be true as argued by Mr. Vishwanathan that the Court may not impose condition for stay, if it deems appropriate not to do so. The power of Court to grant unconditional stay of an Award is not unfettered. The power of unconditional stay is subject to the condition in the second proviso that is:*
> *The Court is satisfied that a prima facie case (sic) is made out that*
> *(i) the arbitration agreement or contract which is the basis of the award; or*
> *(ii) the making of the award, was induced or effected by fraud or corruption"*
>
> (Emphasis supplied)

107. While this Court acknowledged that an unconditional stay could be granted in appropriate cases, it quickly followed up saying that the power to grant an unconditional stay is governed by the second Proviso to Section 36(3). This may indicate that the Court acknowledged the grant of an unconditional stay to the existence of the grounds mentioned in the second Proviso. This would indicate that the benefit of unconditional stay could be granted only in cases of fraud or corruption.

108. Notwithstanding the above, this Court in order to fortify its conclusion in the case, subsequently also noted that the appellant therein was not able to show any cogent and glaring error that went to the root of the award. This observation was repeated later where the Court stated that no cogent ground had been made out even, *prima facie*, for interference with the impugned award. The relevant observations are extracted below:

> *"26. It is settled law that grounds for interference with an award is restricted. Even before this court, the Appellant has not been able to advert to any cogent and glaring error which goes to the root of the award. The contention of the award being opposed to the public policy of India, is devoid of any particulars whatsoever…*
>
> *xxx xxx xxx*
>
> *35. It is not in dispute that there is an award of Rs. 142 Crores in favour of the Respondent. No cogent ground has been made out even prima facie, for interference with the impugned award.*
>
> *xxx xxx xxx*
>
> *37. We find no ground at all to interfere. The Appeals are dismissed. ……"*

109. After arriving at such a finding, this Court proceeded to dismiss the appeal. Therefore, the observations referred to above formed part of this Court's reasoning in arriving at its decision.

110. The aforesaid observations of this Court would suggest that the Court thought it fit to consider the merits of the award at a *prima facie* level in order to decide whether the conditional stay of the award was justified or not. In the facts of the present case, the Court felt that it was justified.

111. In light of the abovementioned observations, it is possible to legitimately argue that if the second Proviso to Section 36(3) was the sole source for granting an unconditional stay, there would have been no occasion for the Court to examine whether any *prima facie* cogent ground that went to the root of the award is forthcoming or not. Therefore, by relying upon this Court's observations, it could be plausibly argued that in exceptional cases an unconditional stay can be granted even in cases not arising under the second proviso to Section 36(3). Such unconditional stay would instead be relatable to the main part of Section 36(3).

112. The above reading of ***Sepco Electric*** (*supra*) would also be in tune with the discretionary power of the court under the main part of Section 36(3) both with respect to the power to grant stay and the power to impose conditions if a stay is granted. After all, it is not inconceivable to contend that a power to impose conditions would also include the power not to impose conditions.

113. Be that as it may, ***Sepco Electric*** (*supra*) does not clearly answer the question whether an unconditional stay can be granted in cases not

covered by the second Proviso to Section 36(3). This confusion remains because while the Court states an unconditional stay can be granted in cases covered by the second Proviso, it does not categorically exclude the possibility of an unconditional stay in cases not covered by the second proviso.

114. This Court in ***Pam Developments*** (*supra*) had occasion to consider the nature of applicability of provisions of the CPC *vis-à-vis* the proceedings under the Arbitration Act, and specifically, the interpretation of the phrase "due regard" appearing in the first Proviso. The respondent therein had preferred an application seeking an unconditional stay of the arbitral award on the strength of Order XXVII Rule 8A, CPC which *inter alia* exempted Government from furnishing a security while seeking stay of a decree. Aggrieved by the application being allowed by the Calcutta High Court, the appellant-award holder approached this Court.

115. This Court allowed the appeal and directed deposit of the award amount as a condition for continuing the stay. The Court reasoned that the exemption from furnishing security under Order XXVII Rule 8A that would otherwise be applicable to the ordinary civil proceedings could not be strictly applied to the arbitration proceedings. Therefore, the respondent-government could not have relied upon that provision to avoid furnishing security for staying the award. The Court further held that even if the exemption from furnishing security was made applicable to the arbitration proceedings, such exemption would not extend to making deposit of the award amounts. This was based on the Court's interpretation of the difference between Order XXVII Rule 8A which was introduced in 1937 and exempted furnishing of 'security' and sub-rule (5) of Rule 5 of Order XLI that was introduced in 1976

and which differentiated between 'security' and 'deposit'. The Court also referred to the implications of a provision introduced during the colonial period and its continuance in the present constitutional set-up.

