
(1991) 02 BOM CK 0084

In the Bombay High Court

Case No : Summary Suit No's. 773 and 774 of 1990

Jayantilal M. Jain

APPELLANT

Vs

J.M. Sons and Others

RESPONDENT

Date of Decision : 25-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2
Contract Act, 1872 — Section 23
Income Tax Act, 1961 — Section 269SS
Negotiable Instruments Act, 1881 (NI) — Section 118

Citation : (1991) 3 BomCR 694

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : K.P. Jain, for the Appellant; Virag Tulzapurkar, instructed by Mehta and Girdhartal for defendant Nos. 1 and 2, for the Respondent

Judgement

A.V. Savant, J.—Heard Counsel for the parties. By consent, both the suits are disposed of by this common judgment. The suits are based on the Bill of Exchange, Exh. "A", dated 8th August, 1989, which was payable 30 days after the date without days of grace. Defendants Nos. 1 and 2 are the drawers and the bill has been accepted by the defendants Nos. 3 and 4. It may be mentioned that defendant No. 1 is a firm, of which defendant No. 2 is a partner and similarly defendant No. 3 is a firm, of which defendant No. 4 is a partner. Incidentally, both defendant No. 2 firm and defendant No. 3 firm are carrying on business from the same premises viz. 11-12, Ashok Chambers, 1st Floor, Broach Street, Bombay.

2. Pursuant to the dishonour of the Bill of Exchange, a Notice dated 8th November, 1989 was given by the plaintiff to both the defendant-firms. On 15th November, 1989, defendant Nos. 1 and 2 wrote to the plaintiff asking for inspection. Similarly, defendants Nos. 3 and 4 asked for inspection by a letter of even date. While doing so, the defendants have acknowledged the receipt of the Notice dated 8th November, 1989. There is, however, no whisper by any of the

defendants of any defence whatsoever in the said letters of 15th November, 1989.

3. By a letter dated 2nd January, 1990, the plaintiff informed the defendants Nos. 3 and 4 that inspection could be had on 9th January 1990. Defendants Nos. 1 and 2 were informed on the same date that inspection could be taken on 11th January 1990. There is no controversy that defendants Nos. 1 and 2 did take inspection. However, defendants Nos. 3 and 4 did not bother to take inspection.

4. In the affidavits filed on behalf of the defendants, certain pleas have been raised such as absence of consideration, absence of notice of dishonour, plea of theft of the blank but signed bills of exchanges with the connivance of some employee, bar of section 269-SS of the Income Tax Act, 1961 and the failure on the part of the plaintiff to make the account books available for inspection.

5. Mr. Jain, the learned Counsel appearing for the plaintiff in both the suits has contended that there is no substantial defence or even a plausible defence raised by the defendants. The plea of theft of the blank but signed bills of exchange is a totally sham and bogus plea. The bar of section 269-SS of the Income Tax Act is not against giving the amount, but at the highest it could be against taking or accepting the amount. Reliance has been placed on the Judgment of Suresh, J., in C.R.A. No. 573 of 1990, decided on 13th August 1990 where a similar plea of the same set of defendants has been negatived by this Court. Mr. Jain has also placed reliance on the Division Bench decision of S.P. Bharucha & B.N. Srikrishna, JJ., on the question of the presumption of consideration and the burden of proof. He, therefore, concluded that the defendants were not entitled to an unconditional leave, but must be called upon to deposit the entire amount.

6. On the other hand, Mr. Tulzapurkar and Mr. Avasia, the learned Counsel appearing for the defendants, have contended that the defendants have raised a substantial defence and there are triable issues such as absence of consideration, absence of notice of dishonour, the plea of theft, etc. Mr. Tulzapurkar has placed reliance on the observations of the Supreme Court in the case of Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, to point out the tests which are to be applied for deciding the question of grant of leave in summary suits. Mr. Avasia has, while adopting the arguments of Mr. Tulzapurkar, emphasised the point that in view of the bar of section 269-SS of the Income Tax Act, section 23 of the Indian Contract Act would also come in the way of the plaintiff. He has also emphasised the fact that in the letter dated 17-01-1990 written by the attorneys of defendants Nos. 1 and 2, it was clarified that the inspection of the accounts was not possible because the plaintiff had informed the defendants that he was not relying upon any account books.

