

**(1988) 07 BOM CK 0011**  
**In the Bombay High Court**  
**Case No : Appeal No. 192 of 1988**

D. Shanlal

APPELLANT

Vs

Bank of Maharashtra

RESPONDENT

**Date of Decision :** 27-07-1988

**Acts Referred:**

Stamp Act, 1899 — Section 35, 36

**Citation :** (1988) MhLj 956

**Hon'ble Judges :** C. Mookerjee, C.J.; S.P. Bharucha, J

**Bench :** Division Bench

**Advocate :** K.S. Cooper with S.K. Cooper instructed by M/s. Thakordas Madgaonkar and Co, for the Appellant; A.P. Chinoy with S.J. Vazifdar, I.M. Chagla and J.D. Dwarkadas instructed by M/s. Little and Co., for the Respondent

**Final Decision :** Dismissed

## Judgement

C. Mookerjee, C.J.—The Bank of Maharashtra which is the Respondent in all the twenty-two Appeals before us had instituted suits against the Appellants in the respective appeals under Order XXXVII of the Civil Procedure Code, 1908, seeking to recover moneys payable by the Defendants-Appellants upon bills of exchange. After summonses of the suits were served upon them, the Defendants-Appellants had entered appearances whereupon the Plaintiff-Respondent Bank had served upon each set of Defendants summonses for judgment under Order XXXVII, Rule 3(2) of the Code. Thereupon the Defendants-Appellants had applied before the learned single Judge for leave to defend the respective suits against them. The learned single Judge had granted them such leave upon condition of depositing the amounts mentioned in the orders. Being aggrieved by the said conditional orders granting leave, the Defendants-Appellants had preferred Appeals before the Division Bench. The Division Bench had upheld the learned single Judge's orders granting conditional leave but had reduced the amounts of security deposits to be furnished by the Defendants. The Appellants had thereafter filed Special Leave Petitions to the Supreme Court against the said

orders granting conditional leave to defend the suits brought by the Respondent-Plaintiff. The Supreme Court had rejected the Special Leave Petitions. A statement at the Bar has been made that Review Petitions filed in the Supreme Court were also rejected.

2. Each of the Defendants-Appellants had failed to give the security and the learned single Judge had proceeded to dispose of the suits in terms of Order XXXVII, Rule 3(6)(b) of the Code. When the suits were called out for disposal, Counsel for the Defendants had appeared before the learned single Judge and had prayed for adjournment. The learned single Judge had rejected the said prayer. The learned single Judge took the non-deposit certificates on record and also marked the documents filed by the Plaintiff as Exhibit "A" (collectively). The learned single Judge ordered that there would be decrees as prayed in favour of the Plaintiff and against the Defendants. Being aggrieved by the said judgments and decrees, the Defendants have preferred these Appeals.

3. The learned Counsel for the Respondent Bank has raised a preliminary objection as regards the maintainability of these Appeals which have been preferred against decrees passed in summary suits under Order XXXVII of the Code after the Defendants had failed to deposit the conditional securities. Mr. Cooper, the learned Counsel for the Appellants, on the other hand, has contended that these Appeals are maintainable. He has made broadly the following submissions in support of these Appeals :-

4. His first submission is that an appeal lies from every decree save as otherwise expressly provided by section % of the Civil Procedure Code. The learned Counsel for the Respondent, however, has rightly pointed out that these Appeals have been preferred under Clause 15 of the Letters Patent, but nonetheless the general principles embodied in section % of the Code would be attracted. We are inclined to uphold the Appellants' first submission that Order XXXVII does not expressly or by implication bar presentation of appeals against decrees passed in summary suits governed by Order XXXVII of the Code. The question as regards the maintainability of an appeal against the decree passed in a summary suit under Order XXXVII of the Code is settled by more than one reported decision of this Court and this point is no longer *res integra*. Chief Justice Marten and Mr. Justice Kemp in the case of *Madanlal vs. Kedarnath*, AIR 1930 Bombay 364, had, *inter alia*, held that an appeal lies from the final judgment passed in a summary suit directing the defendant to pay the amount of the decree claim in default of security not having been furnished to defend the suit under Order XXXVII, Rule 3(2). The learned Chief Justice in his judgment had referred to the Full Bench case of *Narayan Putapa Chandragatgi and Others Vs. Vaikunt Subaya Sonde*, . Mr. Cooper has also placed before us several other decisions of other High Courts where appeals were entertained against decisions made in summary suits, *vide Coimbatore Sri Venkatachalapathi Nidhi, Ltd. and Others Vs. G.K. Nanjappa Goundan and Others*, . In view of the binding decisions of this Court, it is unnecessary for us to further pursue the point.