116. This Court in ***Pam Developments*** (*supra*) held that the phrase "due regard" would only mean that the provisions of CPC are to be taken into consideration and not that they are mandatory. The relevant observations are extracted below:

> *"20. In our view, in the present context, the phrase used is "having regard to" the provisions of CPC and not "in accordance with" the provisions of CPC. In the latter case, it would have been mandatory, but in the form as mentioned in Rule 36(3) of the Arbitration Act, it would only be directory or as a guiding factor. Mere reference to CPC in the said Section 36 cannot be construed in such manner that it takes away the power conferred in the main statute (i.e. the Arbitration Act) itself. It is to be taken as a general guideline, which will not make the main provision of the Arbitration Act inapplicable. The provisions of CPC are to be followed as guidance, whereas the provisions of the Arbitration Act are essentially to be first applied. Since, the Arbitration Act is a self-contained Act, the provisions of CPC will apply only insofar as the same are not inconsistent with the spirit and provisions of the Arbitration Act."*
>
> (Emphasis supplied)

117. On the strength of the above reasoning, this Court held that the exemption from furnishing security could not be applied to the arbitration proceedings. The Court clarified that while courts must have due regard to the CPC, they are not rigidly bound by its provisions. The CPC serves as a guiding framework rather than a strict mandate because the Arbitration Act being a self-contained Act is to be first applied by the court.

118. Although not explicitly stated by the Court as a reason for its decision, yet this Court did note the consequence of accepting the contention that Order XXVII Rule 8A was applicable. The result would be that wherever the government was the judgment-debtor in the arbitration proceedings, it would be entitled to an unconditional stay on the mere filing of an application under Section 36(2).

119. While ***Pam Developments*** (*supra*) relied on the phrase "due regard" appearing in the first Proviso to decline the rigid application of an exemption from furnishing security provided under the CPC it could also be argued that insisting on a conditional stay in all cases of a money award would be a rigid application of Order XLI Rule 5. This is because Rule 5 mandates the furnishing of security or deposit as a condition for granting stay. Relying on ***Pam Developments*** (*supra*), it could possibly be argued that "due regard" to the provisions of CPC, especially Order XLI Rule 5, would not mean a mandatory grant of conditional stay in all cases. This is because the provisions of the Act, especially Section 36, would have to be first applied wherein a discretionary power is vested in the court.

120. If the first Proviso has to be interpreted as done in ***Pam Developments*** (*supra*) and merits of the award have to be considered on a *prima facie* level as done in ***Sepco Electric*** (*supra*), it is difficult to rule out the existence of an unconditional stay in cases outside the second Proviso. A closer analysis of the decision in ***Sepco Electric*** (*supra*) and this Court's interpretation of the first proviso in ***Pam Developments*** (*supra*) suggests that unconditional stays can be granted even in cases outside the second Proviso.

121. At this stage, we must look into one decision of the Bombay High Court in the case of ***ITD Cementation India Ltd.* v. *Urmi Trenchless Technology Pvt. Ltd.***, reported in **2020 SCC OnLine Bom 10611**, wherein the High Court after referring to and relying upon ***Pam Developers*** (*supra*) observed as under:

> *"11. The provision of Section 36(3) are clear, that one must have regard to the provisions of the Code of Civil Procedure 1908 ("**CPC**") and specifically the provisions of Order 41 Rule 5 while addressing the question of stay. The words 'have due regard' have received judicial interpretation. Certainly there is no blanket prohibition barring a Court from unconditionally staying either a money award or a money decree. The three-fold requirement of Order 41 Rule 5(3) will have to be kept in mind. But, as the Supreme Court held in Pam Developers Private Limited v. State of West Bengal (2019) 8 SCC 112 the provisions of Order 41 Rule 5 are for guidance. They do not indicate that a Section 36 Court lacks all discretion to grant an unconditional stay. That said, it is equally well settled that a strong and exceptional case must be made for unconditional stay of a money decree or a money award. The three matters to consider under Order 41 Rule 5(3) are (a) whether the Applicant will be put to a substantial loss if stay is refused; (b) whether there is a delay in making the application and (c) whether the Applicant has furnish sufficient security to satisfy any ultimate decree. There is a delay, though slight. I do not see how the question of substantial loss arises. The fact that it has suffered an Award is neither here or there. The third requirement is that the party applying for stay must show sufficient security. There is no such attempt made."*
>
> (Emphasis supplied)

122. In such circumstances referred to above, we find it difficult to subscribe to the submission of Mr. Gaurav Pachnanda, that even for the purpose of grant of benefit of unconditional stay of money decree under Order

XLI Rule 5 of the CPC, the judgment-debtor has to make out more than a *prima facie* case of fraud or corruption and not solely on the basis of an extreme or egregious view on the merits of the adjudication.

123. We once again clarify that the analogy of Section 36 of the Arbitration Act sought to be applied is inappropriate. The decision of this Court in ***Pam Developments*** (*supra*) should also be understood and confined only to matters relating to arbitration, more particularly, Section 36 of the Arbitration Act.

