
(1989) 06 BOM CK 0019

In the Bombay High Court

Case No : Civil Revision Application No's. 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310 and 311 of 1989

Kalyanji Hansraj and Others

APPELLANT

Vs

Kamini A. Agrawal (Mrs.) and Others

RESPONDENT

Date of Decision : 06-06-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2, 115

Citation : (1990) 1 BomCR 348

Hon'ble Judges : T.D. Sugla, J

Bench : Single Bench

Advocate : Navin Parekh, for the Appellant; K.S. Cooper and T.K. Cooper, instructed by Mehta and Girdharlal, for respondent Nos. 1 and 2, Zia Modi, instructed by Avinash Joshi and A.S. Bobde, A.G., for the Respondent

Judgement

T.D. Sugla, J.—Rule. Returnable forthwith. Heard.

2. These 39 applications arise out of one consolidated order dated 27th February, 1989 passed by Shri R.G. Khedkar, the learned Judge, City Civil Court, Bombay in summonses for Judgement Nos. 1118 to 1956 of 1989 dated 18th October, 1988 taken out in Summary Suits Nos. 2355 to 2393 of 1988 by the respective plaintiffs (respondents herein). The applications raise interesting and somewhat complicated issues.

3. The plaintiffs, who are allegedly creditors, filed the 39 suits on 22nd March, 1988 under order XXXVII of the CPC for different amounts due to them alongwith interest upto the date of the filing of the suits at the stipulated rate on the basis of documents stated to be receipts stamped with 20 Paisa revenue stamp. An order of attachment before judgement was granted by the learned Judge Smt. Upasani on 25th March, 1988 on the application made on behalf of the plaintiffs as a result of which a residential flat and a shop belonging to the defendants was

attached.

Summonses for judgement dated 18th October, 1988 were taken out at the instance of the plaintiffs who also filed their affidavits in support. The contesting defendants, i.e., the two partnership firms and their respective partners except one common partner Shri Jaisingh K. Ved, filed detailed and identical affidavits challenging Summonses for judgement, the affidavit running into 24 typed pages. Shri Jaisingh K. Ved, one of the common partners in the two firms, however, admitted the liability on behalf of the partnership firms. The arguments were heard at length, but ultimately final decrees were passed by the learned Judge against the aforesaid partner in all the 39 suits following the Supreme Court decision in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . Final decrees were also passed against the two partnership firms observing that the said partner was the agent of the firms and that when he admitted the liability, the decree against the firms could and should be passed following the decision in M/s. Fatechand Khubchand v. Firm National Tiles Co. AIR 1940 Sind 19. In their cases, leave to defend was naturally refused.

As regards other contesting defendants, it was observed that receipt of principal amounts was admitted vide paragraphs 13 and 26/27 of the affidavits. There was in fact no scope for defence in view of one partner's admission of the liability. However, referring to the Supreme Court decision in Manekchand Mohanlal Poonawala v. Shah Bhimji Kundanmal & Co., 71 Bom.L.R. 370, the learned Judge granted them leave to defend as an act of mercy on the condition that principal amounts were deposited in the Court within 4 weeks. In two cases where the original receipts on the basis of which suits were filed were not traceable, the Summonses for judgement were allowed to be with-drawn at the instance of plaintiffs.

Main defence disclosed in the affidavits pertain to the very maintainability of the suits as summary suits under order XXXVII, rule 2 on various grounds. There was of course an attempt to show that on merits the defendants had a good case and that the defence was not frivolous or vexatious. Following the Supreme Court decision in Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, and the decision in Manekchand v. Shah Bhimji 71 B.L.R. 370, the learned Judge drew adverse inference from the fact that the defendants had not produced their books of account. He was also convinced of the genuineness of the plaintiffs claims on the basis of averments made by the defendants in paragraphs 13 and 26 of their affidavits and the categorical admission of the liability by one of the partners. Objection pertaining to the jurisdiction of the Court to try the suits as summary suits under order XXXVII appeared to him to be technical which, according to him, was the language of the weak. He referred to such objections in paragraph 11 to 18 and rejected the same as objections raised to defeat the ends of justice. The other objections such as the creditors were carrying on money lending business but did not possess moneylenders licences, that there were no formal agreements for charging of interest, that the amounts paid by