5. So far as this Court is concerned, it is also settled law that the order of a single Judge refusing or granting leave to defend the suit instituted under Order XXXVII of the Code is a "judgment" within the meaning of Clause 15 of the Letters Patent and would be appealable, vide *Ramanlal vs Chunilal*, 34 Bombay LR 252. It may be noted that in the case of *Madanlal vs Kedarnath* (supra), two appeals had been preferred from the learned Chamber Judge's order, the first one being against granting of conditional leave and the other being against the decree passed in default of the security being furnished. The Division Bench held that an appeal did lie from the final order and that in presenting that appeal the appellant was entitled to challenge the interlocutory order by which he had been granted conditional leave to defend. The Division Bench in *Madanlal's* case (supra) had, therefore, thought it unnecessary to decide whether the appeal against the order granting conditional leave would also lie.

6. Our attention has been drawn to a decision of the Division Bench of the Calcutta High Court reported in *Lal Behari Prosad Chowdhury Vs. Parasmull Jain and Others*, . The Division Bench of the Calcutta High Court in the said case had, inter alia, held that a preliminary order granting or refusing leave to defend would not be a "judgment" within the meaning of Clause 15 of the Letters Patent. The point now seems to be concluded by the Supreme Court decision in the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , in favour of the view that such a conditional order would be also a "judgment" within the meaning of Clause 15 of the Letters Patent.

7. In the instant case, the orders of the learned single Judge granting conditional leave to defend to the Defendants were challenged by preferring appeals before the Division Bench. The Division Bench had decided the said appeals on merits and while upholding the conditional orders had reduced the amounts of security. The matter was further carried to the Supreme Court which, as already stated, had rejected the Special Leave Petitions filed by the Defendants-Appellants. Therefore, it is not disputed by the learned Counsel for the Appellants that it is no longer open to the Appellants to make any submission about the correctness and/or propriety of the said orders of the learned single Judge granting conditional leave to defend the suits. The Defendants admittedly did not deposit the amounts or furnish the security. Therefore, they cannot any more question that the Plaintiffs were not entitled to judgment against them. Mr. Cooper, however, submitted that the expression "entitled to judgment" means judgment according to law. According to the learned Counsel for the Appellants, even if the Defendants were not entitled to defend the suit, the Court which had the power to pronounce ex parte judgments was under a duty to itself consider the merits of the Plaintiffs case and was not entitled to pass any judgment which was contrary to law. The learned Counsel has himself submitted that there is no difference in the legal position between the cases where the Defendant does not obtain leave or is refused leave and the cases where because of his failure to furnish the security the conditional leave is revoked. In each of these cases the Court must ask the Plaintiff to prove his case as in the case of a suit heard ex

parte by reason of the Defendant's absence. According to the learned Counsel for the Appellants, when the Defendants are not granted leave to defend while proceeding summarily under Order XXXVII, the Court must assume all facts stated in the plaint to be true; but the Court still has a duty to look into the question regarding the legality of the Plaintiffs claim and as to whether there is any bar in the way of the Defendants obtaining the leave. Where the leave is not applied or where the Defendant does not furnish security in terms of conditional leave, a decree against the Defendant cannot follow as a matter of course. In case an illegal decree is passed, in appeal the Division Bench ought to look into this point and pass its judgment in accordance with law.

8. After leave to defend is refused or is not obtained, the Plaintiff is entitled to judgment. By reason of the Defendant not appearing, the facts stated in the plaint must be admitted by the Defendant. Undoubtedly, there are some similarities between the procedure of the suit which becomes ex parte by reason of the default on the part of the Defendant and that of a summary suit under Order XXXVII of the Code in which the Defendant either did not apply for leave or leave to defend was refused to him or having obtained leave did not furnish the security and, therefore, was precluded from contesting the suit. Undoubtedly, the decree passed in such suits ex parte decided would be on merits and, therefore, the principles of res judicata would be attracted.