124. We are of the view that if fraud or corruption or something analogous to the same is only to be seen for the purpose of granting benefit of unconditional stay of execution of money decree then in such circumstances, the decree holder may argue that although there may not be a valid service of summons to the defendant/judgment-debtor yet, the same by itself would not be sufficient to grant the benefit of unconditional stay of execution of money decree. This would lead to nothing but serious miscarriage of justice.

vi. Relevant aspects which the High Court looked into for the purpose of granting unconditional stay

125. The first thing that the Division Bench of the High Court looked into was that the suit had proceeded in the absence of the respondent herein. In the aforesaid context, the findings recorded by the Division Bench may be looked into:

> *"168. We also find prima facie substance in the contentions of Mr. Nigam and Mr. Kaul that the manner in which, after excluding all defendants from the proceedings, the entire trial of the suit, arguments and rendition of judgment took place solely in the presence of the plaintiff Lifestyle, may not sustain legal scrutiny.*

169. The learned Single Judge has repeatedly observed, in the impugned judgment, that Amazon Tech was deliberately staying away from the proceedings despite being aware of their pendency, and has relied, for the said purpose, on the order dated 5 September 2022 passed in the suit. A reading of the order discloses that the appearance of Counsels are noted only for Defendant 2 Cloudtail and Defendant 3 ASSPL. The mere fact that learned Senior Counsel appearing for Cloudtail advanced a submission, on behalf of his client as well as on behalf of Amazon Tech, that they were willing to suffer reasonable damages, cannot be seen as proof of Amazon Tech being aware of the proceedings or deliberately refraining from participating therein. Even prior to this date, Amazon Tech had been proceeded ex parte on 20 April 2022. As a matter of fact, therefore, Amazon Tech was never present before the learned Single Judge on any date of hearing.

170. When one peruses the orders passed in the suit, vis-à-vis the notings of the Registry, it becomes apparent that, in fact, no summons in the suit were ever served on Amazon Tech. This, to our mind, is a serious infirmity, which may plague all other proceedings. Amazon Tech was proceeded ex parte, by the learned Single Judge, on 20 April 2022. In the order passed by the learned Joint Registrar on 7 July 2021, which was the immediately preceding effective date, it was specifically noted that there was no report regarding service of the suit on Amazon Tech. In the circumstances, Lifestyle was directed to file an affidavit of service. No affidavit of service was filed by Lifestyle, between 7 July 2021 and 20 April 2022. The only affidavit of service which was filed by Lifestyle was of 25 March 2021. That affidavit enclosed, by it, an email dated 8 March 2021. No email, after 8 March 2021, was sent by Lifestyle to Amazon Tech. There is no question of the summons having been served by the email dated 8 March 2021, as the delay in filing process fee was condoned only on 16 April 2021. After 16

April 2021, the summons have never been sent to Amazon Tech, by any means of communication including email. It was for this reason that the order dated 7 July 2021 of the learned Joint Registrar required Lifestyle to file an affidavit of service. This was never done. As such, it is apparent that the learned Single Judge was in error in proceeding ex parte against Amazon Tech by order dated 20 April 2022.

171. In fact, even before us, Mr. Pachnanda, with characteristic candour and forthrightness, did not seek to contend that formal service of summons on Amazon Tech, as directed by the Court while issuing summons on 12 October 2020, ever took place. His submission is, however, that, prior to issuance of summons by the Court on 12 October 2020, as well as by way of attachment to the email dated 8 March 2021, all the documents relating to the suit, as well as applications filed therewith, were forwarded to Amazon Tech. Besides, due compliance with the requirements of the proviso to Order XXXIX Rule 13 of the CPC was also ensured. In these circumstances, Mr. Pachnanda's submission is that the learned Single Judge was correct in holding that Amazon Tech deliberately absented itself from the proceedings and cannot, now, therefore, seek to raise a grievance that it was proceeded ex parte.

172. We cannot, in law, accept the submission.

173. The law does not require a defendant to enter appearance in a suit, unless summons in the suit are served on it. The Commercial Courts Act, 2015 contains strict provisions in that regard. No amount of service, on the defendant, of the papers relating to the suit, by the plaintiff, absent actual summons issued by the suit, can compel a defendant, in law, to enter appearance. The law does not permit a defendant to be proceeded ex parte, even before summons in the suit are served on it. This is plain, and elementary. The learned Single Judge could not, therefore, have proceeded against Amazon Tech ex parte on 20 April 2022,

even before formal summons in the suit had been served on it. In doing so, it appears that the learned Single Judge was not made aware of the order passed by the learned Joint Registrar on the immediately preceding date, i.e. 7 July 2021, in which it was specifically noted that there was no report regarding service of the suit on Amazon Tech. In holding that Amazon Tech had not appeared despite service and, therefore, proceeding against Amazon Tech ex parte, therefore, we are of the opinion that the learned Single Judge materially erred in law and on facts.

174. This, by itself, is a lapse serious enough to vitiate all proceedings in the suit after 20 April 2022, at least insofar as the appellant Amazon Tech is concerned. It also, therefore, suffices, even by itself and independent of all other considerations, as enough to justify entertainment of the present appeal without requiring any deposit of the decretal amount to be made by Amazon Tech.

175. We also find considerable substance in the submission of learned Senior Counsel for the appellant Amazon Tech that, in any event, all these developments took place at a time when the damage claimed by Lifestyle were only to the tune of ₹ 2,00,05,000/-. Enhancement of these damages are necessarily to be proceeded by an amendment of the plaint, of which Amazon Tech had to be put on due notice. This was never done. In fact, the written submissions filed by Lifestyle, which enhanced the damages, earlier computed at ₹ 20,005,000/– to ₹ 3780 crores, were also not served on the Appellant Amazon Tech. In accepting the enhancement of the claim for damages, therefore, we agree with learned Senior Counsel for the appellant Amazon Tech that the learned Single Judge has not acted strictly in accordance with the law.

