A KORES (INDIA) LTD.

v.

BANK OF MAHARASHTRA AND ORS.

NOVEMBER 16, 2006

B [H.K. SEMA AND P.K. BALASUBRAMANYAN, JJ.]

Practice and procedure—Non-impleading of necessary party in appeal—Effect—High Court had passed order in favour of a party—That party not impleaded in appeal—Passing order in the absence of that party that may C *prejudice him or may interfere with the working of the order passed by the High Court—Held, not proper—On facts, High Court asked lessee to pay additional sum other than amount agreed in the lease deed, to Citibank—On appeal by lessee, Citibank not impleaded—Held, appellant could have challenged its obligation to pay anything more, however by not impleading* D *Citibank who might be affected by decision, precluded itself from raising that challenge.*

Interlocutory order—Appeal against—Litigant not bound to appeal against every interlocutory order passed against him—He can wait until the final order is passed and in appeal against that final order challenge all E *orders leading to the final order and affecting that decision.*

'J' leased out its industrial undertaking to appellant-lessee for a term of 11 years on an annual rent of Rs.20 lakhs. A sum of Rs.11 lakhs was paid as security by the appellant and every year a sum of Rs.1 lakh therefrom was to be adjusted towards Rs.20 lakhs payable. 'J' had borrowed funds from F **respondent-bank. On its failure to repay the borrowed sum, respondent-bank filed recovery suit before High Court. Respondent-Bank also moved an application for appointment of receiver for the properties of 'J'. This application was rejected by Single Judge. Meanwhile 'J' had entered into an arrangement with 'Citi Bank' for liquidation of its loan by directing the** G **appellant to pay the amount of Rs.20 lakhs to that Bank.**

Respondent-bank filed an appeal before Division Bench of High Court. By an interim order, Division Bench appointed a receiver, and also directed the receiver to appoint the appellant as his agent in respect of the property. Subsequently, Division Bench confirmed the order appointing the receiver.

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The order also directed that the appellant should continue to pay to the receiver who in turn would pay over the said amount to 'Citi Bank' and that the receiver should separately fix and collect royalty in respect of the plant and machinery.

The receiver got the valuation done by the valuer and accepted the written down value suggested by the valuer but reduced the royalty to about 10% of the written down value and fixed it at Rs.8,46,000/- and directed that a sum of Rs. 70,000/- per month had to be paid by the appellant towards royalty for the plant and machinery in addition to the sum of Rs. 20 lakhs payable for the immovable property.

The fixation of royalty was challenged by the appellant before the Division Bench, whereby it directed that the appellant could question the amount of royalty fixed by the court receiver before the Single Judge. The appellant thereupon moved the Single Judge and questioned the direction to pay royalty at all and further questioned the quantum. Meanwhile, the suit was transferred to the Debts Recovery Tribunal.

The Tribunal rejected the application of the appellant challenging the liability imposed on it for paying royalty at Rs. 70,000/- per month. On the aspect of liability, the Tribunal opined that the appellant having acquiesced in the order of the Division Bench regarding liability, the same could not be questioned and the challenge had to be limited to the quantum and having considered the approach made by the receiver it held that there was no reason to interfere with the quantum of royalty fixed as payable. The appellant unsuccessfully challenged that order before the Appellate Tribunal and the High Court. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. 'Citi Bank' to whom the sum of Rs. 19 lakhs was payable by the appellant described as rent of the immovable property by the order of the High Court, has not been impleaded in this appeal. It is therefore not possible to pass any order in this appeal that may prejudice Citi Bank or that may interfere with the working of the order passed by the High Court in favour of 'Citi Bank'. This aspect may have relevance while considering some of the contentions raised on behalf of the appellant. [104-A-B]

2.1. A litigant is not bound to appeal against every interlocutory order passed against him; he can wait until the final order is passed and in appeal

A against that final order challenge all orders leading to the final order and affecting that decision. [104-E-F]

Anthony C. Leo v. *Nandlal Bal Krishnan & Ors.*, [1996] Supp. 7 S.C.R. 669 and *Moheshur Singh* v. *The Bengal Government,* (1859) 7 Moo Ind. App. 283, referred to.