9. Mr. Cooper has relied upon the decision of Chagla, C.J. and Dixit, J. in the case of Baldevdas vs. Mohanlal, AIR 1948 Bom 232 The Division Bench had dismissed an appeal preferred against the decision of the learned single Judge dismissing a suit which had been filed for a declaration that the promissory note on which an ex parte decree under Order XXXVII of the Code had been passed was without consideration. The Division Bench held that an ex parte decree passed in a summary suit filed on the Original Side of the High Court, on the Defendant's noncompliance with the condition precedent of his getting leave to defend the suit operated as res judicata being a decree on merits. While pointing out the similarities between the ex parte decree and the decree passed under Order XXXVII against a Defendant who failed to comply with the condition precedent to getting the leave to defend the suit, the Court had observed that in one class of decrees the absence of the Defendant was voluntary, while in the case of a decree passed under Order XXXVII, Rule 3, the absence of the Defendant was enforced. In other words, when leave is not obtained or leave is refused or where the Defendant fails to comply with a conditional order, the Defendant is precluded from further contesting the Plaintiffs claim. By reason of the wordings of Order XXXVII, Rules 2 and 3 of the Code, there is further disability upon the Defendant. The facts stated in the plaint must be considered to have been admitted by the Defendant and the Plaintiff becomes entitled to judgment. Order XXXVII of the Code not only provides for abridgement of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiffs' claim. When the matter is carried in Appeal, the Defendant who did not obtain leave or had

failed to comply with the conditional order continues to suffer under the same disability. It could never be contended that by reason of presenting an Appeal from the ex parte decree the Defendant would have any greater right to contest the Plaintiffs claim. The Appeals preferred from such ex parte decrees passed in summary suits must proceed on the basis that such Defendants had admitted the Plaintiffs' case as stated in the plaint and that the Plaintiffs were entitled to judgment. Therefore, although there are undoubtedly similarities between an ex parte decree and a decree passed under Order XXXVII, Rule 3 of the Code, the analogy cannot be carried too far in view of the basic differences between the two kinds of decrees. For the same reason, once an Appeal is filed against an ex parte decree passed under Order XXXVII, Rule 3, there is no unchartered right for a Defendant who had preferred an earlier Appeal against conditional order granting leave and had been unsuccessful. It is not necessary for us to exhaustively indicate the grounds which could be urged by the Defendant in an Appeal preferred against the decree passed under Order XXXVII, Rule 3 of the Code. It would be more pertinent to consider whether the points which are sought to be urged in these Appeals could be legitimately and lawfully urged. Even in the reported decisions, in which right of a Defendant to appeal against an ex parte decree under Order XXXVII was upheld, the learned Judges have pointed out the limited scope of such appeals. In Madanlal's case (supra), Marten, C.J., with reference to the scope of an appeal from a final judgment, had thus Observed:

technically an appeal lies from that judgment, though whether on the merits it would have the slightest chance of success is another matter. That distinction between "whether an appeal lies" and "whether it has any chance of success" was indeed pointed out in the Full Bench case of Narayan Patupa vs Vaijunt Subava " (supra)

The Chief Justice had thus quoted in his earlier judgment in the Full Bench decision :

But to avoid any misconception I may add that though pro forma an appeal may lie, still in the vast majority of cases, the appeal will be one of those known as "hopeless", because the conditions imposed by the lower Court will be reasonable ones, and accordingly if they are not fulfilled, the only result will be that the appeal will be dismissed with costs.

Again, in the case of Romanlal vs. Chunilal (supra), Beaumont, C.J. at page 254 of his judgment had observed:

But, however, that may be, it seems to me to be clear that the effect of Order XXXVII, Rule 2, is that if the Judge refuses leave to defend, or gives leave to defend on terms which the defendant is not able to comply with, the result is that the plaint is taken to be admitted, and the plaintiff is entitled to an order on that basis. Rule 206 of the rules of this High Court provides how the plaintiff is to obtain his order. He is to set the case down for hearing before the Chamber

Judge, but having done that it seems to me that the making of the order will automatically follow in view of the provision of Rule " 2 of Order XXXVII, that all the allegations in the plaint are to be taken as admitted.

