

(2004) 05 CAL CK 0044

In the Calcutta High Court

Case No : G.A. No's. 969 of 1999 and 1258 of 2004, A.P.O.T. No. 184 of 2004 and C.S. No. 548 of 1998

Indian Institute of Metals

APPELLANT

Vs

Vinod Juthani and Another

RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, Order 37 Rule 3(5), Order 37 Rule 3(6)

Citation : (2004) 4 CHN 1

Hon'ble Judges : Arun Kumar Mitra, J;Ajoy Nath Ray, J

Bench : Division Bench

Advocate : Ajoy Kr. Chatterjee and Malay Ghosh, for the Appellant;Pratap Chatterjee, Ratnanko Banerjee and P. Sinha, for the Respondent

Judgement

1. This is an application to prefer an urgent appeal from an order dated the 4th of March, 2004, whereby the learned Judge disposed of a summons for summary judgment taken out by the plaintiff-appellant in an Order 37 suit.

2. The suit was filed on 12 dishonoured cheques. The signature in the cheques are not disputed. Those were presented in sets of 5, 7 and 5 again. Dishonour was consistent. The amount claimed as the aggregate of the cheques is Rs. 15,17,472/-.

3. The defendant has stated that it has paid off Rs. 5,65,000/- out of the said principal sum. So far as the facts are concerned, this part of the defendant's grievance is as excellent and good, as the defence to the claim in regard to the last 5 dishonoured cheques is devoid of any merit to any extent whatsoever.

4. The impugned order is a short one and we have to set it out in full because a point of appealability has been taken. If that point succeeds, we cannot allow the appeal to be filed, whether on an urgent basis or otherwise. If that point does not succeed, the facts stated above are clear enough to indicate that no Court of

Justice should prolong that part of the suit which has no defence to it whatsoever.

5. The order passed was as follows :

"This is an application under Order 37 Rule 4 of the Code of Civil Procedure. Upon going through the rival pleadings it appears to me that interest of justice would be subserved if I direct the defendant to deposit a sum of Rs. 5 lakhs, with their Advocates-on-record. Hence, I direct the defendants to deposit a sum of Rs. 5 lakhs, within a period of four weeks from date. As soon as the money is deposited, the same be kept in the name of the Advocates-on-record for both the parties, viz., Mr. Samir Roy Chowdhury and Mr. Paritosh Sinha in a suitable interest bearing fixed deposit account with any nationalised bank. The said fixed deposit would be held by them free from lien subject to the result of the suit. Written statement be filed by the defendants within four weeks from date. Cross order for discovery within four weeks thereafter and inspection forthwith.

Let the suit appear in the monthly list of July, 2004 before the appropriate regular Bench.

G. A. No. 965 of 2003 is disposed of accordingly. There would be no order as to costs.

All parties concerned are to act on a xerox signed copy of this dictated order on the usual undertakings".

6. On behalf of the appellants a grievance was made that the direction to deposit Rs. 5 lakhs, as contained in the order is a direction, so to speak, in the air; since the filing of the written statement was not made dependent upon the deposit, the direction has not had any meaningful effect yet. In point of fact, taking advantage of the order the written statement has already been filed by the defendant-respondent, although they have made no deposit.

7. The respondent argued, on the other hand, that the proper construction of the order is that it gave the defendant an unconditional leave to defend; that such being the grant, the direction for deposit of Rs. 5 lakhs nonetheless was a direction which was not called for, and accordingly they have cross-objected to that part of the order.

8. Taken as an order of the category falling under Order 37 Rule 3 a grant of leave to defend is not, ordinarily in law, appealable at the instance of the plaintiff. This so, even under clause 15 of our Letters Patent which determines appealability on the Original Side. The reason is that such a leave to defend does not finally dispose of the plaintiffs lis and the plaintiff can still get a full decree, although in a contested hearing. However, a conditional leave to defend is appealable by the defendant, as the order seeks to take away, unless the condition is appropriately met, the right of the defendant to defend the suit.

9. The case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, contains this passage at page 1815 of the report:

"For instance, where the Trial Judge in a suit under Order 37 of the CPC refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiffs case on his own evidence without being given a chance to rebut that evidence. As such, an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the Trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an order passed by the Trial Judge would not amount to a judgment within the meaning of clause 15 of the Letters Patent but will be purely an interlocutory order".

