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**(2017) 02 BOM CK 0105**

**In the Bombay High Court**

**Case No :** Appeal (Lodg) No. 310 Of 2016, In Notice Of Motion No. 1562 Of 2015, In Summary Suit No. 334 Of 2012

Hayagriv Ashok Jogani

APPELLANT

Vs

Sailam BVBA

RESPONDENT

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**Date of Decision :** 27-02-2017

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 4

**Citation :** (2017) 2 AIRBomR 654

**Hon'ble Judges :** S.C. Dharmadhikari and B.P. Colabawalla, JJ.

**Bench :** Division Bench

**Advocate :** Mr. Pravin Samdani, senior counsel with Mr. Ranbir Singh i/b M/s. Prakash & Co, for the Appellants in all the Appeals.; Mr. Venkatesh Dhond, senior counsel with Mr. Archit Jayakar, Mr. Nikhil Wable, Ms. Dimple Magitia i/b M/s. Jayakar & Partner, Advocates, for the Respondent No.1 in all the Appeals.

**Final Decision :** Dismissed

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## Judgement

S.C. Dharmadhikari, J.—;This Appeal (Appeal (Lodg.) No.310 of 2016) by the original Defendant Nos.2 to 4 under section 13 of the Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Act 4 of 2016) challenges the order passed by the learned single Judge dated 16th April, 2016, in Notice of Motion No.1562 of 2015 moved by the appellants and respondent No.3 to this appeal who is the original defendant No.5 in a Summary Suit being Summary Suit No. 334 of 2012.

2. It is the rejection of the appellants' application for setting aside an ex-parte decree dated 20th August, 2014, passed in the above Summary Suit which is impugned in this appeal.

3. At the outset, we clarify that it is that aspect of the impugned order and the proceedings which is highlighted by the appellants before us. Hence, the title as appearing in the impugned order may refer to several applications, but each of those may not be relevant for us. Once we note that the essential controversy is

about the correctness and legality of the learned single Judge's order refusing to set aside the ex-parte decree, then, we would focus only on the same.

4. To appreciate the rival contentions one would have to refer to the relevant dates and events.

5. The first respondent to this appeal is the original plaintiff. It filed Summary Suit No. 334 of 2012, invoking Order 37 of the Code of Civil Procedure, 1908. Since there are serious errors and mistakes in the description of the parties in the title of the Memo of Appeal, we would prefer to go by the description and arrangement of parties as appearing in the Plaint. That reads as under :

"Summary Suit No. 334 OF 2012 (Under Order 37 of the Code of Civil Procedure 1908) Sailam B.V.B.A. A registered partnership firm having its ] Registered office situated at Hoveniersstraat 2-8, 4th Floor, Office No.439, 2018 Antwerpen Bus-337, Belgium And residing at 80, Nepeansea Road, Om Darya Mahal, C Block 73, Mumbai - 400 006 ... Plaintiff

V/s.

1. M/s. Helios Jewellery Pvt. Ltd., A company incorporated under the Provisions of Companies Act having their Office situate at 324, Surat Trade House Unapani Road, 395001 Surat Gujarat India And Local Office at 7 Pratik Arcade, Tata Road No.2, 1st Floor, Opera House, Mumbai - 400 004.

2. Mr. Hayagriv S/o, Ashok Jogani, Of Mumbai, adult, Indian inhabitant, Residing at 61/A, 6th Floor, Tahnee Heights Building No.D. Petit Hall, 66 Napeansea Road, Mumbai 400 036

3. Mr. Aditya s/o Ashok Jogani, Of Mumbai, adult, Indian inhabitant, Residing at 61/A, 6th Floor, Tahnee Heights Building No.D. Petit Hall, 66 Nepeansea Road, Mumbai 400 036

4. Mr. Vikram S/o. Ashok Jogani of Mumbai, adult, Indian inhabitant, Residing at 61/A, 6th Floor, Tahnee Heights Building No.D, Petit Hall, 66 Nepeansea Road, Mumbai 400 036

5. Mr. Ashok Jogani, of Mumbai, adult, Indian inhabitant, Residing at 61/A, 6th Floor, Tahnee Heights Building No.D, Petit Hall, Nepeansea Road, Mumbai 400 036 6

6. In paragraph 1 of the plaint it is stated that the first respondent - original plaintiff is a registered partnership firm and having its registered office at the addresses mentioned in the cause title of the plaint. The appellants are stated to have executed personal guarantees together with the third respondent to this appeal guaranteeing the repayment of the moneys due and payable by the respondent No.2 - original defendant No.1. The plaint proceeds to allege that the plaintiffs have dealt with the first defendant company on the basis of personal guarantees and assurances of defendant Nos.2 to 5 for themselves as also on behalf of defendant No.1. Therefore, the defendant Nos.2 to 5 are jointly and

severally liable to discharge the liability of defendant No.1.

7. It is stated in the plaint that the plaintiff is in the business of sale of diamonds and other allied products. The partners of the plaintiff are residing in India. They reside in the vicinity of the residence of original defendant Nos.2 to 5. They know each other and have been maintaining good relations with each other. It is pleaded that one Mr. Kanwal Shah, partner of the plaintiff has very goods relations and is a close acquaintance of the defendant Nos.2 to 5. In the month of January, 2011, the defendant Nos.2 to 5 represented to the partner of the plaintiff that they are carrying on business in the name and style of defendant No.1 and deal in diamonds. The defendant Nos.2 to 5 further represented to the plaintiff that in the routine course of their business they are importing diamonds. That is how the diamonds were exported by the plaintiff which is based in Antwerp, Belgium under four different invoices dated 25th January, 2011, 26th January, 2011, 31st January, 2011 and 4th February, 2011. The invoices were acknowledged by four shipping instructions, four export documents and four air way bills. The goods were sent to the defendants in Surat, India. The goods were accepted by the defendants. The goods were transported to Mumbai. The defendants claim that they have returned the goods to the plaintiffs and relying upon a challan dated 4th February, 2011. However, it is claimed by the defendants that since plaintiff's had no office in Mumbai and only their partner resided in Mumbai, hence the diamonds could not be despatched to Mumbai. The plaintiff requested the defendants to permit it to use its name and address for the purpose of allowing the import of goods by plaintiff's partner. The defendant claimed commission for such services but did nothing to claim it. The defendant further claimed that the diamonds so sent from Belgium were duly handed over by the defendant to the plaintiff's partner and relied upon a receipt in that behalf. Thus, the supply of diamonds was admitted. The challan made out by the defendant and stated to be signed by the plaintiffs as receivable goods shown therein evidences written contract between the parties made up of four invoices and one challan signed by the plaintiff and written by the defendant. The plaintiff denied the receipt of the diamonds. They claimed that it's partner's signature is forged. Thus, the plaintiff rested their case on a written contract as evidenced by the above documents based on which the price of the diamonds was due and payable. Once the price of the diamonds and in Indian currency was due and payable, but that remained unpaid, then, making the necessary averments the plaintiff claimed a decree against the defendants in terms of the prayer in the plaint appearing at internal page 11 running page 105 of the plaint. Thus, the Suit claim for the purpose of Court fees and jurisdiction was valued at Rs.3,67,85,654/-.

