

(2003) 06 BOM CK 0052

In the Bombay High Court

Case No : Summons for Judgment No. 145 of 2002 in Summary Suit No. 2507 of 2001

Kamlesh Lakhmichand Talreja

APPELLANT

Vs

Vashdev P. Valecha

RESPONDENT

Date of Decision : 17-06-2003

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 227

Citation : (2004) 2 BomCR 314 : (2003) 4 MhLj 717

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Dossa, instructed by Kukreja and Co, for the Appellant; P.G. Pravin, for the Respondent

Judgement

D.G. Karnik, J.—Heard learned counsel for the parties. For valuable consideration, Varun Cements Limited drew a bill of exchange on 28th September, 1998 in favour of the plaintiff. The bill was drawn on the defendant and was accepted by the defendant. On demand, the defendant failed and neglected to make the payment. Plaintiff therefore, issued a notice of demand dated 15th May, 2001 which was not replied. The plaintiff has therefore filed this suit for recovery of the amount of bill of exchange and statutory interest u/s 80 of the Negotiable Instruments Act. Learned counsel for the defendant submitted that the Summons for judgment was not taken out within a period of six months from the date of appearance and therefore, the defendant was entitled to unconditional leave to defend under Rule 227 of the Bombay High Court (Original Side) Rules, 1980.

Rule 227 of the Bombay High Court (Original Side) Rules, 1980 reads as under:

"If the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit shall be set down for dismissal on the board of the Judge in Chambers. The Prothonotary and Senior Master shall notify on his notice board the date on which the suit is to be so set down and he shall do so at least eight

days before such date. If the plaintiff is appearing in person, the Prothonotary and Senior Master shall give notice of the date to the plaintiff by sending a letter to him by post under certificate of posting."

A bare reading of the said rule makes it clear that it does not confer a right on the defendant for an unconditional leave if summons for judgment is not taken out within six months. The only consequence of not taking out the summons for judgment is that the matter is required to be set down for dismissal on the board of the Judge in Chambers. This duty is cast on the office. There is no command in the said rule that the court must dismiss it. The court can condone the delay if sufficient cause is shown when the suit is set down for dismissal. It may be noted that the rule requires the Prothonotary and Senior Master to notify atleast eight days in advance on the notice board the date on which the suit is set down for dismissal before the Judge in Chamber. This is an in-built protection to the plaintiff who can take necessary steps of taking out the summons for judgment within the said period of eight days.

2. The fact that the plaintiff has not applied for the summons for judgment within the period of six months may be only one of the circumstance which the court may take into consideration while considering whether the defendant should be granted leave to defend and if so subject to what conditions. It does not create a right in the defendant to automatically get a leave to defend the suit. The defendant has to make out a defence that is not sham, fictitious or moonshine to get an unconditional leave. In the present case, the defendant has admitted the acceptance of the bill of exchange, and has not made out any plausible defence.

3. However, by way of act of mercy, the defendant is granted conditional leave to defend the suit subject to his depositing in the court a sum of Rs. 1,47,589/- within a period of 10 weeks from today. If the amount is deposited, the plaintiff shall be at liberty to withdraw the same on furnishing security to the satisfaction of the court. On deposit, the suit shall transferred to the list of commercial causes, in which event the defendant shall file written statement within 12 weeks.