176. In some circumstances, we are also of the opinion that lifestyle cannot seek sanctuary behind Order VII Rule 2 or Order VII rule 7 of the

CPC, or even Rule 120 of the IPD Rules. Order VII Rule 2, in fact requires a plaint, seeking recovery of money, to state the precise claimed amount. The proviso to Order VII Rule 2 applies only in cases of suits for mesne profits, or for an amount which would be found on rendition of accounts between the Plaintiff and the Defendant, or for movables in the possession of the defendant or debts of which the value cannot be reasonably estimated at that stage. The present suit does not fall within any of these categories. The suit does not claim mesne profits, or value of movables in the possession of the defendants, or any debt of which the value was not ascertainable. Moreover, para 86 of the impugned judgment records the submission of Lifestyle that it was not pressing for its prayer for rendition of accounts. In that view of the matter, the proviso to Order VII Rule 2 of the CPC would not apply, and the main provision, which requires the precise claim to be quantified in the suit, would apply with all force. The precise amount quantified in the suit was only ₹ 2,00,05,000/–. There is, therefore, substance in the contention of learned Senior Counsel for Amazon Tech that, without an amendment of the plaint, the damages could not have been enhanced, much less to ₹ 3780 crores.

177. Order VII Rule 7, plainly, does not apply, as it exempts a plaintiff from requiring to claim "general or other relief", apart from the specific relief sought in the plaint.

178. In any event, what lies at stake, here, is something far more empirical. The question that is required to be addressed is whether (i) a claim for damages, assessed in the plaint at ₹ 2,00,05,000/–, could be inflated to ₹ 3780 crores merely in written submissions filed by the plaintiff after conclusion of arguments, without amending the plaint and without even serving a copy of the written submissions on a defendant against whom the enhanced damages were claimed and (ii) the Court would, in such circumstances, have awarded damages in excess

of ₹ 336 crores, without any prior opportunity to the concerned defendant to contest the proposed judgment."

126. The second relevant aspect that the Division Bench looked into was the fact that there were no pleadings of infringement against the respondent herein worth the name. In this regard, the following observations are relevant:

"156. Mr. Sai Deepak, appearing on behalf of Lifestyle and supplementing the submissions advanced by Mr. Pachnanda, sought earnestly to convince us that the requisite factual basis or alleging involvement of Amazon Tech in the infringement of Lifestyle's registered trademark, is forthcoming in the plaint. We are unable to agree.

157. We have already set out, from para 29 of the present judgment on words, the relevant averments contained in the plaint. We do not find, therein, any prima facie sustainable allegation of involvement, by Amazon Tech, in any infringement of Lifestyle's registered trademark.

158. Para 41 of the plaint alleges that Amazon Tech is, under its brand 'SYMBOL', "manufacturing, offering for sale and/or selling products which bear the infringing logo mark. These allegations are completely defeated by the assertions in the replication filed by Lifestyle, to the written statement of Cloudtail – also reproduced supra – that it was Cloudtail manufacturing and selling the apparel bearing the mark, and, thereby, infringing Lifestyle's registered trademark.

159. Para 41 goes on to state that ASSPL was selling products of Amazon Tech on its platform under the trademark 'SYMBOL', bearing the infringing mark. This allegation, again, is incorrect. The products sold by ASSPL were not of Amazon Tech, but of Cloudtail. The only connection of Amazon Tech, with the said

products, was the 'SYMBOL' mark, which Cloudtail affixed on the said apparel under license from Amazon Tech. This does not, in any way, connect Amazon Tech with the infringing mark.

160. In fact, after making such bald and unsubstantiated allegations, Lifestyle, in the same para 41 of the plaint, acknowledges that it was not certain about the actual relation between Amazon Tech, Cloudtail and ASSPL. Obviously, the allegations against Amazon Tech, regarding its complicity in the affixation of the mark on the apparel sold by Cloudtail on the ASSPL platform, were merely shots in the dark, without any knowledge of the actual state of affairs. In fact, para 46 of the plaint acknowledges the fact that the invoice, raised by ASSPL, with respect to the apparel purchased by Lifestyle, only contained the name and details of Cloudtail. Despite this, para 48 of the plaint alleges that it was an "admitted case of Defendant No 3 (ASSPL) that orders for the infringing product of the Defendant No 1 (Amazon Tech) are being fulfilled by Defendant No 2 (Cloudtail)", without any such "admitted case" being available on record. The plaint does not disclose where this "admission" is to be found.

161. At this juncture, we may also refer to the affidavits dated 21 July 2022 and 1 September 2022 of ASSPL, on which Mr. Pachnanda sought to place reliance as supporting the finding of the learned Single Judge, in the impugned judgment, that Amazon Tech, Cloudtail and ASSPL constitute a "cohesive commercial entity". We find no such inference being forthcoming from the affidavits. In any case, we are not concerned, here, with the interlink, as commercial entities, between Amazon Tech, Cloudtail and ASSPL. They are, admittedly, independent commercial entities, as was, in fact, noted by the learned Single Judge in the order dated 12 October 2020, reproduced in para 19 of the impugned judgement. What is to be seen is whether there

was any material to indicate involvement of Amazon Tech in the allegedly infringing activities of Cloudtail. There is, in fact, none.