8. After the Suit summons was duly served and a Vakalatnama was entered by the defendants in compliance with the requirement of the provisions (Order XXXVII), the plaintiff moved a Summons for Judgment which was registered as Summons for Judgment No.311 of 2012. That was duly served on the defendants' advocate. The defendants' advocate filed an affidavit-in-reply to this

Summons for Judgment. A learned single Judge, after taking all the affidavits on record, heard the Summons for Judgment and on 6th March, 2014, passed the following order :

"... ..

32. Hence the following order :

1. The defendants Notice of Motion No. 239 of 2014 for stay of the suit pending the criminal trial is dismissed.

2. The suit shall proceed to hearing.

3. The defendant shall deposit the entire principal amount in this Court within 8 weeks from today.

4. The defendant shall be entitled to file its written statement within 2 weeks of the deposit and within 10 weeks from today.

5. The defendant shall have unconditional leave to defend the plaintiff's suit for interest.

6. The amount, if deposited, shall be invested by the Prothonotary and Senior Master of this Court in any nationalised bank initially for a period of 61 months.

7. The plaintiff shall not be permitted to withdraw any amount pending the suit on any condition.

8. Suit to be on board for further directions for hearing on 10th June 2014 at 3 p.m."

9. It is common ground that a Letters Patent Appeal was preferred against this order of the learned single Judge in which an application for stay of the execution and implementation of the order passed by the learned single Judge was moved. A Division Bench of this Court on 6th May, 2014, heard that appeal and made the following order :

" Having heard the learned counsel for parties for some time, in the peculiar facts and circumstances of the case we are of the view that interest of justice requires that case No. being E.O.W.C.B.C.I.D. C.R.No.40 of 2011 pending in the learned Metropolitan Magistrate, Court No.9 at Esplanade, Mumbai be tried and decided as expeditiously as possible. 2. Accordingly, in exercise of suo-motu jurisdiction under Article 227 of the Constitution, we direct that the learned Metropolitan Magistrate, Court No.9 at Esplanade, Mumbai shall try and decide E.O.W.C.B.C.I.D C.R.No.40 of 2011 as expeditiously as possible and in any case by 31 July 2014. Judgment of the said Court shall be placed on record of this proceeding. 3. Learned Trial Judge has made the following order on the plaintiff's summons for judgment:-

1. The defendant's Notice of Motion No. 239 of 2014 for stay of the suit pending the criminal trial is dismissed.

2. The suit shall proceed to hearing.
3. The defendant shall deposit the entire principal amount in this Court within 8 weeks from today.
4. The defendant shall be entitled to file its written statement within 2 weeks of the deposit and within 10 weeks from today.
5. The defendant shall have unconditional leave to defend the plaintiff's suit for interest.
6. The amount, if deposited shall be invested by the Prothonotary and Senior Master of this Court in any nationalised bank initially for a period of 61 months.
7. The plaintiff shall not be permitted to withdraw any amount pending the suit on any conditions.
8. Suit to be on board for further directions for hearing on 10th June 2014 at 3 p.m.
4. As far as the appellant-defendant's prayer for stay of direction No.3 is concerned, learned Trial Judge has directed the appellant to deposit the entire principal amount in this Court within eight weeks from the date of the order i.e. within eight weeks from 6 March 2014.
5. In the facts and circumstances of the case and having heard the learned counsel for parties, we grant ad-interim stay of the said direction on condition that the appellant deposits 25% of the principal amount by 10 July 2014 in this Court.
6. It is clarified that this order is without prejudice to rights and contentions of parties in the appeal and also in the criminal proceedings.
7. Stand over to 5 August 2014."
10. Against this order, a Special Leave Petition was filed by the defendants-original appellants and respondent Nos.2 and 3 before us which came to be dismissed by the Hon"ble Supreme Court on 8th July, 2014. Since that appeal was dismissed and the defendants failed to deposit the amount as directed by the Division Bench, a Non-Deposit Certificate was issued by the Prothonotary & Senior Master of this Court dated 16th July, 2014.
11. After this Non-Deposit Certificate was issued, a learned single Judge of this Court was moved by the plaintiff to seek a decree against the defendant. On 20th August, 2014, the Summary Suit was decreed. The learned single Judge passed a detailed order noting the above facts and observing that the defendants have not appeared before this Court to oppose the passing of the ex-parte decree in favour of the plaintiff and against the defendant. In view of clause (b) of Rule 6 Order 37 of the Code of Civil Procedure, the plaintiff is entitled to a decree in the Summary Suit. He, therefore, passed a decree in terms of prayer clause (a) of the Plaint and also directed payment of costs.

12. It is common ground that since the ad-interim order passed by the Division Bench of this Court on 6th May, 2014, was not complied with, the appeal itself was dismissed on 5th August, 2014, pursuant to which the learned single Judge decreed the suit.

13. Then, the decree was put in execution by filing an Execution Application No.1271 of 2015. The record indicates that a warrant of attachment of immovable property was also issued on 14th July, 2015. The plaintiff also moved an application under Order 21, Rule 41 of the Code of Civil Procedure, styled as Chamber Summons (Lodg.) No. 1051 of 2015 in the above Execution Application and on which an order was passed on 1st October, 2015.

14. Be that as it may, on 25th August, 2015, Notice of Motion No. 1562 of 2015 was taken out by defendant Nos.2 to 5 and Notice of Motion No.1565 of 2015 was taken out by defendant No.1 for setting aside the ex-parte decree.

15. In the meanwhile, the execution proceedings were continued and the directions of the Executing Court to the defendants to file an affidavit disclosing their assets and properties also came to be contested by them by filing another appeal. That appeal was also dismissed on 11th January, 2016, by a Division Bench of this Court on the ground of maintainability. It was held as not maintainable. Even that order was challenged in the Supreme Court of India, but the Hon"ble Supreme Court of India clarified, while not being inclined to entertain the appeal / Special Leave Petition, that it would be open for the defendants to make an application to the High Court to defer the execution proceedings till their applications to set aside the decree are disposed of.

