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**(2014) 04 BOM CK 0168**

**In the Bombay High Court**

**Case No :** Chamber Summons No. 792 of 2013 in Suit No. 5190 of 2000

Emirates Islamic Bank-PJSC

APPELLANT

Vs

Chandra Dev Narain Singh and Others

RESPONDENT

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**Date of Decision :** 11-04-2014

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 37

**Citation :** (2014) 04 BOM CK 0168

**Hon'ble Judges :** R.S. Dalvi, J

**Bench :** Single Bench

**Advocate :** Shivani Khanna, Advocate i/b. FZB and Associates, Advocate for the Appellant; Yogeshwar Bhate, Advocate for Defendant Nos. 1, 2 and 4, Advocate for the Respondent

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**Judgement**

Roshan Dalvi, J.—The plaintiff has taken out this Chamber Summons for condonation of delay of 4495 days in filing Summons for Judgment in the above Summary Suit and to allow plaintiff to file a Summons for Judgment and place it for hearing. The defendants have opposed Chamber Summons and have contended that the suit be dismissed. The plaintiff has sued for recovery of certain monies under a foreign judgment passed by the Court in Dubai. The plaintiff has taken out various interim applications in the suit but not a Summons for Judgment. The plaintiff claims that in 2005 the plaintiff has changed its advocate and due to inadvertence not filed the Summons for Judgment. The delay is of about 13 years in taking out Summons for Judgment. It is indeed a gross delay. It would have to be seen whether it can be condoned or not.

2. It may be mentioned that there is no time limit by way of period of limitation set out either in Order 37 of the CPC or in the High Court Original Side Rules (Rules) to take out Summons for Judgment within a specified time. Plaintiff who is otherwise entitled, has to take out Summons for Judgment within a reasonable time of the filing of the suit. Even if the Summons for Judgment is delayed by few years it is numbered and comes up for hearing. In this case the plaintiff's

Summons for Judgment has not been accepted by the Court's registry itself, presumably in view of the gross delay and hence this application is made for leave to file the Summons for Judgment which otherwise plaintiff does not have to take. If the Summons for Judgment is delayed it has to be taken as one of the ground for granting unconditional leave. There have been judgments of the Single Judge of this Court holding that the Summons for Judgment may result in unconditional leave, if it is taken out after a lot of delay. It has been held by the Division Bench of this Court in the case of Bankay Bihari G. Agrawal Vs. M/S Bhagwanji Meghihi and Others, that merely because the Summons for Judgment is delayed is not the ground to grant unconditional leave. Similarly even if the Summons for Judgment is delayed it is not a ground to ignore the delay and the balance has to be struck between the lack of promptitude of the plaintiff and the nature of the defence of the defendant to grant unconditional leave or to decline leave to defend the suit. (See paragraph 37). It is also held upon considering the Supreme Court Judgment in the case of Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs., that failure of the plaintiff in taking out the Summons for Judgment within six months need not necessarily lead to dismissal of the suit. Similarly it is observed in paragraph 45 of the judgment that the contention that the delay in taking out the Summons for Judgment is wholly irrelevant is not correct. But the Court would exercise judicial discretion to dismiss the suit or to condone the delay and grant relief. The Court would have discretion to relegate the plaintiff to the procedure of an ordinary suit (See paragraph 45).

3. The Court considered Rule 227 in this behalf. The defendant also has relied upon Rule 227 and the judgment of the Single Judge of this Court in a case in which since the Summons for Judgment was not taken out for 8 years the suit was dismissed. The learned Judge in that case also referred to Rule 227.

4. It may be mentioned that Rules 226 and 227 must be read together. They run thus:

226. Defendant's default in filing appearance or Vakalatnama.-If the defendant does not enter an appearance in person or a vakalatnama within ten days from the service upon him of the Writ of Summons and the plaint, the plaintiff shall be at liberty to have the suit set down forth with for hearing before the Judge in Chambers.

227. When no decree applied for within six months.-If the plaintiff does not apply for a decree within six months after the filing 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 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.