In his concurring judgment, Rangnekar, J. in the case of Ramanlal vs. Chunilal (supra) had observed that if the Defendant is refused leave then he cannot appear and defend the suit and he would be deemed to have admitted the allegations contained in the plaint and the Plaintiff will be entitled to a decree as a matter of course. The result, therefore, of a refusal of an application for leave to defend is to deprive the Defendant of the right to defend the suit and so far as the Defendant is concerned, the order practically determines the whole, cause. While preferring an Appeal against the ex parte decree passed under Order XXXVII, Rule 3 of the Code, the Defendant continues under the same disability. We had invited the learned Counsel for the Appellants to point out any reported decision in which the Defendant against whom an ex parte decree had been passed under Order XXXVII, Rule 3 of the Code had successfully urged any point on merits of the Plaintiffs claim- In most of the reported cases cited before us the Defendant's Appeal had been in substance an Appeal from an order on summons wherein the conditional order granting leave had been appealed against. In the instant case, the said question of granting leave to the Defendant on condition of furnishing security is no longer open. Therefore, even in law although an Appeal lies from the ex parte decree passed under Order XXXVII, Rule 3, the consistent judicial view has been that the finality of a conditional order practically precludes the Defendant-Appellant from assailing the decree on merits.

10. The decision of the Supreme Court in Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, , which was cited by the learned Counsel for the Appellants, is hardly of any assistance to the Appellants. In the case before the Supreme Court the moot question was whether in view of the express provisions for setting aside a decree passed under Order XXXVII of the Code, the Court could invoke its inherent powers u/s 151 of the CPC to set aside an ex parte decree. The Supreme Court held that report to section 151 of the Code was not open. In paragraph (3) of his judgment, Sarkar J. (as he then was) has pointed out that the effect of an order in that case was to give a conditional leave to defend so that on failure" to perform the conditions, the tenant had no longer the right to defend the action. In paragraph (10) of the same judgment the learned Judge had observed that in making a decree under sub-rule (2) of Rule 2 of Order XXXVII the Court had to keep in mind that the allegations in, the plaint shall be deemed to have been admitted. If the law required the Court to exercise discretion in the facts deemed to be admitted, it would have to do so. In the next paragraph of his judgment the learned Judge had further observed that the Defendant may not be allowed at the hearing to place his side of the case for assisting the Court in the exercise of that discretion, but that did not create any conflict with the Rent Act. In the instant case, the learned Counsel for the Appellants urged that the bills of exchange viz. the negotiable instruments upon which the plaintiff founded its claim were insufficiently stamped and, therefore,

under the proviso to section 35 of the Stamp Act the said negotiable instruments could not be received in evidence nor could have been acted upon by the learned single Judge. The learned Counsel for the Appellants, in view of the provisions of bar of section 36 of the Stamp Act, tried to urge that even if the Appellants were no longer entitled to question admissibility of these negotiable instruments produced by the Plaintiff, they could still contend that these documents could not have been acted upon. In our view, these submissions are no longer open to the Appellants to make. In the first place, these submissions really amount to raising defences by the Appellants even after they had failed to comply with the conditional orders-granting leave to defend. The question of proof of admissibility of documents in a contested suit could have been raised by a party against whom such documents are attempted to be brought on record and used. But in view of their failure to furnish the security, the Defendants who had failed to obtain leave to contest must be deemed to have admitted the contents of the plaints filed by the plaintiff. Secondly, the Plaintiff Bank had become entitled to a decree. We are unable to accept the submission made on behalf of the Appellants that objections u/s 35 relate to matter of jurisdiction on the part of the Court to pass a decree. At the highest, the same relate not to existence but to exercise of jurisdiction by the learned single Judge in granting leave. Apart from being precluded under the provisions of Order XXXVII of the Code itself, in view of the bar u/s 36 of the Stamp Act, the Defendants were not entitled to urge in Appeals the questions which were not open to them to raise in the trial Court.

11. We have also perused the judgment of the Division Bench in the Appeals preferred by the Defendants-Appellants against orders of the learned single Judge granting conditional leave to defend the suits. The Division Bench had gone into the question of the inadmissibility of the defences of the Defendants. As regards admissibility of the negotiable instruments vis-a-vis the provisions of section 35 of the Stamp Act, the Division Bench had rejected the contentions raised on behalf of the Plaintiff.

12. For the foregoing reasons, we hold that these Appeals have no merit. We affirm the decrees passed by the learned single Judge and dismiss these Appeals with costs.

13. The learned Counsel for the Appellants prayed for granting certificate to prefer Appeals in the Supreme Court. For the reasons already given in our judgment, we are of the view that these Appeals do not involve substantial questions of law fit to be considered by the Supreme Court. We accordingly reject the prayer for granting leave to appeal to the Supreme Court.