16. That is how on 9th March, 2016, Notices of Motion Nos.1086 of 2016 and 1088 of 2016 were moved by the defendants and seeking to defer the implementation of the order and direction in the execution proceedings dated 2nd/8th October, 2015, to file affidavits disclosing their assets.

17. Thereafter, by the impugned order, the learned single Judge dealt with the Notices of Motion/applications to set aside the decree. It is the order passed on these applications which is under challenge before us.

18. The learned single Judge held that the decree came to be passed because the defendants failed to deposit the amount as directed by the Court and on a Non-Deposit Certificate was issued by the Prothonotary & Senior Master. The Summons for Judgment was disposed of by granting conditional leave to defend the Summary Suit. When the defendants do not comply with the condition imposed, then, there was no question of granting them any leave to defend the suit. Even in the affidavit-in-support of the Notice of Motion to set aside the ex-parte decree, the defendants have not made any statement regarding deposit. Once the defendants do not make even an effort to comply with the pre - condition of deposit, then, the question of recalling the decree does not arise. More so, when the order in the Summons for Judgment was unsuccessfully appealed by the defendants. On such reasoning, he dismissed the Notice of

Motion.

19. It is against these findings and conclusion that the present appeal has been filed.

20. Mr. Samdani, learned senior counsel appearing on behalf of the appellant would submit that this appeal raises important questions of law. He would submit that there is a grave error committed by the learned single Judge in dismissing the Notices of Motion seeking to set aside the ex-parte decree. Mr. Samdani would submit that the learned single Judge failed to note that in the affidavit-in-support, the appellant pointed out that the suit claim is false and based on forged and fabricated documents. An affidavit-in-reply was already filed to the Summons for Judgment stating therein that diamonds supplied have been handed over and there is an acknowledgement issued by the plaintiff accepting receipt of the diamonds. There is an exhaustive affidavit-in-reply filed to the Summons for Judgment. It is only because the amount could not be arranged that the learned single Judge's order and direction on the Summons for Judgment was not complied with. However, the defendants have pointed out that they have a very good defence to the claim in the suit. Defendant Nos.2, 3 and 4 are individuals; they are Directors of the company (Defendant No.1), but are not personally liable to repay the amount. As far as defendant No.5 is concerned, he is a senior citizen and has nothing to do with the claim of the company. The suit suffered from various defects and was beyond the purview of Order 37 of the Code of Civil Procedure. The decree is stated to have been passed on 20th August, 2014, but the defendants had no knowledge about its passing till 3rd August, 2015. The decree is ex-parte. Now that the execution applications have been filed, grave and serious loss so also injury will be caused to them.

21. Inviting our attention to the statements in the affidavit-in-reply to the Summons for Judgment, Mr. Samdani would submit that the learned single Judge's order in the Summons for Judgment is peculiar. There is a clear indication therein that as far as the claim for interest is concerned that was not maintainable under Order 37 of the Code of Civil Procedure. Even otherwise, that was not tenable and the version in the affidavit-in-reply of the defendants had definite substance. If this was not the position, the learned single Judge while disposing of the Summons for Judgment would not have granted unconditional leave to defend the suit insofar as interest is concerned. Mr. Samdani would, therefore, submit that this is a peculiar order. A decree on non-deposit of the amount directed in this very order and decreeing the suit in its entirety thus can never follow in law. The Summons for Judgment being disposed of in the above manner, even if there was a default in compliance with the order and direction on such Summons for Judgment, a decree for the entire sum and as prayed, together with interest could never have followed. The learned single Judge, therefore, was obliged to consider this aspect of the matter while hearing the instant Notices of Motion. In the Notices of Motion / applications to set aside the ex-parte decree the special circumstances thus were categorically set out. The

requirement of the provision, namely, Order 37, Rule 4 of the Code of Civil Procedure was satisfied. The ex-parte decree, therefore, deserved to be recalled.

22. Mr. Samdani terms the decree passed in the Summary Suit as ex-parte. He would submit that going by the language of Order 37 of the Code of Civil Procedure and several rules and sub-rules thereof, it is apparent that this Court is not obliged to pass a decree against the defendant even if there is a default in compliance with the conditional order delivered on a Summons for Judgment. Merely because some amount as directed has not been deposited in this Court and a certificate of the Registry to the effect that there is no deposit is issued, does not mean that the ex-parte decree as prayed follows. This Court has enough discretion in the scheme of Order 37 itself to refuse to pass a decree. It can issue a notice to the defendant and thereafter, on it being served, hear the plaintiff and call upon him to satisfy as to why a decree as prayed should be passed. Even otherwise, this Court is not obliged to decree the suit as prayed. It can make an order even at that stage refusing to decree the suit in its entirety. This being the scheme of the law, the decree in the Summary Suit can be safely called and termed as ex-parte. Such an ex-parte decree can be set aside by taking a recourse to Order 37, Rule 4 of the Code of Civil Procedure and pointing out that there is sufficient cause for non appearance of the defendant on the given date and time. Even while praying for setting aside that decree, the appellants and the supporting respondents could have argued that the order passed on the Summons for Judgment is not legal, valid and proper and they deserve an unconditional leave to defend the suit. When such is the position in law, then, the learned Judge's understanding, with great respect, that he has no choice but to pass a decree and if an application is made to set aside that decree in that application while pressing it, the appellants and the supporting respondents cannot urge that no unconditional leave should be granted is incorrect in law. Mr. Samdani, therefore, submits that the impugned order contravenes the provision of Order 37 of the Code of Civil Procedure.

23. Mr. Samdani summed up his arguments by submitting that there are three grounds and specifically pleaded to set aside this ex-parte decree. Firstly, a Summary Suit would not lie on an oral contract. Secondly, the plaintiff and the defendant No.1 are not the contracting parties. In any event, defendant Nos.2 to 5 are Directors of defendant No.1. In the absence of any cause of action and personal to them, no decree can be passed against the Directors of a company which is a distinct legal entity. Thirdly, no component of interest can be covered under the decree. The ex-parte decree, as granted and passed, includes that component. Mr. Samdani, therefore, submits that the impugned order does not contain the relevant and germane matters, but is based on irrelevant and non germane facts and matters. The learned single Judge, with great respect, missed the point that as against original defendant Nos.2 to 5, there is absolutely no case. For these reasons, he would submit that the appeal be allowed and the impugned order be quashed and set aside.