the defendants were not adjusted towards the principal amounts were dealt with and rejected by him in paragraphs 19 to 26 of the order. Ultimately, as stated in the earlier part of this paragraph the learned Judge passed final decrees against the two firms and the partner Shri Jaisingh K. Ved and granted leave to defend to the remaining partners on deposit of full principal amounts. As already stated, in two cases Summonses for judgement were allowed to be withdrawn at the instance of the plaintiffs as they were not able to produce original documents on the basis of which suits were filed.

4. Before proceeding to consider rival contentions, it is considered desirable to mention that in response to a query from the Bench, Shri Cooper, the learned Counsel for most of the respondents stated that decrees could not be executed against partner Shri Jaisingh K. Ved as he was a pauper. It is thus evident that final decrees were passed in this case against the two partnership firms on the basis of an admission by one partner who being pauper had nothing to lose. The contesting defendants are the two partnership firms and the partners other than Shri Jaisingh K. Ved. In other words, a firm being only a compendious name in which the partners carry on business, for all practical purposes the contesting defendants. Both in the cases of the partnership firms and the partners, are the partners other than Shri Jaisingh K. Ved. The impact of the impugned order is that final decrees having been passed against the partnership firms and the decrees being money decrees, ordinarily the partnership firms will not be entitled to appeal without depositing the decreetal amounts. The contesting defendants will also not be able to defend without depositing the principal amounts claimed in the suits. Apart from the fact that when decrees have already been passed against the partnership firms and the liability of the partners being joint and several, it is doubtful whether such partners can really have an effective defence, granting them leave to defend on deposit of principal amounts the sum total of which would mean depositing almost double of the decreetal amount will, besides being ridiculous, make the leave to defend as mockery and meaningless. The primary duty of the Courts being to do justice, I am sure such an aspect of the matter cannot be glossed over unless the letters of the law are clear and unambiguous justifying such an act.

5. It is proposed to deal with the preliminary objection raised on behalf of the plaintiffs- respondents as to the maintainability of civil revision applications in the first instance. For this purpose, it is necessary to refer to the relevant provisions of section 115 of the CPC which read thus:

115(1). The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears,---

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material

irregularity, the High Court may make such order in the case as it thinks fit;..."

The first two conditions are, according to me, conditions precedent to the assumption of jurisdiction u/s 115. These are---

(i) the case must have been decided by any Court subordinate to the High Court, and

(ii) such an order must not be appealable.

If these two conditions are satisfied, there is then a third condition which contemplates three alternative situations in which alone the High Court can interfere. There cannot possibly be any dispute that the City Civil Court is a Court subordinate to this Court. As regards the order in the case of two partnership firms, though there is no dispute that eventually final decrees have been passed and such decrees are appealable u/s 96 of the Civil Procedure Code, the contesting defendants have urged that the final decrees having been passed in the proceedings-Summonses for judgment-primarily on the ground that the leave to defend was refused, the signing of decree was the consequence or outcome and not the cause. It was contended that in the peculiar situation in which the final decrees are passed, the impugned order in the case of the firms also is subject to the revisional jurisdiction of this Court u/s 115. In my judgment, the second condition precedent for revision u/s 115 of the CPC is not satisfied so far as the cases of partnership firms are concerned. It is not necessary for this purpose to examine the cause why the final decrees were signed. The fact of the matter is that final decrees have been signed and such decrees are appealable u/s 96 of the Civil Procedure Code. That being so, it will have to be held that so far as the firms are concerned, revision u/s 115 would not lie. It will, of course, be open to the partnership firms to argue all aspects of the matter before the Appellate Court.