162. Apart from this, the plaint only refers, repeatedly, to the infringing mark as belonging to Amazon Tech and has having been adopted by it. No factual basis for these allegations is forthcoming.

163. We have already explained, in para 18 to 26 supra, why it cannot be said that any substantial allegation of involvement, by Amazon Tech, in the allegedly infringing activities of Cloudtail, by affixation of the mark on the apparel sold by it, can be said to exist.

164. This, therefore, is not merely a case in which damages have been awarded against Amazon Tech without any finding, by the learned Single Judge, of involvement, in the alleged infringing activities, but is, in fact, a case where no such pleadings exist."

127. The third aspect which the Division Bench looked into was one relating to no pleadings for the purpose of claiming Rs. 3,36,02,87,000/- towards damages. In this regard, the findings recorded are:

"136. Leave alone the fact that there were no pleadings, claiming ₹ 336,02,87,000/-, there were also no pleadings on the basis of which is claim could be supported or sustained. The learned Single Judge has herself ventured into an exercise of computing the awardable damages as ₹ 336,02,87,000/-, without the said exercise being supported by any pleadings of Lifestyle. The position that has resulted is, therefore, that
(i) the pleadings of Lifestyle only justified damages of ₹ 2,00,05,000/–,
(ii) without amending its pleadings, Lifestyle, in its written submissions before the learned Single Judge, worked out the damages to which it was

allegedly entitled as approximately ₹ 3780 crores, and

(iii) the impugned judgment decrees in favour of Lifestyle and against Amazon Tech, ₹ 336,02,87,000/-, again on the basis of a computation solely devised by the learned Single Judge, not pleaded by the parties and unsupported by any pleading on record.

137. Mr. Pachnanda sought to submit that the damages to which the Plaintiff is entitled need not be specifically computed and claimed in the pleadings. The submission, in our view, begs the issue. This is not merely a case where there are no pleadings, supporting the damages of ₹ 3780 crores, claimed by Lifestyle in its written submissions, or the damages of ₹ 336,02,87,000/-which ultimately came to be awarded by the learned Single Judge. Even the basis for the claim of ₹ 3780 crores, all for the amount of ₹ 336,02,87,000/-which was ultimately awarded, is not to be found anywhere in the pleadings of Lifestyle.

138. The basis for the claim for damages are, at all costs, to be contained in the pleadings of the Plaintiff. It cannot be reserved for evidence. It is a legal truism that evidence cannot traverse the pleadings."

128. The fourth aspect that the Division Bench looked into was the fact that the learned Single Judge had recorded no findings as regards the role of the respondent herein in the alleged infringement. The relevant observations are as under:

> *"142. With greatest respect, it appears to us that the impugned judgement is more concerned with the fact that e-infringement is a new phenomenon, and that it is very difficult to identify the actual players in the act. Paras 42 to 44 of the impugned judgment deal with the menace of e-infringement, and the difficulty in localising liability in such cases. Para 44, in fact, refers to intermediary liability, which is of no particular relevance, as Amazon Tech does not claim itself to be an intermediary. We may note,*

even at this juncture, that the learned Single Judge has, in para 99 of the impugned judgment, observed that Amazon Tech was identifying itself as an intermediary. This is a prima facie erroneous finding. At no point of time has Amazon Tech claimed to be an intermediary. In fact, in earlier orders passed in the suit, particularly in the orders dated 2 March 2023 and 7 August 2023 – which the latter was passed by the learned Single Judge herself – it has been correctly noted that Defendant 3 ASSPL was claiming to be an intermediary and was, in fact, one. In the impugned judgment, therefore, the learned Single Judge has proceeded on an apparently mistaken assumption that Amazon Tech was also claiming to be an intermediary.

143. Returning to the findings in the impugned judgment, following the adverse observations regarding the menace of e-infringement is a new species of trademark infringement, which poses significant challenges in localising of liability, the learned Single Judge proceeds, in para 45, to characterise the present case as a case of e-infringement – with which there can be no serious cavil. Following this, however, the learned Single Judge was on to note that the brand 'Symbol', being used by Cloudtail, was owned by Amazon Tech. This is also; however, is difficult to understand how the ownership, by Amazon Tech, of the brand 'Symbol' is of any relevance. The mark 'Symbol' is, quite clearly, not infringing in nature.

144. In fact, even the plaint in the suit does not so assert. The case that Lifestyle has sought to build up, in the plaint, is that, as the infringing mark figured on the same apparel, which bore the 'SYMBOL' mark of Amazon Tech, Amazon Tech could not escape liability from the tort of infringement by use of the mark. In our considered view, the said plea, which has apparently found favour with the learned Single Judge in the impugned judgment, has no basis in law.