24. To support the above contentions, Mr. Samdani relied upon the following judgments :

- (1) P.N. Films Ltd. & Anr. v. Overseas Films Corporation Limited AIR 1958 Bom. 10.
- (2) Ramchandra Dhondu Dalvi v. Vithaldas Gokaldas AIR 1964 Bom. 251.
- (3) Bankay Bihari G. Agrawal v. M/s. Bhagwanji Meghiji & Ors. 2001 Vol. 103(1) Bom. L.R.823.
- (4) Jyotsna K. Valia v. T.S. Parekh & Co. 2007 (3) Bom. C.R.
- (5) Tarun Sharma v. Ali Zulfikar Ahmed & Anr. 228 (2016) Delhi Law Times 316.
- (6) IDBI Trusteeship Service Ltd. v. Hubtown Limited, 2016 SCC 1274.

25. On the other hand, Mr. Dhond, learned senior counsel appearing for the original plaintiff supported the impugned judgment and decree in the Summary Suit. He would submit that there is absolutely no substance in any of the contentions of Mr. Samdani. Mr. Dhond tendered, not only an extensive list of dates and events, but a chart establishing the relationship. He would submit that this is nothing, but a family tree. Relying upon it he would submit that the conduct of the present appellants alone should disentitle them from seeking any discretionary and equitable reliefs. Their conduct deserves to be strongly deprecated. When the order was passed on the Summons for Judgment directing full principal sum to be deposited, instead of complying with it, an attempt was made to alienate an immovable property by the original defendant No.5 to one Rajmal Exports. That defendant received Rs.55,92,676/-. Despite receipt of this sum, the condition imposed in the order passed on the Summons for Judgment was not complied with. The matter was carried in appeal, but even the reduced amount (to the extent of 25% of the principal sum) was not deposited by the stipulated date. What transpired thereafter is further interesting because in furtherance of the sale proceeds generated from the agreement for sale of a immovable property belonging to defendant No.5, which agreement is dated 20th March, 2014, a gift deed was executed by defendant No.5 in favour of one Dhanveer. Mr. Dhond would submit that Dhanveer is the son of original defendant No.3. Dhanveer transfers a sum of Rs.60,00,000/- to Rosina Jogani on 11th July, 2014 and on 12th July, 2014, Rosina Jogani transfers the sum of Rs.60,00,000/- to Aksa Jewels. Therefore, for want of compliance with the order passed by the appellate court even the appeal was dismissed on 5th August, 2014. This order of the Division Bench was not challenged. It has attained finality. Thus, the order on the Summons for Judgment has become final. It is in these circumstances that a decree was passed in the Summary Suit. That decree was to the knowledge of the present appellants and in that regard, our attention is invited to paragraph 3 page 25 of the paper-book. Mr. Dhond would submit that several attempts have been made to defeat the execution of this decree and he has then invited our attention to the transactions under which defendant No.4 obtained

some moneys from the Life Insurance Corporation of India and then gifted those amounts within his family. Even that amount gifted to their sons was transferred to the account of Rosina Jogani. Between 2nd and 5th January, 2015, Rosina Jogani transferred Rs.11,50,000/- to Avni Jogani wife of defendant No.3, Rs.7,00,000/- to Aksa Jewels and Rs.6,50,000/- to one Venus Shipping. This continued and even the other defendants indulged in similar acts, all of which have been highlighted in the proceedings in execution. After such clandestine removals and adjustments of moneys, the defendants moved the Notice of Motion for setting aside the ex-parte decree on 25th August, 2015. Thus, between 20th August, 2014 till 25th August, 2015, when the Notices of Motion for setting aside ex - parte decrees were moved, some of the transactions were initiated and completed. Even after a direction was issued in execution proceedings to disclose their assets the appellants and the supporting respondents continued such wrongful and illegal acts. They went on depositing and transferring moneys. The moneys were rotated between them and parties claiming through them. Each of these transactions and post the decree are now challenged in execution proceedings. It is in these circumstances that he would submit that given the earlier orders and directions, including in execution proceedings, this Court should not grant any reliefs, but dismiss the present appeals. The transactions and transfers are termed by Mr. Dhond as fraudulent. Mr. Dhond would then submit that even when the present appeal was moved, the appellants played a trick by not serving the appeal Memo initially and serving the plaintiff-decree holder only on 24th September, 2016.

26. Mr. Dhond, therefore, submits that in the light of this reprehensible and wrongful conduct, we must not go into any legal questions and raised by Mr. Samdani for our consideration. By their conduct and by suppressing from this Court relevant and material facts, the appellants have dis entitled themselves from claiming any discretionary and equitable relief. In these circumstances, he would submit that the appeal be dismissed on this ground alone.

27. Alternatively and without prejudice, Mr. Dhond would submit that the plain language of Order 37, Rule 5 would denote that it can have no application to the present facts and circumstances. Even otherwise, there is no warrant for reading into Order 37, Rule 4 another opportunity to raise the very pleas and issues which were raised at the stage of praying for leave to defend the suit. When that leave was not granted unconditionally, but conditionally, then, all the stipulations in that order would have to be read together and harmoniously. One cannot be permitted to pick and choose any operative direction and favourable to oneself and relying on it by ignoring the other. If the order to defend the claim for interest unconditionally is alone picked up for claiming favourable reliefs that would not only do violence to the plain language of the statute, but also to the impugned decree. The decree followed because there was no compliance made with the condition of pre-depositing the principal sum. It was on deposit of that sum and satisfying other stipulations that an opportunity to defend the suit was granted. It is not an order granting unconditional leave to defend the suit. That

with regard to interest such leave has been granted does not mean that the order is granting unconditional leave to defend the suit. That follows the compliance with the condition imposed on the appellant to deposit the principal sum. Hence, by distorting and misreading the order passed on the Summons for Judgment so also by misinterpreting it, the appellants cannot succeed. Thus, the opportunity to claim leave to defend was exhausted as above. Once the order granting leave was conditional and the conditions imposed therein were breached and violated, a decree as prayed in the Summary Suit and in favour of the plaintiff follows and is rightly passed. No application to set aside such a decree would lie inasmuch as no arguments on merits can again be canvassed. The special circumstances that are referred in Order 37, Rule 4 would not take within their import the case as projected before us. Thus, there are no special circumstances. The appellants challenged the order on the Summons for Judgment as it was understood by them to be prejudicial to them. They, therefore, filed an appeal to challenge it. In that appeal also, after obtaining a discretionary ad-interim order, they did not comply with it. Eventually that appeal was dismissed. Hence there is a clear merger of the order passed by the learned single Judge with that of the appellate order. In the circumstances, the Division Bench order cannot be recalled and revisited as prayed. For these reasons, Mr. Dhond would submit that the appeal be dismissed.

