

(1999) 12 BOM CK 0048

In the Bombay High Court

Case No : Summons for Judgment No. 548 of 1998 in Summary Suit No. 683 of 1994

Bankay Bihari G. Agrawal

APPELLANT

Vs

M/s. Bhagwanji Meghji and others

RESPONDENT

Date of Decision : 23-12-1999

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 220, 227
Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, 148, 151

Citation : (2000) 2 ALLMR 10 : (2000) 3 BomCR 302

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : R.S. Chandnani, for the Appellant; H.J. Thakker and R.C. Shah, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—This suit is filed for realisation of an amount of Rs. 66,850/- from the defendant who admittedly executed the suit promissory note Exh. "O" dated 10th December, 1991 for the amount of Rs. 50,000/- The defendant has filed a reply contesting the plaint claim. Apart from that he disputes the suit claim on the ground that he has already paid all the amount to the plaintiff, defendant has raised a contention that the plaintiff failed to comply with the time frame prescribed under the Rule 227 of the High Court of Judicature at Bombay, Original Side Rules which reads as under:

"If the plaintiff does not apply for a decree within six months after the filling of the plaint, the suit shall be set down for dismissal on the board of the Judge in chambers. The Prothonotary and Senior Master shall notify on his notice board the date on which the suit is to be so set down and he shall do so at least eight days before such date. If the plaintiff is appearing in person, the Prothonotary and Senior Master shall give notice of the date to the plaintiff by sending a letter to him by post under certificate of posting."

2. In view of the above clause, the defendant submit that he is entitled to

unconditional leave. In order to address this question, it is necessary to refer to certain dates relevant for consideration. The present suit was filed on 12th December, 1994. It appears that the plaint was under certain objections and Court records shows that the objection was removed and the suit deemed to have been filed on 2-2-1995. After filling this suit, summons was applied for by the plaintiff on 31-7-97. The summons was issued on 20-12-1997. The writ of summons was served on defendant on 23-6-1998. The defendant appeared on 30-6-1998. The learned Counsel for the defendant raised preliminary objection that since the plaintiff did not apply for the decree within six months from the date of the filling of the suit as envisaged under Rule 227, suit ought to have been listed for dismissal by the Prothonotary and Senior Master, and therefore, non-compliance of this provision entitles him for unconditional leave to defend the case. To counter this argument, learned Counsel for the plaintiff submit that the defendant is also in violation of the rules. According to him sub-rule (3) of the Order 37 of C.P.C. mandates the defendant that he should enter appearance within 10 days of receipt of the summons and he shall file address for service of notice on him. Though defendant did not commit any delay in filing his appearance because, according to the Counsel for the plaintiff, defendant filed appearance on 29-6-1998. While he was served as I indicated earlier on 23-6-1998, he committed delay in filing his reply after the service of summons for judgment. According to sub-rule (5) of Rule 3 of Order 37 defendant has to file his affidavit seeking leave to defend the suit within 10 days of receipt of the Summons for judgment. If any failure in doing so, sub-rule (7) of Rule 3 of Order 37 comes to the rescue of the defendant to invoke jurisdiction of this Court to condone the delay showing sufficient cause for such delay. The exercise of such discretion is not available as far as the failure to comply with the provisions of Rule 227 of the High Court Rule is concerned. On a reading of Rule 227 of the High Court Rules and Order 37 of C.P.C. will go to show that those provisions has prescribed certain time frame for dealing with summary suits. The legislative objective for fixing such time frame is quite obvious. The summary suits are separately be classified for the separate treatment without being subjected to cumbersome and time consuming procedure laid down by the provisions of the CPC which are applicable for other suits. This class of suits are mainly affecting the trading or business of the society. If the commercial activities of the society is entangled in the litigation waiting for a result endlessly will definitely affect the economic progress of the society. To keep the economic activities volatile, it is necessary that it should not suffer from any liquidity crunch because of the litigations which the creditor and debtor are stranded in the Court. So the object of the legislation is that if any dispute arises between the debtor and creditor, it should be resolved by the Court with minimum possible time and therefore, certain time frame have been fixed by the Rules itself which should be scrupulously observed by the plaintiff and defendant. As I indicated earlier, if the defendant commits delay in entering his appearance or filing reply that can be excused only in exceptional circumstances where the defendant could show the sufficient cause for such delay. As I see in practice that has been followed in the

litigation in this Court as well as other Courts, which deals with the summary suits, the procrastination which has become birth mark of the civil litigation has been gradually and successfully gripped summary suits also. To bring about this state of affairs, both Bar and Bench and also the litigant public are equally responsible. It is quite natural that the creditors require their money back urgently and the debtor tries to postpone his evil of repayment of the debt as long as he can. In the midst of this invisible forces drawing apart in opposite directions the courts, lawyers and the litigants become oblivious of the above legislative object underlying in enacting Order 37 of Code of Civil Procedure. Very often, lawyers are praying for time to file reply; very often, the plaintiffs do not take action after filing of the suit to issue summons and with impunity the courts are also granting time endlessly. This practice has resulted in obliterating of the very statutory provisions of Order 37.