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2.2. Therefore, on principle, the argument that the appellant cannot challenge in this appeal the order holding that he should pay royalty for the plant and machinery in addition to the rent on the ground that as far as the High Court is concerned it had become final, cannot be accepted. But, there is some difficulty in accepting this contention of the appellant in the absence C of Citi Bank from the array of parties. Any finding on liability different from the one rendered by the High Court by this Court and another arrangement regarding payment, may have an impact on the order of the High Court directing that Rs. 19 lakhs payable by the appellant (after adjusting Rs. 1 lakh from the security) be paid to Citi Bank on the basis that separate royalty D is payable for the plant and machinery and that is liable to be paid to the Respondent-bank. [105-D-F]

Nainsingh v. *Koonwarjee & Ors.*, [1971] 1 S.C.R. 207 and *Sita Ram Goel* v. *Sukhnandi Dayal & Anr.*, [1972] 1 S.C.R. 836, relied on.

E *Satyadhayan Ghosal & Ors.* v. *Sm. Deorajin Debi & Anr.*, [1960] 3 S.C.R. 590 and *Lonankutty* v. *Thomman & Anr.*, [1976] Supp. S.C.R. 74, referred to.

3. Though legally the appellant could have challenged its obligation to pay anything more than the amount agreed upon under the indenture of lease, F on the facts and in the circumstances of the case, the appellant has precluded itself from raising that challenge by not impleading a necessary party who might be affected by the decision. [106-D-E]

4. On the facts and circumstances of the case, it would be appropriate to fix the royalty at 6% of the written down value as found by the valuer. The G royalty would come to Rs.5 lakhs per year. The order of the receiver as affirmed by the Debts Recovery Tribunal and the High Court fixing the quantum at Rs. 70,000/- per month therefore requires modification. That part of the order is modified. It is seen that the appellant had deposited a sum of Rs. 34,99,232.87 in the light of the order passed by the Tribunal and the H extension of time granted by this Court for making that payment. Out of this

amount, the Debts Recovery Tribunal will disburse to the respondent-Bank royalty at the rate of Rs.5 lakhs per year for the relevant period and refund the balance to the appellant. [107-B-E]

CIVIL APPELLLATE JURISDICTION : Civil Appeal No. 5005 of 2006.

From the Judgment and Order dated 27-4-2004 of the High Court of Judicature at Bombay in Writ Petition No. 787/2004.

Chetpat Aryama Sundaram, Ramesh D. Dhanuka, Syed Naqvi, Smieetaa Inna, Rustom Pardiwalla, Rohini Musa and Asha Gopalan Nair for the Appellant.

Vijay Pandey, Balraj Dewan, D.K. Sammi, Dhruv Mehta, Harshvardhan Jha, Yashraj Deora and Mannoj Mehta (for M/s. K.L Mehta & Co.), for the Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. Leave granted.

Heard both sides.

1. On 9.1.1990, M/s Jyoti Chemicals leased out its industrial undertaking situate in the State of Andhra Pradesh to the appellant for a term of 11 years on an annual rent of Rs. 20 lakhs. A sum of Rs. 11 lakhs was paid by the appellant as security and every year a sum of Rs. 1 lakh therefrom was to be adjusted towards the Rs. 20 lakhs payable for that year. It appears that M/s Jyoti Chemicals had borrowed amounts from the Bank of Maharashtra on the security of the properties and had agreed to formally mortgage the properties. On 14.12.1993, the Bank of Maharashtra filed Suit No. 307 of 1994 on the Original Side of the High Court of Bombay for recovery of the amount due to it on the basis of the loan transaction and for specific performance of the alleged agreement to mortgage the properties included in Schedule 'B' to that plaint. It was pleaded that a hypothecation had been created in respect of the machineries in favour of that Bank as far back as on 25.11.1982. In that suit, the appellant was not originally made a party. But the Bank moved an application for appointment of a receiver for the properties of M/s Jyoti Chemicals situate in Thane as well as the industrial undertaking situate in the State of Andhra Pradesh. The application under Order XL Rule 1 of the Code of Civil Procedure in regard to the industrial undertaking of which the appellant was the lessee, was rejected by the learned single judge of that court. The learned judge noticed that the loan was advanced by the Bank

A in the year 1982; that the Bank had consented to the appellant being put in possession as a lessee subject to the appellant paying to the Bank a sum of Rs. 20 lakhs as rent. The court further noticed that the amount had not been paid by the appellant into the Bank from the year 1982 and the suit was filed by the Bank only in the year 1993. Also, in the mean time, M/s Jyoti Chemicals had entered into an arrangement with Citi Bank for the liquidation B of its loan by directing the appellant to pay the amount of Rs. 20 lakhs to that Bank. It was also stated that the Bank of Maharashtra had been negligent in not having taken prompt steps for recovery of the amounts and under the circumstances it was not just and convenient to appoint a receiver.