28. For properly appreciating the rival contentions, a reference would have to be made in somewhat details to Order 37, Rule 4 .

29. The Order in the form in which and with the amendments by this Court would denote the following. In the year 1908 which is the oldest Code of Civil Procedure, 1908, available with us (Act V of 1908), Order 37 reads thus :

" Order 37 Summary Procedure on Negotiable Instruments :

1. This Order shall apply only to -

(a) the High Courts of Judicature at Fort William, Madras and Bombay;

(b) the Chief Court of Lower Burma;

(c) the Court of the Judicial Commissioner of Sind; and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed here under, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No.4 in Appendix B or in such form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so as to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the

allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith.

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. In any proceeding under this Order the Court may order the bill, hundie or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

30. A bare perusal of the above would indicate that it was applicable to suits upon bills of exchange, hundies or promissory notes and the plaint was to be presented in the form prescribed, the summons also shall be in the form prescribed from time to time. Tersely put, the plaint and summons in such forms and the suit being based upon the negotiable instruments that the stringent provision that the defendant shall not appear or defend the suit unless he obtains leave from a Judge as provided in Order 37, to appear and defend and in default, the allegations in the plaint shall be deemed to be admitted. Importantly, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) to the date of the decree and such sum for costs as may be prescribed unless the plaintiff claims more than such fixed sum in which case the costs shall be ascertained in the ordinary way. Pertinently, such decree may be executed

forthwith.

31. On receipt of the suit summons, the defendant had to make an application and on such an application the Court shall give leave to appear and to defend the suit after perusing affidavits which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application (Order 37, Rule 3 ). Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving a security, framing and recording issues or otherwise as the Court thinks fit. Then, by Order 37, Rule 4 after decree the Court may, under special circumstances, set aside the decree and, if necessary, stay or set aside execution and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so do to and on such terms as the Court thinks fit. We need not refer to other rules of order XXXVII.

32. Then, what we have before us is an amendment styled as the Code of Civil Procedure (Amendment Act) 1976. The statement of objects and reasons preceding this amendment would indicate as to how the amendments were thought of so as to ensure that a litigant should get a fair trial in accordance with the accepted principles of natural justice and that every effort should be made to expedite the process of civil suits and proceedings so that justice may not be delayed. The procedure should not be complicated and should, to the utmost extent possible, ensure fair dealing with the poorer sections of the community who do not have the means to engage a pleader to defend their cases. That is how by clause 87 of the bill introduced in the Parliament styled as Bill No.27 of 1974, proposed omission of the words " on negotiable instruments" and substitution of Order 37, Rule 1 by adding sub-rule (2) therein and several other changes were suggested. The statement of objects and reasons states further that the scope of summary trials is being substantially widened. Thereupon the following amendments have been incorporated:-

"87. In the First Schedule, in Order XXXVII,-

(i) in the heading, the words "ON NEGOTIABLE INSTRUMENTS" shall be omitted;

(ii) for rule 1, the following rule shall be substituted, namely;-

"1. (1) This Order shall apply to the following Courts, namely:-

(a) High Courts, City Civil Courts and Courts of Small Causes; and

(b) other Courts;

Provided that in respect of the other Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) on an enactment where the sum sought to be recovered is fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

(iii) for rule 2, the following rule shall be substituted, namely:-

2 (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,-

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:-

"(Under Order 37 of the Code of Civil Procedure, 1908"

(2) The summons of the suit shall be in Form No.4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and obtains the leave of the Court or Judge to defend the suit and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree, and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith;"

Order 37, in its present form, reads as under :

"Order 37 Summary Procedure

Courts and classes of suits to which the Order is to apply.

1. (1) This Order shall apply to the following Courts, namely:-

(a) High Courts, City Civil and Courts of Small Causes and

(b) other Courts;

Provided that in respect of the courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper. (2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:

(a) suit upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising, -

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

(iv) suit for recovery of receivables instituted by any assignee of a receivable.  
Institution of summary suits

(1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain, --

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:-

"(Under Order 37 of the Code of Civil Procedure, 1908)".

(2) The summons of the suit shall be in form No. 4 in Appendix B or in such other form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.

## Procedure for appearance of defendant.

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexure thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in court an address for service of notice on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may at any time within ten days from the service of such summons by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or judge to be just :

Provided that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious :

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,--

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such

security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay the defendant in entering an appearance or in applying for leave to defend the suit. Power to set aside decree.

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit. Power to order bill, etc., to be deposited with officer of Court.

5. In any proceeding under this Order the court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof. Recovery of cost of noting non-acceptance of dishonoured bill or note.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note. Procedure in suits.

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

33. There are certain insertions which have been made and the Bombay amendment only makes it in Order 37 Rule

1. We have reproduced Order 37, Rule 1 with the Bombay amendment above.

34. Hence, it is apparent that the order applies to the class of suits mentioned in Order 37, Rule 1 sub-rule (2). It is now not restricted in its application to only negotiable instruments, but also applies to suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a written contract or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only. Then, the institution of the summary suits is governed by Order 37, Rule 2 where we find that averments and inscriptions as stated therein have to be made. The procedure for appearance is set out in Order 37, Rule 3 and now there is an obligation on the defendant after a copy of the plaint and annexures thereto is served on him by the plaintiff to enter an appearance either in person or by pleader within ten days of such service and he shall file in court an address for service of notice on him. There is a specific procedure for service set out in Order 37, Rule 3, sub-rule(2)

and there is an obligation on the defendant, namely, that on the date of entering his appearance, he has given notice of such appearance to the plaintiff's pleader or to the plaintiff if he is suing in person.

35. Then follows the procedure which has to be adopted in the event the defendant enters an appearance. Then a Summons for Judgment in Form A in Appendix B or such other form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit, shall be filed. Thereafter, the defendant, on service of this Summons for Judgment at any time within ten days, file an affidavit or otherwise disclose such facts as may be deemed sufficient to entitle him to apply for leave to defend the suit. The leave may be granted to him unconditionally or upon such terms as may appear to the Court or the Judge to be just. These are the two provisions and both of which are emphasized before us. Therefore, there is an obligation on the Court not to refuse leave to defend unless it satisfies itself that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. There is a further provision which obliges the defendant to deposit the admitted sum in the Court if he wants to avail of the opportunity to defend the suit. Such leave to defend cannot be granted unless the admitted amount is deposited by him in Court.