3. In this back ground I have to refer to certain decisions of this Court which has been cited across the bar. In *The United Western Bank Ltd. Vs. Marmago Steel Ltd.*, the Single Judge of this Court Mr. S.S. Nijjar, J., has held that since the plaintiff has failed to comply with the provisions of Rule 227, the defendant is entitled to grant unconditional leave. The learned Judge was examining the case with reference to two Division Bench decisions of this Court in *M/s. Randerian & Singh Pvt. Ltd. v. Indian Overseas Bank*, an unreported judgment in Appeal No. 1060 of 1996 in Summons for Judgment No. 307 of 1986 in Summary Suit No. 3212 of 1985 and also the decision in *Hydraulic and General Engg. Ltd. and others v. UCO Bank*, reported in 1998 L.J. 793. These two Division Bench decisions of course highlight the diligence and expediency that the parties of Summary Suit required to be exercised in dealing with the matters and said that if the Plaintiff commits laxity in observing such diligence, the defendant is entitled for unconditional leave. The learned Single Judge, however, differed from another unreported judgment of the Single Judge of this Court, rendered on 26th February, 1994 in Summons for Judgment No. 713 of 1991 in Summary Suit No. 2684 of 1990. The learned Judge in this case has observed that Rule 227 of the High Court Rules has given wider discretion to this Court and therefore, if any plaintiff violates mandate of Rule 227 will not result in fatal consequences. These two decisions rendered by two learned Single Judges of this Court, contradicts in one single point that whether Rule 227 gives any discretionary powers to this Court to excuse the delay committed by the plaintiff in taking action within six months. When two judgments of this Court speaks of different paradigm on a legal point, it has to be examined by the Division Bench of this Court particularly in the light of the objectives to be achieved under Order 37.

4. According to me, in principle I agree with my learned brother Mr. Justice Nijjar that any plaintiff who takes this Court for a ride without complying with the mandatory provisions of Rule 227, can not get any relief and in failure of any steps being taken within six months, it should be necessarily posted for dismissal with the notice to the defendant. If it is so listed and the plaintiff comes to the Court and convince the Court that the delay was on account of unavoidable

circumstances beyond his control, perhaps if any such case is made out, probably this Court may exercise its discretion vested u/s 148 or u/s 151 of CPC and excuse the failure of mandatory provisions of Order (sic) Rule 227. However, I respectfully disagree with the observations of the learned brother Mr. Justice Vyas, J., in observing that after amendment of Rules 227, discretion of this Court has widened. The discretion already vested in the Court either in 148 or 151 of C.P.C. is still kept intact either without abridging or widening the same, The learned Judge probably indicated omission of the word occurring in the old Rule 220, sub-clause 4 "Shall be". The said old rule reads thus:-

"If the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit shall be set down in the delay cause board for dismissal before the Sitting Judge in Chambers, one week before the day fixed for such dismissal. Upon the day fixed for such dismissal, the suit shall be called on before the Sitting Judge in Chambers and shall be dismissed if the plaintiff fails to appear, or appearing fails to satisfy the Judge that he has sufficient cause for not having proceeded with his suit."

5. The old rule also give certain discretion to the Court to condone the delay in taking steps by the plaintiff within six months. Even after amendment, nothing has been abridged or widened as regards the exercise of the discretion of this Court is concerned. If the plaintiff appears and shows cause as to why the delay has occurred, the Court can always exercise that discretion vested in it under sections 148 and 151 of C.P.C. The question is whether such discretion can be used as a matter of course or whether such discretion should be exercised sparingly or in exceptional circumstances only where the interest of justice is being jeopardized. In other words, unless there is manifest injustice postulated, whether this Court's discretion should be exercised against such Plaintiff who is not diligent in prosecuting the case. In view of this, apart from the merits of the case, I refer this matter to the Division Bench to decide following questions:

1. Whether the discretion vested in the Court can be exercised as a matter of course if the plaintiff commits any failure to comply with the time frame prescribed under Rule 227 of the High Court Rules coupled with provisions of Order 37 of Code of Civil Procedure?

2. Whether time frame stipulated under Order 37 of CPC has to be scrupulously followed both by plaintiff and defendant and whether the Court as a matter of course use its discretion to condone such failure and grant relief to such parties in view of the social objectives that has to be achieved in enacting Order 37 of Code of Civil Procedure?

P.A. to issue ordinary copy of this Order.