145. The learned Single Judge proceeds to lay considerable stress on order dated 5 September

2022, passed in the suit, particularly on the opening sentence of the order, which reads:

> *"The learned senior counsel for the defendant no. 2/applicant herein submits that the said defendant, including for and on behalf of the defendant no. 1 is willing to suffer a decree of injunction and also for paying reasonable damages to the plaintiff."*

The learned Single Judge has treated this sentence, from the order dated 5 September 2022, as recording some kind of a concession, on behalf of Amazon Tech, admitting its liability for infringement and agreeing to pay damages. Significantly, prior to the passing of this order, Amazon Tech had already been proceeded ex parte on 20 April 2022. Even if it were to be assumed that Amazon Tech had agreed, through learned Counsel who appeared on behalf of Cloudtail, to suffer reasonable damages, that statement, if at all, was made at the stage when the damages claimed by Lifestyle were of ₹ 2,00,05,000/–. In the face of this claim, it would be preposterous to hold that the order dated 5 September 2022 amounts to an admission, by Amazon Tech, to suffer damages of ₹ 336,02,87,000/-. Before awarding such damages, therefore, it was incumbent on the learned Single Judge to render specific findings of infringement, or at least of complicity in the infringing activities, by Amazon Tech. With greatest respect, we do not find this to have been done.

146. Para 47 of the impugned judgment observed that Amazon Tech, Cloudtail and ASSPL were "closely related to or interlinked with each other". Para 48 records that "it is a matter of public knowledge that the www.amazon.in platform is closely linked with Defendant No. 1", i.e. the present appellant Amazon Tech. To a large extent, it is clear that the impugned judgement proceeds on the premise that Amazon Tech, Cloudtail and ASSPL, i.e., all the defendants, were acting in concert and were one commercial entity.

147. We also find, prima facie, that the learned Single Judge has, in para 52 of the impugned

judgment, completely misread the Licensing Agreement dated 23 December 2015 as fastening liability on Amazon Tech for infringement whereas, in fact, it does nothing of the kind. The learned Single Judge observes that the License Agreement dated 23 December 2015, between Amazon Tech and Cloudtail indicated "that Amazon retains significant control over Cloudtail's branding and distribution activities". Following this, the learned Single Judge returns an opinion that "the clauses in the Agreement clearly diminish Amazon's liability to distance itself from the alleged infringement committed by Cloudtail", that "the contractual restrictions on unauthorised trademark use, coupled with indemnification obligations, provide strong legal grounds for (Lifestyle) to argue Amazon's direct involvement in trademark infringement", "the agreement being a license agreement, Defendant No. 1 being a licensor an Defendant No. 2 being a licensee, any infringement or unlawful use by the licensee would also affix liability about the licensor", "while licensing the word mark SYMBOL" Amazon would be unable to distance itself from the use of the accompanying horse logo device mark" and that "thus, the consequences of infringement squarely fall upon Defendant No. 1".

148. We are, prima facie, unaware of any law which supports these observations and findings. The Licensing Agreement dated 23 December 2015 was restricted to the 'SYMBOL' mark, owned by Amazon Tech. Amazon Tech had, by the agreement, licensed, to Cloudtail, the right to use the mark 'SYMBOL'. The agreement does nothing beyond this. By no stretch of imagination could be Licensing Agreement be read as authorising Cloudtail to affix, on the apparel sold by it, the allegedly infringing mark. In fact, the Licensing Agreement makes no reference to the said mark at all, obviously because Amazon Tech had no concern with the said mark. If, therefore, Cloudtail did affix the mark on the apparel sold by it, it certainly did not do so by virtue of any authorisation or permission granted by the Licensing Agreement dated 23 December 2015. In

fact, the Licensing Agreement contained a specific clause proscribing any infringement, by Cloudtail, of the trademark of any third party, and indemnified Amazon Tech in that regard.

149. The observations contained in para 52 of the impugned judgment, extracted by us earlier in paragraph 139, are unsupported by law. In a Licensing Agreement, whereby and whereunder Amazon Tech had only licensed, to Cloudtail, the right to use the 'SYMBOL' mark, we are unable to understand how Amazon Tech could be fastened with liability for use, by Cloudtail, of the mark, with which the Licensing Agreement – and, indeed, Amazon Tech itself – had no concern.

150. Needless to say, a licence by one party to another, to do a particular act, cannot render the first party liable for every infringing or illegal act committed by the second, in the absence of any material to indicate that the commission of the illegal infringing act was also authorised by the license. The findings in para 52 of the impugned judgment, in our prima facie view, are contrary to this principle which, according to us, is practically fossilized in the law. They, therefore, suffer from patent illegality.