36. Therefore, at the hearing of such Summons for Judgment and in terms of Order 37 sub-rule (b), there is no application for leave to defend or if such application has been made and is refused, then, the plaintiff shall be entitled to judgment forthwith. If the defendant is permitted to defend as to the whole or any part of the claim the Court or Judge may direct him to give security and within such time as may be fixed by the Court and that on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may be given by the Court or Judge the plaintiff shall be entitled to judgment forthwith. The judgment that is contemplated and to which the plaintiff is entitled forthwith is referable to the rigorous and stringent condition where under the defendant shall not defend the summary suit unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of decree. If the procedure for appearance of the defendant envisages certain obligations and duties to be carried out by the defendant and if he acts in terms thereof, then, the plaintiff moves a Summons for Judgment and in the form which is prescribed, namely, Form No.4-A.

37. If the plaintiff has notice of appearance being filed by the defendant, then, he is obliged to move a Summons for Judgment in this form and serve a copy thereof. Such Summons for Judgment shall be accompanied by his affidavit and

in terms of the Order 37, Rule 3 sub-rule (4). After such Summons for Judgment is served, the duty and obligation of the defendant in terms of Order 37, Rule 3 sub-rule (5) commences and he has to apply for leave to defend the suit and that may be granted unconditionally or upon such terms as may appear to the Court or Judge to be just. The Judge has to act in terms of the proviso below Order 37, Rule 3 sub-rule (5). What transpires at the hearing of the Summons for Judgment is set out in Order 37 sub-rule (6) and, therefore, if no leave to defend is applied for or if application is made and refused, the plaintiff shall be entitled to judgment forthwith. For a conditional leave and based on which the leave to defend is granted, the condition imposed has to be complied with and in default, similar consequences of a judgment in favour of the plaintiff follow and forthwith. Some debate was raised before us about what is the ambit and scope of these sub - rules of Order 37 but we have no hesitation in our mind that the judgment that the plaintiff is entitled to is as per the Summons for Judgment. Meaning thereby, in the sum claimed therein together with or without interest for no other meaning can be given to these words and phrases. Order 37 of the Code of Civil Procedure is a departure from the normal mode of suing. That speaks of a summary suit meaning a suit triable by summary procedure. The suit is tried in a summary way and with a view to enable the plaintiff to obtain expeditious judgment and decree. Hence, we have no hesitation in rejecting the arguments of Mr. Samdani that there being a difference in the phraseology of Order 37, Rule 2 sub-rule (2) and Order 37, Rule 3 sub - rule (6), the words "decree and judgment" appearing respectively therein have to be interpreted accordingly. The only difference is that there will be a decree, but when there is no appearance on behalf of the defendants, the suit shall stand decreed to the extent of the sum mentioned in the summons of the suit together with interest at the rate specified, if any, and the judgment to which the plaintiff is entitled to in terms of Order 37, Rule 3 sub - rule (6) would be in terms of the sum mentioned in the Summons for Judgment. No provision of Order 37 can be read in isolation. All rules and sub-rules will have to be read together and harmoniously to make a consistent law. If there is any ambiguity, for the sake of clarity and completeness, the forms appended to the rules can be looked into and read together with the substantive provisions [See *Jashoda Factories Pvt. Ltd. v. Judge, Labour Court, Nagpur & Ors.* 1980 MLJ 453; *Teddington Chemical Kamgar Sangh v. Maharashtra General Kamgar Union* 1985 MLJ 590]. Therefore, when the present Summons for Judgments were taken up by the learned single Judge (Mrs. Roshan Dalvi, as Her Ladyship then was), she had before her the plaint, the annexures thereto and the Summons for Judgment and the affidavit in support thereof filed by the plaintiff so also the application in the form of an affidavit-in-reply by the defendant seeking leave to defend. Upon consideration of all the materials, including annexures to the plaint and affidavits, the learned Judge made an order and we cannot rely only on one part of the operative direction. The order has to be read as a whole. We are in agreement with Mr. Dhond that each of the directions of the learned single Judge are in tune with the mandate flowing from Order 37, Rule 3 sub-rules (5) and (6). In the present

case, the learned Judge found that as far as the claim for interest is concerned, the defendant has an arguable case and that part of the amount need not be secured nor any direction needs to be issued to deposit the sum towards interest in Court. To that extent, the defendants would be entitled to unconditional leave to defend, but preceding that is a direction to secure the principal amount in the suit. Therefore, one cannot pick and choose a condition convenient to oneself and ignore a stricter and stringent one for that is difficult, if not impossible, to comply. That money has to be arranged for depositing in Court or that money has to be secured in the form of such security as is required to the satisfaction of the Court. That does not mean that the condition can be ignored. It is that condition essentially which came to be impugned while challenging the order of Her Ladyship in appeal. The appellate court, as an ad-interim measure, directed the defendants to deposit in this court 25% of the sum demanded as principal. That was in no way interference with the order of the learned single Judge, but only to test the bona fides of the appellants and not to non-suit them or taking away their right of appeal altogether that the appellate court stepped in and balanced the rights and equities. Even such a fair order of the appellate bench was challenged in the Hon'ble Supreme Court of India by the aggrieved defendants and they failed. Thereafter, they abandoned the appeal. Meaning thereby, they did not comply with the condition imposed on them in the ad - interim order. Resultantly, for non-compliance, the appeal was dismissed. It is thus clear that the order on the Summons for Judgment attained finality.

38. A bare perusal of Order 37, Rule 3 sub-rule (6) clause (b) would enable us to hold that the plaintiff was entitled to a judgment forthwith. Now, there was no impediment in law for the learned single Judge (S.J. Kathawalla) to pass a decree. He has recorded a finding that the defendants have failed to carry out the directions in the order passed on the Summons for Judgment. They have failed to deposit the principal amount. Thus, they have not availed of the opportunity to defend the suit. They failed to comply with the conditional order. The learned Judge was not required to do anything further at that stage. Once he noticed that there is a failure to comply with the directions, he could have passed a decree in favour of the plaintiff and against the defendants. We do not see why we should entertain an argument from the defendants at this stage that the decree was passed without any notice to them. The Summons for Judgment was argued by them. They were not only aware of the consequences which would follow on account of non-compliance with the order and directions on the Summons for Judgment, but they were aware of the same also because they were advised by competent advocates. They challenged the order in appeal and even the appellate order was challenged further in the Hon'ble Supreme Court of India. This was on the understanding and rightly entertained by them that in the event they do not succeed in their appeals and the order of the learned single Judge is not set aside, then, they would have to comply with it, else a judgment and decree against them will follow. That is how they approached the matter and throughout. Once such litigants are aware of the consequences in law, then, they

can hardly complain. Even otherwise, Mr. Samdani has not pointed out to us as to how in the scheme of Order 37 of the Code of Civil Procedure not hearing the defendants at the stage of passing a judgment against them and decreeing the suit would necessarily cause a prejudice. There is no prejudice established because the order on the Summons for Judgment was not complied with though it was repeatedly challenged. There was an appearance of an advocate for the defendants and throughout displayed. Therefore, we do not see as to how the appellants-defendants can complain of any prejudice or loss. In the given facts and circumstances and by their conduct they cannot raise such a ground in the present appeal. We have no hesitation, therefore, in rejecting this submission as well. We are of the firm opinion that the discretion vested in the learned single Judge in the scheme of Order 37 of the Code of Civil so also Rule 221(iv) of the Bombay High Court (Original Side) Rules, 1980, is properly exercised and there is nothing nothing arbitrary or capricious about the same.