10. Also a Full Bench decision of our Court in the case of Tanusree Art Printers & Anr., reported at 2000, Volume 2, Calcutta High Court Notes, page 213 states as follows in paragraphs 16 and 17 of the judgment:

"16. When a suit is filed in terms of Order 37 of the Code of Civil Procedure, an application seeking leave to defend the same is mandatorily required to be filed in the event, the defendant intends to defend the action. Such leave can be refused or granted either conditionally or unconditionally in terms of Order 37 Rule 5 of the Code of Civil Procedure. An appeal does not lie against an order passed under Order 37 Rule 5 of the CPC although thereby a right of the party has been determined.

17. An order passed under Order 37 Rule 5 of the CPC keeping in view the amendment effected by CPC (Amendment) Act, 1976 would be a judgment within the meaning of clause 15 of the Letters Patent is neither in doubt nor in dispute".

11. In that case the appeal was held to be maintainable at the instance of the defendant from an order passed in an Order 37 suit granting the defendant conditional leave to defend.

12. Although the impugned order is not appealable by the plaintiff, if it is considered generally as an order passed granting conditional leave to defend, yet it has to be examined whether the order was passed with or without jurisdiction. There is no doubt that an order passed without jurisdiction, and which is an order of some moment, is undoubtedly appealable as a judgment under Clause 15 of the Letters Patent. No authorities are needed in this regard, as this proposition is thoroughly indisputable. We examine aspect of the matter below.

13. Under Order 37 Rule 3 there are only a few things which the Court can do. The Judge dealing with a summons for summary judgment in an Order 37 suit is compelled to work within the framework of Order 37 Rule 3 when determining the question of leave to defend.

14. It is not necessary to set out the entirety of Order 37 Rule 3 which contains several Sub-rules, but some portions have to be considered carefully.

15. The first part of Sub-rule (5) reads as follows :

"(5) The defendant may, at any time within ten days from the service of such summons for judgment, 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".

16. It is clear from the above that the Judge is free to grant unconditional leave if the defence sought to be disclosed by the defendant is of a substantial nature, or he may grant such leave to defend on terms as may appear to be just.

17. The point to note here is that the condition to be imposed by the Judge must be connected with the defendant's liberty to defend, which is being granted by the order; if the Court calls for security, that security is the condition for allowing the defendant leave to defend the suit. In the order under appeal we find that Rs. 5,00,000/- was directed by the learned Judge to be put in within four weeks, and also written statement was allowed to be filed within the said same time of four weeks. But the order does not connect these two factors. Because of the lack of connection the defendant-respondent has chosen on the one hand not furnish the sum of Rs. 5,00,000/- yet, and it is beyond four weeks now, and on the other hand it has filed its written statement within the four weeks stipulated by the impugned order.

18. In our opinion, Sub-rule (5) does not envisage the passing of a disjointed order like the above where the furnishing of money has no relationship with the filing of the written statement.

19. Also relevant in this regard is Sub-rule (6)(b) which is as follows : -

"6(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".

20. Here again the Court is given liberty either to direct the defendant to give security or not, as the Court might think fit; but sub-rule also enjoins that if security is called for and the security is not furnished within the time to be specified by the Court, the plaintiff would be entitled to judgment forthwith. In the impugned order the non-furnishing of Rs. 5,00,000/- by the defendant is not directed to be visited with the consequence of judgment being entered in favour of the plaintiff forthwith.

21. In our opinion, if money is directed to be deposited, and the matter is an

Order 37 summary summons matter, the Court must direct that in case of non-furnishing of the amount, the plaintiff would be entitled to judgment immediately.

22. As a result it seems to be quite clear and without any doubt or dispute that under Order 37 Rule 3, if the Court is pleased to call for security, then the Court must order that if such security is not furnished :

(i) the defendant shall not be entitled to defend the suit; and

(ii) that the summary judgment shall immediately follow in favour of the plaintiff.