6. The position regarding contesting partners/defendants is different. In their case, conditional leave to defend has been granted. Such an order is admittedly not appealable. Therefore, on the face of it the two conditions precedent for assumption of jurisdiction u/s 115 are satisfied. It was, however, urged on behalf of the plaintiffs that the impugned orders were passed by the learned Judge, City Civil Court, Bombay in exercise of discretion vested in him under Rule 3, that they do not raise question of jurisdiction and that, therefore, none of the alternative situations contemplated in the third condition obtain in this case justifying interference by this Court.

In order to appreciate this part of the preliminary objection, it is necessary to appreciate the purport and scope of Order XXXVII of the CPC under which summary suits are or can be filed. Rule 1 empowers certain courts which can exercise jurisdiction under Order XXXVII. Sub-rule (1) of Rule 2 provides for suits to which Order XXXVII applies. These suits, as per sub rule (1) substituted by Bombay High Court Notification dated 30th September, 1966, have to be :---

"upon bills of exchange, hundies or promissory notes, and all 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 a liquidated demand only, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint with a specific averment therein that the suit is filed under this Order and that no relief not falling within the ambit of this rule has been claimed, and..."

Rest of the Rule 2 and other rules, viz., Rules 3 to 7 refer to the procedure and to the circumstances in which leave to defend should at all be granted and whether the leave should be granted unconditionally or on conditions. The decisions relied upon by Shri Cooper for the purpose, viz., *Rajah Amir Hassan Khan v. Sheo Baksh Singh*, XI Indian Appeals 237 P.C., N.S. Venkatagiri Ayyangar and another v. The Hindu Religious endowment Board, Madras, AIR 1940 P.C. 156 , D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, and Shah Jagmohandas Purshottamdas and Another Vs. Jamnadas Vrajlal Gandhi and Others, refer to discretionary orders passed by the Courts which fall under ---(1) 45 the rescind category and that is why it was held that the Court should not interfere in such matters in the limited jurisdiction u/s 115 of the Civil Procedure Code. In my judgment, the legal position as regards the dispute whether the suits filed are really such to which Order XXXVII would apply would be materially different from the dispute whether on merits the defendants have a triable case, because by questioning the maintainability of the suit as a summary suit under Order XXXVII, it is not the mere order passed by the Court but its very jurisdiction to try the suit as a summary suit is challenged.

7. In this context, it may be useful to refer to the nature of objections raised by the contesting defendants before the learned trial Judge, the manner in which the learned trial Judge has dealt with those objections and the objections raised before this Court. The learned Judge has referred to three points of defence which are of the above nature in paragraph 2 of his order as under :-

"(1) The suits do not fall within the purview of Order XXXVII, Rule 2 of the Civil procedure Code.

(2) The documents on which the suits are filed do not have proper stamps and, are, therefore, inadmissible in evidence.

(3) Interest claimed is at an excessive rate than what is permissible under the law ."

He has dealt with these objections in the later portion of paragraph 11 and paragraphs 12 to 16 of his order. The fact that the learned trial Judge had to devote six and a half paragraphs running into seven typed pages is, to say the least, indicative of the fact that the objections as to the maintainability of the suits as summary suits under Order XXXVII were not just frivolous or vexatious.

In any event, if the learned Judge considered it appropriate to deal with such contentions in these proceedings, it would have perhaps been more appropriate to decide these contentions as preliminary issues so as to enable the aggrieved parties to approach this Court without suffering the consequences of the order resulting from a decision on the preliminary issues. That part, when this Court looks at the nature of objections as elaborated before it by the learned Counsel for the contesting defendants, it finds that the objections are required to be given serious consideration and not prima facie consideration in summary proceedings for the purpose of deciding whether or not to grant leave to defend conditionally or unconditionally. It is more so because, according to this Court, while the burden to show that the defence is not frivolous or vexatious or that the amounts claimed by the plaintiffs are or are not admitted to be due by the defendants is on the defendants, the burden to show that the suits are triable as summary suits under Order XXXVII would certainly be on the plaintiffs.