39. Then, an argument is canvassed by pointing out the language of Order 37, Rule 4 of the Code of Civil Procedure. Some debate was raised as to whether that power enables this Court to set aside only a decree which is passed in terms of Order 37, Rule 2 (3) or it also enables this Court to set aside the decree that is passed in the present case which is styled as a judgment in favour of the plaintiff for want of compliance with the order and directions on the Summons for Judgment. It is submitted that the special circumstances would include a case of the latter nature as well.

40. In the context in which this submission is raised, it would be better if we rely upon the judgment of the Hon"ble Supreme Court of India in the case of Rajni Kumar v. Suresh Kumar Malhotra and Anr. reported in AIR 2003 SC 1322. The Hon"ble Supreme Court in paragraphs 7, 8, 9 and 10 held as under:-

"7. A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit :

(i) to stay or set aside execution and

(ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit.

8. The expression "special circumstances" is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon.

It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4 , the court has to determine the question, on the facts of each case, as to

whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

9. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 C.P.C. Rule 7 Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9, Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9, Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff

is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

10. It is important to note here that the power under Rule 4 Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 Order 37 is different from Rule 13 Order 9."

41. Therefore, pre and post decree matters could be highlighted and brought before the Court in an application invoking Order 37, Rule 4 of the Code of Civil Procedure, but the ambit and scope of the Court's powers are as indicated above.

42. Mr. Samdani, relying on these principles, would submit that this Court should even now allow the defendants to raise the plea of maintainability of the instant suit as a summary suit. This Court must also allow the defendants to submit that given the order passed on the Summons for Judgment, a decree for the principal and interest could not have followed. We have already rejected these submissions and by assigning reasons. We do not deem it fit and proper now to enlarge the scope of the present proceedings for we have faulted the manner in which the defendants read the order passed on the Summons for Judgment. They pick and choose a convenient portion of it and emphasize it to their advantage. They ignore the duty and obligation cast on them inasmuch as it is only when they comply with all the directions that the leave to defend can be availed of. Else, they cannot claim that leave to defend the suit is granted. Once that is conditional and the order in that behalf is not complied with, then, there is no leave to defend. Then, the judgment and decree in terms of the Summons for

Judgment can follow. That is the legal consequence flowing from the order on the Summons for Judgment. Hence, we do not see any reason to agree with Mr. Samdani.

43. In the light of the reasons assigned above, we are of the view that there is no substance in the contentions of Mr. Samdani. The defendants now cannot urge that there are special circumstances enabling them to have the decree set aside. They are now calling upon us to go behind the order passed on the Summons for Judgment which was unsuccessfully challenged by them. Apart therefrom we find that in the application / Notice of Motion to set aside the ex parte decree they have not pointed out any special circumstances. We have perused the affidavit of Aditya Jogani son of Ashok Jogani who has filed the affidavit on behalf of defendant No.3. In the entire affidavit, he has only stated that the said applicant - original defendant No.3 has got very good defence and he is not liable to pay any amount to the plaintiff. However, it must at once be clarified that this is a Notice of Motion for setting aside the ex parte decree which has been moved by defendant Nos.2, 3, 4 and 5 to the Summons for Judgment. Thus, this is the stand of all the defendants other than defendant No.1. However, in this affidavit-in-support, except stating that the defendant Nos.2, 3 and 4 were mere Directors and not liable for the alleged amount nothing has been elaborated with regard to their defence or special circumstances. This affidavit is silent about the personal guarantees and assurances pleaded by the plaintiff in the plaint and also the other cause of action, namely, the signature on the documents. This affidavit is silent about the defence earlier taken and namely that the diamonds were returned to the plaintiff. Except relying upon an alleged writing which also was not proved, the initial affidavit-in- reply to the Summons for Judgment raised no defence. In the present affidavit-in-support to set aside the ex parte decree, not a word is mentioned about any writing alleged to have been executed by the plaintiff or lack of privity. By maintaining silence about the personal guarantees and assurances, additionally these defendants have not raised any plea about the nature of the order passed on the Summons for Judgment either. None of the pleas raised before us by Mr. Samdani are to be found in the affidavit in support. Thus, everything now urged is an afterthought. Hence, there are no legal and factual pleas based on which this Court can deduce any special circumstances. As far as defendant No.5 is concerned, he says that he is a senior citizen and has nothing to do with the company. Therefore, he is not a Director nor has any connection with the company is a defence which is sought to be culled out by Mr. Samdani from this statement in the affidavit-in - support. Far from any association and pleaded as a Director, what the plaint states is that the defendant No.1 on the personal guarantee and assurances given by defendant Nos.2 to 5 for themselves and as also the company, namely, defendant No.1 initiated and concluded the dealings. These defendants are, therefore, jointly and severally liable. There is not a word disputing this position. We do not see how a bald and vague statement in the affidavit-in-support would make out any special circumstances or good defence on merits. Hence, we are of the opinion that even

on facts there are no special circumstances which would enable this Court to exercise the power under Order 37, Rule 4 of the Code of Civil Procedure.

44. The Notice of Motion has been, therefore, rightly dismissed. The conclusion of the learned single Judge deserves to be upheld. Then, reliance is placed by Mr. Samdani on the judgment of a Division Bench of this Court in the case of P.N. Films Ltd. & Anr. v. Overseas Films Corporation Ltd. reported in AIR 1958 Bombay 10, but what we find is that the reasoning therein is more or less on the same lines as the Hon"ble Supreme Court. The judgment of the Hon"ble Supreme Court binds us.