151. In para 98, the learned Single Judge observes that the judgment would proceed to examine, inter alia, "the degree of culpability of the Defendants". Paras 98 to 99 proceed, apparently, to record certain observations regarding Amazon Tech which, in our view, are not incriminating in any manner. Before, however, adverting thereto, the learned Single Judge observes, in para 98 and in the opening part of para 99 of the impugned judgment, that the mark 'SYMBOL', of which the right to use had been licensed by Amazon Tech to Cloudtail, was used "along with" the infringing mark, on the apparel sold by Cloudtail. Even if it was, we are unable to understand how any liability or responsibility for infringement, on the ground, be fastened on Amazon Tech. Amazon Tech was not the manufacturer of the apparel on which the infringing mark was used. It had never licensed,

to Cloudtail, the right to use the infringing mark, with which, in fact, it had no concern. In fact, Cloudtail itself conceded, before this Court on 2 March 2023, that the decision to use the infringing mark on the apparel sold by was not of Amazon, but of Cloudtail itself. Unfortunately, the learned Single Judge has entirely overlooked this concession, regarding which no objection or reservation was ever expressed by Lifestyle, either before this Court on 2 March 2023 or at any point thereafter. In view thereof, it is plainly obvious that the affixation, on the apparel sold by Cloudtail, of the infringing logo, could not incriminate Amazon Tech in any manner, merely because the same apparel also happened to carry the 'SYMBOL' mark, the use of which had been licensed by Amazon Tech to Cloudtail.

152. Para 99 of the impugned judgment proceeds to observe that Amazon Tech was "one of the most dominant players in the ecommerce space", that it "possesses ways and means to utilise its dominant presence in the e-commerce space to promote its own products as also products which it might otherwise wish to promote", and that it had "the leverage through its own platforms to dilute Plaintiff's brand/logo by indulging in deep-discounting of its own products which compete with the Plaintiff by using a similar mark/logo". These findings are, prima facie, entirely in the realm of presumption and conjecture. They reflect an impression, by the learned Single Judge, that Amazon Tech was in a position to indulge in infringing activities by means such as deep discounting – with respect to which there is not even a whisper of an allegation against Amazon Tech in the entire plaint of Lifestyle – and that, therefore, it must have done so. On the face of it, we are of the view that these findings suffer from perversity in law, and cannot, therefore, sustain.

153. Para 99 goes on further to observe that "it is well known reality that all 3 Defendants belong to the Amazon Group of Companies and operate as a cohesive commercial entity". This finding has nothing forthcoming, available on the record, to support it. There is certainly no pleading to that

effect. The plaint, filed by Lifestyle, does not allege, even indirectly, that Amazon Tech, Cloudtail and ASSPL constituted a "cohesive commercial entity". A finding that 3 companies, which are independent corporate ventures, constitute a cohesive commercial entity, cannot be returned without any pleading to that effect. We are constrained to observe that the learned Single Judge has, in so holding, made out a case in favour of Lifestyle which it itself did not plead.

154. There are no other findings, in the impugned judgment, against Amazon Tech. Of course, the learned Single Judge has adversely commented on what she perceives as Amazon Tech's deliberate absence from the proceedings in the suit. Even if it were to be presumed, merely for the sake of argument, that Amazon Tech took a conscious decision not to participate in the suit proceedings, that cannot justify mulcting it with damages of ₹ 336,02,87,000/-.

155. The case, therefore, is one of awarding, against Amazon Tech and in favour of Lifestyle, of damages of ₹ 336,02,87,000/-, without any sustainable finding of infringement, or of complicity in infringement, against Amazon Tech."

129. If the Division Bench after looking into all the relevant aspects referred to above thought fit to grant benefit of unconditional stay of execution of money decree then, applying the principles of law discussed by us, it cannot be said that the Division Bench committed any error much less an error of law in passing the impugned judgment and order.

130. It goes without saying that whatever has been observed by the Division Bench in its impugned judgment and order is not an expression of any final opinion but are *prima face* observations for the purpose of granting the relief as prayed for by the respondents.

131. It is necessary for us to observe that the Court's jurisdiction over a respondent is founded on a valid service of summons. Without a valid service, the Court cannot acquire jurisdiction over the respondent, unless the defendant voluntarily submits to it. The original defendant-respondent must be properly be apprised of a pending action against him and assured of the opportunity to present his defenses to the suit. Proper service of summons is used to protect one's right to due process.

132. In an action strictly *in personam*, personal service on the defendant is the preferred mode of service, i.e., by handing a copy of the summons to the defendant in person. If defendant, for excusable reasons, cannot be served with the summons within a reasonable period, then substituted service can be resorted to. While substituted service of summons is permitted, "it is extraordinary in character and in derogation of the usual method of service."

133. In the case in hand, what is important for us to note is the Order passed by the Joint Registrar (Judicial) of the High Court of Delhi dated 01.03.2021 which reads thus:

> *"CS(COMM)443/2020*
> *"1. Written statement filed by the defendant No. 2 & 3 with affidavit of admission/denial.*
> *2. Replication to the written statement of the defendant no.3 with affidavit of admission/denial of the documents has been filed by the plaintiff.*
> *3. It is submitted by counsel for the plaintiff that replication and affidavit of admission/denial of the documents qua the defendant no.2 has also been filed but the same is lying under scrutiny. Let necessary steps be taken to ensure that replication and affidavit of admission/denial of the documents are placed on record.*
> *4. Affidavit of service filed by the plaintiff reflects that entire paper book was delivered to the defendant no.1 through speed post and courier.*

However, from the report of the Registry it appears that PF was not filed for service of the defendant no.1 and summons of the suit through e-mail and Whatsapp were not issued to the defendant no.1 as per orders of the Hon'ble Court which is dated 12/10/2020. Let the order be complied with, and process be Issued, returnable for the next date.