23. It is to be borne in mind, however, that in making these orders the Court is entitled to cut up the claim of the plaintiff. It might be that one part of the claim deserves an unconditional leave for defending it, and another part should be defended only upon furnishing of security. In such a case non-furnishing of security would result in refusal of leave to defend only with regard to second part of the claim and also summary judgment would be entered only with regard to such second part of the claim and not the first part.

24. In this view of the matter, the order under appeal, with all due respect, was passed without jurisdiction and outside the terms specified in Order 37 Rule 3. This would be so whether the order is viewed in the manner submitted by the appellants or in the manner by the respondents. If the appellant's point of view is accepted, then the furnishing of Rs. 5,00,000/- subject to the result of the suit was an order for security for the default of which the learned Judge imposed neither of the two consequential results which we have indicated above. If the order is viewed from the point of view submitted by the respondent i.e., that the order was an unconditional leave to defend and a further insupportable order for furnishing of Rs. 5,00,000/- subject to the result of the suit, then also the furnishing of the said sum of money falls outside the scope and purview of Order 37 Rule 3. This is because the Court has no power in Order 37 Rule 3 merely to call for security for the purpose of securing the claim in the plaintiff's suit; if it calls for security it must call for it in the manner above indicated i.e. that if it is not furnished there shall be no leave to defend and there shall be summary judgment immediately.

25. As the order is without jurisdiction it is appealable. As it is appealable, in our opinion, neither the appeal nor the application should be allowed to drag further on in time, as that would be very unjust to the plaintiff-appellant who has had 17 cheques dishonoured, which is roughly about 2 cheques per rupees one lakh, and for which the defendant can disclose no reasonable or just defence.

26. The aggregate amount of the dishonoured cheques is Rs. 13,20,000/- although the claim in the suit is for the principal sum of Rs. 15,17,472/- since the plaintiff has calculated interest @ 24% per annum on the said sum of Rs. 13,20,000/- from 1.8.97 to 31.10.98. The suit was filed in December, 1998. We do not see any written clause permitting the plaintiff to obtain any pre-suit interest. As such the principal claim of the plaintiff on the basis of the

dishonoured cheques is Rs. 13.20 lakhs only.

27. It is important to keep the arithmetic right and the basis of the claims clear in these matters as a summary decree is to be passed. The claim in the plaint with regard to the last set of five dishonoured cheques of value aggregating Rs. 13,20,000/- as enumerated in paragraph 8 of the plaint and reproduced as an annexure to the affidavit-in-opposition filed by the defendant-respondent before us would form the correct basis for grant of a summary decree in this matter. This claim is squarely on a written instrument, viz. the cheques, which are as per Section 6 of the Negotiable Instruments Act a Bill of Exchange drawn on a specified Banker, and being a Bill of Exchange it is covered by Order 37 Rule 1 Sub-rule (2)(a).

28. There will be an order in terms of prayer (a) of the petition admitting the appeal on an urgent basis. The undertakings are hereby discharged and the necessity of making the appeal ready any further is dispensed with. Similarly, the appeal, or cross-appeal is also hereby admitted and the necessity of making the same ready any further is dispensed with. Both the appeal and the cross-appeal are treated as on the day's list. Those are disposed of by the following order.

29. There will be a final judgment and decree in favour of the plaintiff-appellant as against the respondent-defendant for the principal sum of Rs. 13.20 lakhs less Rs. 5.65 lakhs, that is, Rs. 7.55 lakhs and there will be decree for interest thereon from the date of the suit until payment at the rate of 6% per annum.

30. As regards the balance of the suit the defendants shall have unconditional leave to defend. The order under appeal is set aside. The written statement already filed by the respondent-defendant on the basis of the said order shall be taken off the file. The defendants would be at liberty to deliver their defence within a period of six weeks from date hereof as regards the claim which we permit them to defend unconditionally. The appellants would be entitled to the costs of the appeal, the cross-appeal, the application which is disposed of before us as well as their costs in the Court below irrespective of the result of the balance of the suit.

31. Decree be drawn up expeditiously.

32. Stay of operation of this order and decree is prayed for but in view of the succession of the dishonoured cheques and the unmeritorious nature of that part of the respondent's defence, which we have brushed off, the prayer is unhesitatingly turned down.

33. All parties and all others concerned to act on an authenticated copy of this judgment and order on the usual undertakings.