C 2. The Bank of Maharashtra filed an appeal before the Division Bench. By an interim order dated 4.4.1996, the Division Bench appointed a receiver, the Court Receiver, High Court of Bombay, for the industrial undertaking. The court also directed the receiver to appoint the appellant as his agent in respect of the property on usual terms and conditions without security. The undertaking including the machinery which was already in possession of the D appellant as a lessee, was permitted to be continued in the possession of the appellant. Subsequently, the Division Bench confirmed the order appointing the receiver. It noticed the contention of the appellant that the court receiver was not entitled to claim from the appellant anything more than what the appellant was liable to pay to M/s Jyoti Chemicals. The Division Bench did not answer that contention but directed the appellant to make that submission E before the receiver and observed that the receiver was bound to take all relevant materials into consideration. The order also directed that the appellant should continue to pay a sum of Rs. 20 lakhs per year to the receiver who in turn would pay over the said amount to Citi Bank. The order also directed that the receiver should separately fix and collect royalty in respect of the F plant and machinery located in the State of Andhra Pradesh. By a subsequent order, the order was modified by substituting the figure of Rs. 19 lakhs per year as against Rs. 20 lakhs per year as payable by the appellant since Rs. 1 lakh out of Rs. 20 lakhs was to be adjusted out of the sum of Rs. 11 lakhs paid as security.

G 3. The receiver purported to get a valuation of the plant and machinery. The valuer suggested a valuation of Rs. 1,15,16,000/- and reported that the written down value on depreciation would be Rs. 74,44,600/-. It was also suggested by the valuer that 15% of the written down value would be the quantum of royalty that ought to be collected.

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4. In view of the liberty given to the appellant by the Division Bench to raise its contentions regarding the liability to pay royalty and its quantum before the receiver, the appellant raised the contention that the valuer had grossly over-valued the plant and machinery and has not properly calculated the written down value of the 20 years old machinery and it was not correct to have taken 15% of the written down value as the royalty payable by the appellant. It was also contended that the obligation of the lessee to M/s Jyoti Chemicals could not be enlarged merely because a creditor had sued M/s Jyoti Chemicals and had got a receiver appointed for the properties of M/s Jyoti Chemicals. The receiver accepted the written down value suggested by the valuer but reduced the royalty to about 10% of the written down value and fixed it at Rs.8,46,000/- and directed that a sum of Rs. 70,000/- per month had to be paid by the appellant towards royalty for the plant and machinery in addition to the sum of Rs. 20 lakhs payable for the immovable property. When the fixation of royalty thus, was challenged by the appellant before the Division Bench, the Division Bench directed that the appellant could question the amount of royalty fixed by the court receiver before the single judge and gave liberty to the single judge to pass an appropriate order. The appellant thereupon moved the learned single judge and questioned the direction to pay royalty at all and further questioned the quantum. Meanwhile, on the constitution of the Debts Recovery Tribunal, the suit filed by the Bank of Maharashtra was transferred to the Debts Recovery Tribunal. The Debts Recovery Tribunal dealt with the application of the appellant challenging the liability imposed on it for paying royalty at Rs. 70,000/- per month. The Debts Recovery Tribunal rejected the challenge. On the aspect of liability, the Tribunal thought that the appellant having acquiesced in the order of the Division Bench regarding liability, the same could not be questioned and the challenge had to be limited to the quantum and having considered the approach made by the receiver it held that there was no reason to interfere with the quantum of royalty fixed as payable. The appellant challenged that order before the Debts Recovery Appellate Tribunal. The Appellate Tribunal dismissed the appeal. The appellant thereupon approached the High Court with a Writ Petition. The High Court took the view that the order dated 17.12.1998 precluded the appellant from challenging the liability itself and on the materials available, there was no reason to interfere with the fixation of royalty at Rs. 70,000/- per month. Thus, the Writ Petition was dismissed by the Division Bench. It is this order that is challenged before us by the appellant.