5. Re-notify the matter for completion of service, completion of pleadings and admission/denial of the documents on 22"' April, 2021."

(Emphasis supplied)

F. CONCLUSION

134. We summarize our final conclusion on the grant of benefit of stay of execution of a decree by an appellate court in term of Order XLI as under: -

(I) Order XLI Rule 5 contains the provision for the grant or refusal of stay of execution of the decree by the appellate court under the CPC. It categorically stipulates that mere filing of an appeal against an order of execution, shall not *ipso facto* operate as stay of proceedings. Any execution proceeding or an order therein, shall be stayed only if a specific, reasoned order granting such stay is passed by the appellate court, after proper application of mind.

(II) For the grant of stay of execution of a decree in terms of Order XLI, a prayer to such effect has to be specifically made to the appellate court and the appellate court has the discretion to grant an order of stay or to refuse the same.

(III) Order XLI Rule 5(3) of the CPC provides for satisfaction regarding sufficient cause as a pre-condition for granting benefit of stay of execution of decree, and it casts an obligation

upon the appellate court to record its satisfaction for stay of execution such decree.

(IV) The power of the Appellate Court to order stay of execution of the decree is circumscribed and made subject to the existence of a "sufficient cause" in favour of the appellant being shown. In order to ascertain whether a "sufficient cause" exists for the grant of stay of execution of a decree under Order XLI of the CPC, the appellate court as per sub-rule (3) of Rule 5 is required to examine:-

(i) Whether there will be substantial loss to the party applying for stay;

(ii) Whether the application has been made without unreasonable delay; and

(iii) Whether security has been given by the applicant for due performance of the decree.

(V) For the grant of stay of execution of the decree, the appellate court is required, after perusing the materials on record, to assign reasons for its satisfaction regarding the existence of a "sufficient cause". Such reasons should be cogent and adequate. The reasons assigned must indicate the necessity for the *status quo* prevailing on the date of the decree and/or the date of making of the application for stay, to continue by granting stay, and not merely the reasons why stay should be granted.

(VI) Although, Order XLI Rule 5 of the CPC, uses the word "shall", yet a combined reading of the sum and substance of Rule(s) 1(3) and 5(5) would reveal, that for the grant of stay of execution, it is not mandatory for the appellate court to impose

a condition for deposit of the amount in dispute. The aforesaid provisions make it abundantly clear that the appellate court, for the grant of stay of execution, has a discretion to impose a condition of deposit of the amount depending on the facts and circumstances of each case.

(VII) A deposit is not a condition precedent for an order of stay of execution of the decree by the appellate court. The only guiding factor and statutory mandate, for the grant of such stay of execution as indicated in Rule 5, is the existence of "sufficient cause" in favour of the appellant, on the availability of which the appellate court would be inclined to pass an order of stay.

(VIII) For the grant of benefit of an unconditional stay of execution of a decree, an exceptional case has to be made out before the appellate court. This discretion of the appellate court to grant an unconditional stay of execution of decree must not be exercised arbitrarily. It must be exercised sparingly and only if an exceptional case is made out for such stay in view of the peculiar facts and attending circumstances of the case before it.

(IX) A lodestar for bringing a case within the purview of "exceptional case" for the purpose of granting benefit of unconditional stay of the execution of money decree by the appellate court would be, if the money decree in question: -

(i) is egregiously perverse;

(ii) is riddled with patent illegalities;

(iii) is facially untenable; and/or

(iv) such other exceptional causes similar in nature.

(X) For the purpose of the grant or refusal of stay of execution of the decree under Rule 5 of Order XLI, it is immaterial whether the decree is a money decree or any other decree. The language couched in the said provision is very clear. Order XLI, Rule 5 of the makes no distinction between a money decree and other decrees, and the said provision applies with full rigour in both instances. Yet as a rule of prudence and established practice evolved over a period of time, no stay of execution of a money decree should be granted, except on the condition that the decretal amount be deposited in the court. However, such condition for deposit cannot be said to be mandatory and non-prescription thereof does not operate as a bar to staying the execution of a money decree.

(XI) There is no provision under Order XLI Rule 5 of the CPC imposing a mandate to deposit cash security as the only mode of security for execution of the decree. Security, for the purpose of the said provision, can be in the shape of property, bond and or in the form of an appropriate undertaking from the appellant to abide by the decree, seeking stay of execution.

135. In view of the aforesaid, we have reached the conclusion that we should not disturb the impugned judgment and order passed by the Division Bench of the High Court.

136. It is needless to clarify that the main appeal shall be decided on its own merits and without being influenced in any manner by any of the observations made in the impugned judgment and order passed by the High Court including our judgment.

137. It shall be open for the parties to put forward all contentions available to them in law at the time of the final hearing of the Regular First Appeal.

138. Registry shall forward one copy each of this judgment to all the High Courts.

.....J.
[J.B. PARDIWALA]

.....J.
[K.V. VISWANATHAN]

New Delhi;
7th October, 2025.