
(2008) 06 BOM CK 0075

In the Bombay High Court

Case No : Appeal No. 801 of 2002 in Summons For Judgment No. 1408 of 1999
in Summary Suit No. 5511 of 1989

Karim Hussainali Wajawalla and Husainali Wajawalla

APPELLANT

Vs

Origin Information Technology (India) Limited

RESPONDENT

Date of Decision : 04-06-2008

Acts Referred:

Contract Act, 1872 — Section 74

Citation : (2008) 6 BomCR 301 : (2008) 110 BOMLR 2063 : (2008) 4 MhLj 937

Hon'ble Judges : R.M.S. Khandeparkar, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : H.N. Thakore and Agnes Baradia, instructed by Thakore Jariwala and Associates, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

P.B. Majmudar, J.—The present appeal is directed against the order dated 2nd April, 2002, passed in Summons for Judgment No. 1408 of 1999 in Summary Suit No. 5511 of 1999. By the impugned order, the learned single Judge granted Summons for Judgment in favour of the original plaintiffs and the suit was decreed in terms of prayer clauses (a) and (b) of the suit.

2. The respondents plaintiffs instituted the aforesaid Summary Suit on the ground that the first defendant was appointed as a Software Engineer in GradeII cadre by the plaintiffs by issuing appointment letter. The first defendant was put on probation period for six months. During the period of probation, both the parties had an option to terminate the services of first defendant by giving one month's notice or one month's salary in lieu thereof. After commencement of the service, defendant Nos. 1 and 2 entered into contract with the plaintiffs and as per the said contract, the plaintiffs were to send the first defendant for training. It may be mentioned here that the second defendant is the father of the first defendant who had signed the service bond as a guarantor. The first defendant undertook to complete the training and thereafter he further

undertook to serve the plaintiffs for a minimum period of two years from the date of completion of such training. The second defendant also entered into a contract with the plaintiffs guaranteeing that the first defendant will abide by the contract. The contract in question is dated 25th August, 1998. As per Clause (3) of the said contract, in case the first defendant fails to complete the training or gives up the service in breach of the terms of the contract, he will be liable to pay an amount of Rs. 5,00,000/ (Rupees Five lakhs only) to the plaintiffs as liquidated damages. Relying on the said clause, the plaintiffs instituted the said suit as the first defendant has left the services without completing the training period. The first defendant resisted the aforesaid claim on the ground that the plaintiffs were not entitled to get the aforesaid amount and that since it is an amount of liquidated damages, the suit under Order 37 of the Code of Civil Procedure, 1908, hereinafter referred to as "the Code" , is not maintainable. It is the case of the first defendant that the plaintiffs will have to prove its case for getting the decree for liquidated damages by leading evidence as to the actual loss suffered by the plaintiffs in view of the so called abandonment of service by the first defendant.

3. The learned single Judge, after considering the submissions of both sides, came to the conclusion that the suit filed under Order 37 of the Code as a summary suit is maintainable and that since the defendants have no defensible case, the Summons for Judgement is required to be granted and accordingly the suit was decreed by the learned single Judge which order is impugned in this appeal.

4. We have heard the learned Counsel appearing for the appellants and also gone through the order of the learned single Judge. None appeared on behalf of the respondents. So far as the factual aspect of the matter is concerned, the aforesaid suit is filed on the basis of an alleged breach of contract on the part of the first defendant and for getting the liquidated damages. The case of the plaintiffs is that since the first defendant had abandoned the services during the training period, the plaintiffs were entitled to claim damages which is an ascertained sum of money as per the contract. The learned single Judge accepted the said fact and has decreed the suit.

5. The principal question, in our view, which requires consideration is as to whether such type of suit can be instituted by resorting to Order 37 of the Code. In this behalf, reference is required to be made to the provisions of Order 37 of the Code which reads as under:

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

In our view, so far as the claim for damages is concerned, the plaintiffs are required to prove its case by leading evidence in order to substantiate that they have suffered damages for particular amount. In our view, suit for damages, therefore, cannot be instituted by way of a summary suit and the plaintiffs are required to move the Court by way of a regular suit wherein, after appreciating the evidence on record, the Court has to adjudicate the claim and to find out the actual loss or damages suffered by the plaintiffs. Even if it is held that the first defendant has left the services without completing the training, yet, the plaintiffs are required to prove the actual damage suffered by it for getting damages towards such abandonment of service by first defendant. So far as Section 74 of the Contract Act is concerned, it may be true that in terms of the said provision, in a given case, the Plaintiffs may not be required to prove the actual damages. It cannot be said that by virtue of Section 74 of the Contract Act, summary suit of this nature is maintainable under Order 37 of the Code, as maintainability of summary suit is required to be considered in the light of the provisions contained under Order 37 of the Code. So far as reference to Section 74 of the Contract Act is concerned, it is for the plaintiffs to rely upon the same in a suit by leading proper evidence in this behalf. At this stage we are not expressing our opinion on this aspect of the matter but we are satisfied from the averments in the plaint that the suit in the present case is not maintainable as a summary suit under Order 37 of the Code. Simply because, according to the plaintiffs, there is an ascertained sum of damages for which they have filed the suit is no ground for bringing the suit as a summary suit. It is a special remedy provided only in certain type of transactions as provided under Order 37 of the Code. We are, therefore, of the view that the suit in question is not maintainable as a summary suit under Order 37 of the Code and the remedy available to the plaintiffs is to move the regular suit. Considering this aspect, we set aside the impugned order and decree and remand the matter to the learned single Judge.

6. Considering the aforesaid, in our view, the defendants are entitled to get leave to defend the suit unconditionally and accordingly, while setting aside the order and decree of the learned single Judge, we grant unconditional leave to the defendants to defend the suit. The matter is accordingly remanded to the learned single Judge and after the defendants file their written statement, the Registry will give regular number to the aforesaid suit and the suit be accordingly proceeded further as a regular suit. It is clarified that we have not expressed any opinion on the merits of the issue as ultimately the issue regarding the claim of the plaintiffs is required to be considered on the basis of evidence which may be led before the learned single Judge by the Plaintiffs and the defendants.

7. Appeal is accordingly allowed to the aforesaid extent with no order as to costs.