8. The summary suits were filed on the basis of so-called receipts. As the receipts are almost identical, reference is made to only one such receipt which is at page 145 in Civil Revision Application 273 of 1989. The English translation of the receipt is found at page 146. The first contention was that the alleged receipt was not a receipt in the true sense. It was an acknowledgement. Receipt would be an evidence of receipt of money pure and simple. It could both be an evidence of advancement of money and/or repayment of money due. The receipt in this case indicates that the money was borrowed. Therefore, it becomes an acknowledgement as distinct from receipt. For an acknowledgement proper stamp would be Rs. 1/- as prescribed under Item 1 of Schedule 1 of the Bombay Stamp Act 1958. Only a plain, and simple "receipt" is taken out of the purview of Bombay Stamp Act as provided in section 74 of that Act. In such a case, proper stamp duty could be 20 paise as laid down in the Indian Stamp Act. Further, summary suits were filed not only for the principal amounts but also for the interest. The stipulation about interest, even though confusing, is found to be in the receipt itself. It varies from 15% to 21% per mensem/per annum. If the agreement is to be spelled out from the receipt as regards charging of interest then under the Bombay Stamp Act (Item 5 (H) Schedule 1), the proper stamp would be Rs. 10. Therefore, considered from either point of view, the alleged receipt is not a receipt within the meaning of section 74 of the Bombay Stamp Act read with section 2(23) of the Indian Stamp Act. Even if the principal amount is taken into account, it is an acknowledgement for which proper stamp would be Rs. 1/- and if it is taken as evidence both as regards principal amount and interest, it would be an agreement for which proper stamp would be Rs. 10/-. In either case the documents on the basis of which summary suits were filed are not duly stamped within the meaning of section 2(H) or the Bombay Stamp Act. The consequence is that insufficiently stamped documents could not be admitted in evidence in view of sections 14, 15 and 34 of the Bombay Stamp Act. Fairly admitting that a document originally not duly stamped could also be admitted in evidence provided it is the time of presentation, duly stamped alongwith

penalties payable in terms of proviso to section 34, the Counsel for the contesting defendants urged that the trial Court was confined to the situation obtaining at the time when it was considering the summonses for judgment on which day the documents relied upon were evidently unduly stamped. The defendants, it was further pointed out, had raised all these contentions vide paragraphs 7, 14 and 20 of their affidavits. All these points raise vital questions of jurisdiction of the Court to try the suits as summary suits. The receipt, it was stated, is certainly not a negotiable instrument and that section 34 of the CPC provides for the rate of interest to be charged either as per agreement or on the basis of a statutory rate. In the present case, the rate of interest charged is admittedly on the basis of an agreement spelled out from the receipt and, therefore, the receipt remained to be unduly stamped. Further, under Rule 2, of Order XXXVII, the plaintiffs were specifically required to make an averment in the plaint that what was claimed by them was fully covered by Order XXXVII, Rule 2 and that no claim was made which was not covered by Rule 2. In the circumstances mentioned above, the averments made by the plaintiffs it was argued, were certainly not correct.