5. Rule 227 refers to the cases where the defendant does not enter appearance

at all. When the Writ of Summons in the Summary Suit is filed the defendant has to enter appearance within 10 days. If the defendant does so, the plaintiff must take out the Summons for Judgment. The time period for taking out the Summons for Judgment is not specified either in Order 37 or in the Chapter XIV of the rules relating to the Summary Suits. It, therefore, follows that the Summons for Judgment should be taken out within a reasonable time after the appearance is entered by the defendant. There have been cases where the Summons for Judgment have not been taken out for 2 to 4 years. The Courts have diversely held whether the defendant would be entitled to unconditional leave merely on that ground. That issue has been settled in the case of Bankay Bihari (*supra*) as aforesaid.

6. Rule 227 shows that if the defendant does not enter appearance within 10 days of the service of the Writ of Summons, the plaintiff shall have the suit placed on board for hearing. That would be for an *ex parte* decree. Rule 227 is in that behalf. It shows that when the plaintiff does not apply for such decree within six months after the filing of the plaint, the suit shall be set down for dismissal. It does not state that it shall be dismissed. In fact it enjoins the Prothonotary and Senior Master to notify the date when the suit is kept for dismissal. This should be kept on the notice board eight days before the date on which it is kept for dismissal. If the plaintiff appears in person he must also be given notice of this fact.

7. The purport of this rule has been explained in the aforesaid judgment in the case of the Bankay Bihari (*supra*). The Division Bench of this Court has held that "setting down the suit for dismissal" is not the same as dismissing the suit. The rule requires that the suit must be kept for dismissal and hence the judge has the discretion to dismiss it or not. This judicial discretion must be exercised judiciously. Consequently in the penultimate para of the judgment the decision of the question referred to the Division Bench have been answered to show that such a suit is liable to be placed on board for dismissal. The plaintiff may contend why the suit should not be dismissed. The Judge would exercise his judicial discretion to dismiss the suit or to proceed with it on such terms as he deems fit. It is further held that the delay in taking out the Summons for Judgment beyond the period of six months described by Rule 227 would not automatically entitle the defendant to unconditional leave to defend the suit. It would be a relevant factor to be considered along with the nature of the defence of the defendant. This reasoning of the Division Bench which binds this Court would suffice to determine the above Chamber Summons. Though *stricto sensu* under Rule 226 when the defendant does not enter appearance the plaintiff has to apply for *ex parte* decree and when the plaintiff does not apply for such decree within six months the suit would be kept for dismissal. We may take it even when the plaintiff does not take out the Summons for Judgment the same analogy would apply though rule 227 does not specify the taking out the Summons for Judgment at all.

8. In this case the delay is of about 13 years from the filing of the suit in taking out the Summons for Judgment. The defendant would contend that the case shown by the plaintiff in paragraph 4 of the affidavit in support of the Chamber Summons showing the change of the advocate and the inadvertence is not sufficient. The plaintiff would contend that sufficient cause is shown for condonation of gross delay. The plaintiff has detailed how the change of advocates and the inadvertence took place in paragraph 11 (d) of the affidavit in rejoinder. The plaintiff claims that they took out various other applications upon the advise of their advocates through their officer. The plaintiff has denied negligence on the part of the officer. It is the plaintiff's case that it was busy prosecuting the Notice of Motion No. 3660 of 2000 and appeal therefrom and hence inadvertently failed to file the Summons for Judgment.

9. The plaintiff has claimed that the suit was never set down for dismissal on the board of the Chamber Judge for all these years. It was only in 2013 that the plaintiff saw that the Court Receiver appointed in respect of the premises was removed. Hence it perused the file and then realized that the Summons for Judgment was not filed. Hence it sought to file it and it was not allowed by the registry and hence the application for condonation of delay is made. It may be mentioned that even if the plaintiff never took out the Summons for Judgment which is had to take out within six months after the filing of the plaint (if Rule 227 applied to taking out the Summons for Judgment which it does not), under Rule 227 the Court was as much required to place the suit on board for dismissal. Just as much as the plaintiff failed to file the Summons for Judgment, the Court also failed to place the suit on board for dismissal. Consequently, the plaintiff never received the 8 days notice of the board before the Prothonotary and Senior Master and so it must be accepted to have skipped to taking out the Summons for Judgment altogether due to inadvertence.