5. Before considering the contentions raised by learned counsel for the

A appellant we have to notice that Citi Bank to whom the sum of Rs. 19 lakhs was payable by the appellant described as rent of the immovable property by the order of the High Court, has not been impleaded in this appeal. It is therefore not possible to pass any order in this appeal that may prejudice Citi Bank or that may interfere with the working of the order passed by the High
B Court in favour of Citi Bank. This aspect may have relevance when we consider some of the contentions raised on behalf of the appellant by their Senior Counsel.

6. It is contended by the learned Senior Counsel that the appellant was a lessee long prior to the filing of the suit by the Bank of Maharashtra, a
C creditor, against M/s Jyoti Chemicals and the lease itself was granted to the appellant by M/s Jyoti Chemicals with the consent of the Bank. Learned counsel submitted that merely because a creditor had filed a suit against M/s Jyoti Chemicals and got a receiver appointed, the liability and obligation of the lessee could not be enhanced and the obligation of the lessee would remain the same as the one contained in the indenture of lease. Learned
D counsel sought support from the decision of this Court in *Anthony C. Leo* v. *Nandlal Bal Krishnan & Ors.*, [1996] Supp. 7 S.C.R. 669 for this position. This contention is sought to be met on behalf of the Bank mainly on the basis that the appellant had acquiesced in the earlier order of the Division Bench of the High Court directing that Rs. 20 lakhs, the agreed lease amount, is to
E be paid towards the rent of the immovable property and that the appellant would be liable to pay royalty for the plant and machinery in addition to that amount. We are not impressed with the argument. A litigant is not bound to appeal against every interlocutory order passed against him; he can wait until the final order is passed and in appeal against that final order challenge
F all orders leading to the final order and affecting that decision. Stated the Privy Council in *Moheshur Singh* v. *The Bengal Government,* (1859) 7 Moo Ind. App. 283] :-

> "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory
G order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting forever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor
H the necessity of so appealing, whereby on the one hand he might be

harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities." A

The two exceptions to the rule are Section 105(2) of the Code of Civil Procedure which precludes an order of remand being challenged at a subsequent stage, while challenging the decree passed pursuant to the order of remand and Section 97 of the Code where while filing an appeal from the final decree, a litigant is not entitled to question the preliminary decree on which it is based and which had earlier become final. Since the Code of Civil Procedure is not applicable in terms to the Supreme Court, it was held by this Court in *Satyadhayan Ghosal & Ors.* v. *Sm. Deorajin Debi & Anr.,* [1960] 3 S.C.R. 590] and in *Lonankutty* v. *Thomman & Anr.,* [1976] Supp. S.C.R. 74 at page 81 that even Section 105 (2) of the Code, did not preclude this Court from examining the correctness of the earlier order of remand passed by the High Court in an appeal arising from the decree passed subsequent to the remand. But as regards the High Court, the order of remand would be final. (see the decisions in *Nainsingh* v. *Koonwarjee & Ors.* [1971] 1 S.C.R. 207 and *Sita Ram Goel* v. *Sukhnandi Dayal & Anr.,* [1972] 1 S.C.R. 836. Therefore, on principle, the argument that the appellant cannot challenge in this appeal the order holding that he should pay royalty for the plant and machinery in addition to the rent on the ground that as far as the High Court is concerned it had become final, cannot be accepted. B C D

7. But, here we find some difficulty in accepting this contention of the appellant in the absence of Citi Bank from the array of parties. Any finding on liability different from the one rendered by the High Court by us and another arrangement regarding payment, may have an impact on the order of the High Court directing that Rs. 19 lakhs payable by the appellant (after adjusting Rs. 1 lakh from the security) be paid to Citi Bank on the basis that separate royalty is payable for the plant and machinery and that is liable to be paid to the Bank of Maharashtra. To counter this position, learned Senior Counsel submitted that the appellant had surrendered the undertaking on 30.9.2000 on the expiry of the term of the lease and the Bank of Maharashtra has subsequently sold the undertaking and had recovered substantial amounts towards the liability of M/s Jyoti Chemicals and under those circumstances this Court could pass an order holding that no royalty was payable by the appellant to the Bank of Maharashtra. We also find from the particulars furnished by the appellant itself that the appellant was permitted to continue as agent of the receiver on usual terms and conditions without security and royalty for the plant and machinery was fixed pursuant thereto. We may also E F G H