9. Shri Cooper, on the other hand, stated that there was no dispute about the receipt of money or the signatures of the defendants on the receipts. Transactions were all by cheques and through the brokers. The receipts were printed in Gujarathi and that is why, superficially looked at, there might be some scope for doubt about the rate of interest. i.e. whether it was per month or per annum. However, the parties had understood the implications correctly. That is why till April, 1988, interest was paid by the defendants to the plaintiffs monthly by cheques. The contention that the amounts so paid should have been adjusted against the principal amounts was, according to Shri Cooper, an afterthought as was evidence from the manner in which the amounts of interest were paid monthly. That apart, it was stated to be a well settled practice that amounts paid are first to be appropriated towards interest. In case of doubt, the choice was with the plaintiffs and lastly, the defendants having not produced their books which could have indicated whether they had really made the payment of interest or not, it was not open to them to make this claim at this late stage. In this context it was pointed out that the defendants were deducting Income Tax from the amount paid as interest. The defendants thus had no defence whatsoever. Technical objections raised are devoid of any substance. The documents relied upon were receipts. 20 Paise stamp was a proper stamp. In any event, there was no total bar to the admission of improperly stamped document in evidence. Under proviso to section 34, it was mandatory upon the Court to admit such documentary in evidence on payment of difference in stamp payable and penalty. Moreover, a document once admitted in evidence could not be questioned in any other proceedings as laid down in section 35 of the Bombay Stamp Act. Payment of stamp, it was stated, was for the benefit of the State and not for the benefit of the parties and, in any event, the defendants could not take advantage of their own wrong, if any, in not properly stamping the documents.

After all it was they who had issued the receipts. The whole object has to be advancement of justice and not frustration of it. For this purpose, reliance was placed on a decision in *Shah Jagmohandas Purshottamdas and Another Vs. Jamnadas Vrajlal Gandhi and Others*, . Reliance was also placed on a supreme Court decision in the case of *Shri M.L. Sethi Vs. Shri R.P. Kapur*, . The decision in *Bala Raghu Dhanwade v. Bhiku Genu Jambhale*, 25 B.L.R. 450 was stated to be distinguishable. He stated that the plaintiffs are mostly housewives, retired persons etc. Mere fact that they advanced monies to the defendants does not make them money lenders in the sense of that expression used in Money lenders" Act. If the purpose of receipt of amount is indicated in the receipt and that makes it something else than receipt, then all lawyers and solicitors issuing receipts to their clients in respect of fees received for rendering professional services will be found wrong. The burden to prove that the defendants had a good defence and not vexatious or frivolous is on the defendants. Other objections such as minors could not be contracting parties, the suits filed by the H.U.F. were not maintainable, he stated, are too technical and frivolous to be dealt with.

10. I have given serious consideration to the rival contentions pertaining to the dispute whether the suits filed were really triable as summary suits under Order XXXVII. According to me, there is a marked distinction between the nature of disputes as regards Rule 1 and sub-rule (1) of Rule 2 of Order XXXVII and the disputes as regards other sub rules of Rule 2 and rules 3 to 7 of that Order. Rule 1 and sub-rule (1) and Rule 2 empower certain Courts to try suits as summary suits and define suits to which Order XXXVII would apply. It is true that ordinarily this Court will not interfere in its revisional jurisdiction u/s 115 of the CPC with the discretionary orders passed by the subordinate Courts as laid down by the Privy Council and the Supreme Court in a number of decisions relied upon by the Counsel for the plaintiffs. The legal position in this regard, it is open, has been further elaborated by the Supreme Court in its later decision in the case of *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, . However, the position as regards disputes pertaining to Rule 1 and sub rule (1) of rule 2, as stated by me above, is materially different as such disputes have direct nexus with the jurisdiction of the particular Court in the matter of a suit to be tried as a summary suit under Order XXXVII . Therefore, the contentions raised on behalf of the defendants relating to sub-rule (1) of rule 2 have to be appreciated in this background. It is not even suggested that the defendants would ultimately succeed. They may or may not. However, their such contentions, viz, that the documents on the basis of which suits are filed are not properly stamped, that interest charged is at a rate higher than the rate prescribed in the enactment, that if an agreement is spelled out from the receipt the agreement requires to be stamped with a Rs. 10/- stamp and that the averment made by the plaintiffs that all claims made fall within Rule 2 (1) of Order XXXVII is incorrect are the questions which, prima facie, have some substance and could not be rejected as merely frivolous or vexatious.