10. Once such inadvertence is shown the number of years really do not matter as a single reason. Only if something else were to happen such inadvertence would come to light. In this case the plaintiff's advocate was changed. The plaintiff's officer sought certain advise from their advocate. The plaintiff had prosecuted another interim application in an appeal in which Court Receiver came to be appointed though the plaintiff has only filed Summary Suit for recovery of a specified amount. The plaintiff saw that the Court Receiver's board were removed. That aspect has not been denied. It is that aspect that brought the plaintiff to its notice of its failure to take out the Summons for Judgment. That could have happened at any time. Once that comes to the notice of the plaintiff, the delay in taking out the summons for Judgment would have to be seen.

11. This came to the notice of the plaintiff in the year 2013. The plaintiff has sought to take out the Summons for Judgment in 2013 itself. That not been accepted by the Court registry. Hence in September, 2013 this Chamber Summons is filed. That delay is not gross.

12. Once the plaintiff takes out the Summons for Judgment also the ruling in the

case of (Bankay Bihari supra) would require the Court to consider not only the delay in taking out the Summons for Judgment but also defence of the defendants. The Court cannot consider either one of these things to the exclusion of the other. However, the Court must consider the extent of the delay. In this case the extent of the delay exceeds the delay in the cases cited in the judgment. The ruling of the Supreme Court in the case of Kalipada Das relied upon in paragraph 39 would require the Court to consider the gravity of the lapse. Indeed the gravity is gross.

13. It may be mentioned that the Court suggested that the plaintiff's suit could be tried as an ordinary suit so that even without taking out the Summons for Judgment unconditional leave would be granted to the defendant. That would be in compliance with the specific observations of the Division Bench in paragraph 45 of the judgment in the case of Bankay Bihari (Supra). The defendants, however, pressed for dismissal of the suit. Hence the aforesaid law is considered.

14. The defendant has relied upon the judgment in the case of Union Bank of India Vs. J. Raj and Co. and Others, , in which Summons for Judgment not having been taken out for 8 years, the suit came to be dismissed upon reference to the case of Bankay Bihari (Supra). The Court observed that in the various cases cited before it the plaintiff has taken out the Summons for Judgment after six months where as in that case the plaintiff has not taken out the Summons for Judgment at all. Relying upon penultimate para of the judgment in the case of Bankay Bihari (Supra) the Court refused to exercise this discretion. That itself would be a judicial discretion in a given case. The judgment does not reflect any sufficient cause shown by the plaintiff for the Court to exercise its discretion in favour of the plaintiff. The judgment only reflects that the suit was filed in 2000 and dismissed in 2009. The judgment further observed that the suit appeared before the Court for filing affidavit of evidence and documents i.e. for hearing and final disposal. How that came to be is in comprehensible. If the plaintiff filed a Summary Suit, its prosecution would depend upon the defendants appearance being entered within 10 days after which the Summons for Judgment would be taken out. If the Summons for Judgment is not taken out and no order was passed thereon, the suit would not appear on board for hearing. It would have to be placed for dismissal and only if the Court exercised its discretion in not dismissing the suit would it then come up for hearing either for the Summons for Judgment, or upon it being treated as an ordinary suit, for hearing as such. Nevertheless that suit appeared for hearing. The defendant sought to have it dismissed and which the Court did on the next date of hearing.

15. The order of the Court in not exercising discretion is based upon the facts of that case. This Court has not bound by that order. The plaintiff in this case has shown sufficient cause for considering its claim on merits. Since the defendant is not agreeable to treat the suit as an ordinary suit so that in terms it would be granted unconditional leave, the plaintiff is allowed to file the Summons for Judgment which would have to be heard as per the parameters laid in the

Bankay Bihari (Supra).

16. Hence Chamber Summons is granted in terms of prayers "a" and "b". Office of the Prothonotary and Senior Master of this Court shall accept Summons for Judgment and the affidavit in support of the Summons for Judgment filed by the plaintiff. The plaintiff shall serve Summons for Judgment upon the defendant's advocate and thereafter place it on board for hearing.

17. The Chamber Summons is disposed off accordingly. This order is stayed for 2 weeks.