notice that a specific ground challenging the order holding that royalty was payable is also not set out in the grounds of appeal so as to put the respondent Bank on notice of such a contention though of course reference is made to the decision in *Anthony C. Leo* (supra) and the obligations of the appellant as a lessee being confined to the rent payable. The appellant has also acquiesced in this part of the order since the appellant could have, according to us, validly contended that there was no reason to dispossess it during the subsistence of the lease and it would have been for the court to direct that the sum of Rs. 19 lakhs payable by the appellant should be paid to the receiver and not to M/s Jyoti Chemicals. We have already indicated that the order we may pass may have an impact on the right of Citi Bank in collecting the sum of Rs. 19 lakhs per year during the subsistence of the lease, since, we may have to find on the terms of the lease deed executed by the appellant that the rent for the immovable property was fixed only at Rs.60,000/- per year and the rest of the rent was royalty for the plant and machinery which was also specified as immovable property therein and that would raise questions as to whether the plant and machinery having been hypothecated to the Bank of Maharashtra, it did not have a priority to claim that amount as against Citi Bank. In this situation, we are satisfied that though legally the appellant could have challenged its obligation to pay anything more than the amount agreed upon under the indenture of lease, on the facts and in the circumstances of the case, the appellant has precluded itself from raising that challenge before us by not impleading a necessary party who might be affected by our decision and by acquiescing in that decision. We, therefore, overrule that contention of learned Senior Counsel for the appellant.

8. Then comes the question as to whether there is any justification in interfering with the quantum of royalty fixed by the receiver and approved by the Debts Recovery Tribunal and the High Court. Learned counsel for the appellant points out that even at the time of entering into the lease transaction, the parties had valued the plant and machinery at Rs. 11,01,912.44 and that valuation was as on 30.6.1985 and if at all, there was only further depreciation of the value and under the circumstances the valuer had grossly overvalued the plant and machinery at Rs.1,15,16,000/- and in determining the written down value at Rs. 74,44,600/-. Learned counsel also submitted that 10% of the written down value fixed as royalty by the court receiver and approved by the court, was also on the higher side. Learned counsel for the Bank on the other hand contended that there was no proper or tenable objection to the valuation made by the valuer and it was too late in the day for the appellant to question the valuation. Learned counsel further submitted that

there was no reason to interfere with the acceptance of that valuation and the fixation of royalty at 10% thereof by the receiver. He also submitted that 10% of the written down value was reasonable under the circumstances. A

9. We think that on the facts and in the circumstances of the case, taking note of the various aspects that had been projected before us, it would be appropriate to fix the royalty at 6% of the written down value as found by the valuer. That would mean that the royalty would come to Rs.4,46,676/- per year. We think it appropriate to round off that figure to Rs.5 lakhs per year. The order of the receiver as affirmed by the Debts Recovery Tribunal and the High Court fixing the quantum at Rs. 70,000/- per month therefore requires modification. We therefore modify that part of the order and hold that the royalty payable by the appellant per year in addition to the sum of Rs. 20 lakhs (minus Rs. 1 lakh to be adjusted out of the security) would be Rs. 5 lakhs and the yearly sum at that rate has to be paid towards liability for the period from 5.7.1996 to 30.9.2000. B C

10. It is seen that the appellant had deposited a sum of Rs. 34,99,232.87 on 12.10.2004 in the light of the order passed by the Debts Recovery Tribunal and the extension of time granted by this Court for making that payment. Out of this amount, the Debts Recovery Tribunal will disburse to the Bank of Maharashtra royalty at the rate of Rs.5 lakhs per year for the relevant period and refund the balance to the appellant. If the amount deposited had earned any interest, the interest on the sum of Rs. 5 lakhs per year will also be disbursed to the respondent Bank. Since the appellant had surrendered the premises on expiry of the term on 30.9.2000, the above adjustment would put an end to the obligation of the appellant imposed by the court on appointing a receiver at the instance of the Bank of Maharashtra. The balance amount with interest, if any, would be refunded to the appellant. D E F

11. The appeal is thus allowed as above to the limited extent with a direction to the parties to suffer their respective costs in this Court.

D.G. Appeal partly allowed.