45. Then, reliance is placed on another judgment of a Division Bench in the case of Ramchandra Dhondu Dalvi v. Vithaldas Gokaldas reported in 67 (1965) BLR 277. We have precisely followed that course, in the sense that we have held that the judgment and decree which can be passed under both circumstances as are enumerated by the Division Bench and to be found at page 279 of the report. However, on merits, we do not agree with the learned senior counsel appearing for the defendants. There were no special circumstances which would enable the learned single Judge to set aside the ex parte decree.

46. The next judgment relied upon by Mr. Samdani is in the case of Bankay Bihari G. Agrawal v. M/s. Bhagwanji Meghji & Ors. 2001 Vol. 103 (1) BLR 823.

47. There, the Division Bench was concerned with a Reference. The first question referred for opinion and answer by the Division Bench is 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 (Original Side) Rules, 1980, coupled with the provisions of Order 37 of the Code of Civil Procedure and whether the time frame stipulated under Order 37 of the Code of Civil Procedure has to be scrupulously followed both by the plaintiff and the defendant and whether the Court can 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 have to be achieved in enacting Order 37 of the Code of Civil Procedure. These two questions were referred for opinion and answer by the Division Bench but the question was re-framed inasmuch as the Division Bench held that it is required to answer the two questions in paragraph 3 as reformulated. Thus, the only issue was if a Summons for Judgment is not taken out within a period of six months of the plaint being filed, what is the legal consequence. Whether that would enable the defendant, as a matter of course, to claim unconditional leave to defend the suit or the merits have a place even at that stage. Meaning thereby, irrespective of the merits of the defence, can the unconditional leave be granted as a matter of course. We must, therefore, not lose sight of this aspect and it is in that context that the Division Bench, after scanning the entire Order 37 rendered an opinion. Mr. Samdani would only rely upon paragraph 16 of this judgment and in that regard invite our attention to the Bombay High Court (Original Side) Rules, 1980. We find that the rules in Chapter XIV of the Bombay High Court (Original Side) Rules, 1980, denote that by Rule

221, a Summons for Judgment has to be moved to claim a decree together with interest, if any, and costs. Then, there is a procedure set out in Rule 221 as to how the summons shall be supported by an affidavit and the form in which this summons has to be taken out; the period within which the summons has to be made returnable. Then, the defendant may apply on such summons for leave to defend the suit and file an affidavit or affidavits showing that he has a good defence to the suit on merits or disclose such facts as may be deemed sufficient for him to be entitled to defend. Then, follows sub-rule (iii) of Rule 221 which says that the leave to defend may be granted unconditionally or upon such terms as the Judge may feel just. If leave to defend is granted, the Judge may give such directions as he may deem fit. If the defendant does not apply for leave to defend or if such application is made and is refused, the Judge may pass a decree forthwith for the plaintiff. Then follows Rule 222 which enables passing of judgment for part of claim. Thus, consistent with the language of Order 37 these Rules provide that if it appears to the Court that the defence set up applied only to a part of the plaintiff's claim or any part of the claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, taxation of costs, or otherwise, as the Judge may think fit and the defendant may be allowed to defend as to the remaining claim of the plaintiff. This would mean that in the instant case, the learned Judge could have decreed the summary suit, if she deemed fit, on the principal sum which she found to be undisputed or that the defence in that regard to be lacking substance. Even if the language is as indicated above, still, the learned Judge could have, in the present case, insisted on the undisputed principal amount being brought in and deposited and then alone the defendants could have defended the remaining claim. Then, Rule 223 speaks of one defendant having good defence but another has not. Therefore, there could be an order permitting the one who has good defence to defend the suit and the other whose defence was not found to be good or of substance, then a final judgment against the latter could have been passed and even the execution could be issued without prejudice to the plaintiff's right to proceed with the suit as against the former defendant.

48. Rule 224 reads as under :

"R. 224. Default in completing security or carrying out directions .- If the defendant does not complete his security (if any) or carry out such other directions as the Judge may have given within the time limited in the order, the plaintiff shall be at liberty to have the suit set down for hearing forthwith before the Judge in Chambers, as if no order granting leave had been made."

49. Thus, Rule 224, consistent with the language of Order 37 of the Code of Civil Procedure, enables passing of a decree by having the suit set down for hearing. The hearing of the suit would proceed on the footing as if no order granting leave had been made. Even in such circumstances, we are of the opinion that contrasting this with the language of Order 37 sub-rule (2) of the Code of Civil

Procedure that the Division Bench made the observations in paragraph 16. The Division Bench was thus concerned with the language of Order 37, Rule 2 (2) and Rule 221(iv). The contrast in the language and because of the presence of the word "may" in Rule 221(iv) of the Bombay High Court (Original Side) Rules, 1980, that the Division Bench held that there is no mandate that the suit must be decreed. There is a discretion in the learned Judge even at that stage, namely, Order 37, Rule 3 (6) of the Code of Civil Procedure. If that is the position and emerging from the language of the substantive rules, then, Rule 227 cannot be interpreted to mean that there is a mandate to grant unconditional leave to defend if the plaintiff does not apply for a decree within six months after the filing of the plaint. There is enough discretion in the Court and going by the language of the Rules. We do not think that we are concerned with this aspect of the matter. Rather some of the observations of the Division Bench reinforce our conclusion as above.

50. A faint attempt was made by Mr. Samdani to rely upon the judgment of the Full Bench of this Court in the case of *Jyotsna K. Walia v. T.S. Parekh & Co.* 2007 (3) BCR 772 . Once we find that there is no substance in the defence that was sought to be raised to set aside the decree passed in the summary suit, then, we need not deal with any larger issue. No wider controversy and on maintainability of the summary suit needs to be considered.

51. As a result of the above discussion and finding that there is a power to set aside the decree under Order 37, Rule 4 , but under special circumstances and which circumstances were hopelessly lacking in this case, there was no occasion for the learned single Judge to have allowed the Notice of Motion. The defendants could not have availed of a leave to defend the suit without complying with the conditions imposed on them in the order passed on the Summons for Judgment. More so, after that had gained finality. There was no defence as far as the merits are concerned. The learned Judge was right in dismissing the Notice of Motion.

52. For these additional reasons, we concur with the learned single Judge and hold that the order under challenge does not suffer from any serious legal infirmity nor can be termed as perverse calling for interference in our appellate jurisdiction. The appeals fail. They are dismissed, but in the circumstances, there shall be no order as to costs.

53. In the view that we have taken, it is not necessary to make a reference to the Division Bench judgment cited by Mr. Singh and reported in (2009) 1 Bom. Cases Reporter 453 (*S.P. Brothers v. Biren Ramesh Kadakia* ) and the judgments of this Court brought to our notice by Mr. Dhond. Suffice it to say that we have not deviated from the legal principles set out therein.