11. The questions raised evidently to go to the very root of the matter inasmuch as upon the decision there of alone will the further questions, viz. whether the suits were triable as summary suits or not and whether leave to defend should be granted conditionally or without conditions or whether leave to defend should be refused be decided. In a matter like this, it was, according to me, not quite proper for the learned Judge to deal with at length and reject the contentions at the preliminary stage and then grant conditional leave particularly when he had signed the final decrees against the partnership firms. Ordinarily, having regard to the principle of agency between the partners and firms and the partners inter se decree against a firm could be executed against any of the partners as the partners are jointly and severally liable and as the firm is merely a compendious name in which the partners carrying the business. In fact, this is what the trial Court has observed in its impugned order. In the circumstances, it is doubtful whether leave to defend to the contesting defendants is really effective. Such a leave becomes all the more illusory when the contesting partners are asked to deposit the principal amount as a condition for granting them leave to defend.

12. In the above view of the matter, I am inclined to hold that the questions raised by the contesting defendants and well argued by their Counsel raise the question of jurisdiction of the Court to try the suits as summary suits and, therefore, this Court can interfere within its revisional jurisdiction when it finds that the objections raised *prima facie* require to be considered and cannot be thrown away as vexatious, frivolous and without any substance.

13. Before concluding, it may not be out of place to mention that the learned Advocate General had placed reliance on second proviso to sub-rule (5) of rule 3 of Order XXXVII for the proposition that if the amounts claimed by the plaintiff were admitted by the defendants to be due to them, the Court was bound to grant leave upon the condition that the amounts so admitted to be due would be deposited in the Court. Reliance in this context was placed on paragraphs 6 and 27 of the affidavits to show that the defendants had admitted the amounts claimed by the plaintiffs to be due from them. Shri Parekh, on the other hand, stated that rule 3, as applicable in the case of Maharashtra, was the rule as substituted by Bombay High Court Notification No. P 6324/60 dated 30th June, 1966 and that the substituted rule 3 did not have any such proviso. His contention, in other words, was that under the rules substituted by Bombay High Court, the Court was bound to grant leave to defend unconditionally or upon such terms as appeared just to the Court.

14. In the view this Court has taken about the objections raised on behalf of the defendants as to the triability of the suits as summary suits under Order XXXVII, strictly speaking, it is not necessary to consider and/or finally express ourselves on the dispute raised herein. All the same, however, since the arguments were advanced, it is desirable to mention that the CPC was overhauled by the CPC (Amendment) Act, 1976.

Section 97 of the Amending Act deals with the subject "repeal and savings". Sub-section (1) thereof reads as under :---

"Any amendment made or any proviso inserted in the principal Act by a State legislature or a High court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

It is evidence from above that substitution of rules by the Bombay High Court in 1966 to the extent the provisions are inconsistent with the Amending Act stood repealed. In that view of the matter, it is not possible to accept Shri Parekh's argument that second proviso to sub-rule (5) of rule 3 is not applicable in this case. Similarly, other objections raised by Shri Parekh such as suits were filed by minors in some cases, that in some other cases the suits were filed by the H.U.F. etc. are not dealt with as it is not necessary to do so. In view of this judgment, the contesting defendants would be entitled to defend without any conditions. It will naturally be open to them to raise all such questions before the learned City Civil Court Judge.

15. In the result, so far as partnership firms are concerned, the rule stands discharged as Civil revision application u/s 115 does not lie against the final decrees passed, the final decrees being appealable u/s 96 of the Civil Procedure Code. However, having regard to the fact that contentions raised question the very maintainability of the suits as summary suits and the peculiar situation that has arisen in this case as a result of final decrees passed against the two partnership firms of which the contesting defendants are partners and thus liable, the rule is made absolute insofar as the contesting partners defendants are concerned. They will be entitled to defend the suit without any condition. No order as to costs.