7. In reply, Mr. Jain for the plaintiff has placed reliance on the provisions of section 118 of the Negotiable Instrument Act. He has further invited my attention to the fact that under the document itself the Notice of dishonour was waived. He has contended that the plea of theft of certain blank but signed Bills of Exchanges is wholly un-believable and that beyond the ipsi dixit of the

defendants, there is nothing on record to inspire confidence in the said evidence. There are no details of the alleged theft, no employee has been named and there is nothing to indicate what action has been taken by the defendants in that behalf. The plea of some blank but signed bills of Exchanges being stolen, is therefore, totally false, sham and a bogus plea, nothing short of moonshine. In this behalf, Mr. Jain has also placed reliance on the Judgment delivered by Suresh, J., in Civil Revision Application No. 573 of 1990 where against another plaintiff the same set of defendants had taken identical pleas which have been rejected. In reply to the plea of bar of section 269-SS of the Income Tax Act, this Court has rightly observed that the prohibition under the Act was against taking or accepting and not against giving the amount. In view of this, in my opinion, the plea of bar of section 23 of the Contract Act would not survive for my consideration.

8. On the question of the plaintiff not having offered the Account Books for inspection apart from what Suresh, J., has stated, Mr. Jain has invited my attention to the observations of the Division Bench of Bharucha and Srikrishna, JJ., in Appeal No. 1238 of 1988 where similar plea was raised by the defendants in that case. It was contended before the Division Bench that though the plaintiffs in that case were money-lenders and were thus bound to maintain books of accounts, they had not disclosed their books of accounts, which disclosure may have borne out the defendants case. The Division Bench rightly negated the contention referring to the fact that the suit was a summary suit and the reliance placed on the Privy Council Judgment was mis-placed. It was further pointed out by the Division Bench that in view of section 118 of the Negotiable Instruments Act, a special rule of evidence was laid down which required the Court to presume that the negotiable instrument was made for consideration. Since the maker of the instrument has placed nothing to show lack of consideration, the argument was rejected. In my opinion, the observations of the Division Bench would equally apply to the facts of the present case and hence, the plea of the defendants has to be rejected.

9. The judgment of the Supreme Court in M/s. Mechalac Engineer's case (supra) no doubt lays down the general principles for considering the question of grant of leave to defend. There can be no controversy that where the defendant satisfies the Court that he has a good defence, he is entitled to seek leave to defend which may be unconditional. Similarly, if the defendant raises a triable issue indicating that he has a fair, reasonable and a bona fide defence, although not a positively good defence, he may be entitled to unconditional leave to defend. However, the Supreme Court itself has said that in category of cases where the defendant has no defence, or where the defence set-up is illusory, sham or practically moonshine, then ordinarily the plaintiff would be entitled to leave to sign the judgment and the defendant may not be entitled to leave to defend. In my opinion, the last category of cases cited by the Supreme Court would nearly answer the present cases. The defendants' case about the theft of the blank but signed Bills of Exchanges is totally sham and bogus and is nothing short of

moonshine. Justice Suresh, before whom the same defence was pleaded by the very set of defendants, rejected the same. There is nothing in the replies to the Notice dated 8-11-1989 to indicate, even remotely, that the defendants had any such defence to the suit. There is not even a whisper in the correspondence of even the possibility of such a defence.

10. Mr. Avasia also relied upon the judgment of the learned Single Judge of the Gujarat High Court in the case of Jashbhai Motibhai Patel v. Hasmukhbhai Ravjibhai Patel, (1990)2 Guj.L.R. 1296. In my opinion, the facts of that case were entirely different and, therefore, the ratio of the Gujarat case can have no bearing on the facts of the present cases. Moreover, in a case where identical defence was raised by the same set of defendant's Suresh, J., has taken the view that grant of conditional leave was proper. I see no reason to take a different view in the facts and circumstances of these two cases.

11. In view of the above, leave to defend is granted on condition that in each of the two suits, the defendants deposit Rs. 50,000/- within 6 weeks from today. In the event of the defendants depositing the amount as aforesaid, both the suits to be transferred to the list of Commercial Causes. Written Statement within 8 weeks thereafter. Affidavit of documents within 8 weeks thereafter. Inspection forthwith thereafter. Suits to be placed on Board for hearing in the last week of February, 1992.

In the event of the defendants depositing the said amount of Rs. 50,000/- (Rupees Fifty Thousand only) in the Court in each of the two suits as aforesaid, the Prothonotary & Senior Master to invest the said amount with a Nationalised Bank, initially for a period of one year and to renew the same thereafter for suitable period until further orders of the Court.

In the event of the defendants not depositing the same amount as aforesaid, liberty to the plaintiffs to have the suits set down forthwith for hearing.