

(2004) 07 GUJ CK 0034
In the Gujarat High Court

Case No : Special Civil Application No's. 2366 and 6074 of 2004

Kilara Power Pvt. Ltd.

APPELLANT

Vs

Jyoti Ltd.

RESPONDENT

Date of Decision : 22-07-2004

Acts Referred:

Bombay Court Fees Act, 1959 — Article 7, 6
Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 7 Rule 10A, Order 7 Rule 10A(1), Order 7 Rule 10A(2), Order 7 Rule 10A(3)

Citation : (2005) 1 GLR 538

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Advocate : Harshad J. Shah, for the Appellant; Trivedi and Gupta for Respondent No. 1, Mrugesh Jani and Archana Raval, Assistant Government Pleader, for the Respondent

Judgement

P.B. Majmudar, J.—Rule. Respective Advocates waive service of rule on behalf of the respondents.

2. With the consent of the parties, the matters are taken up for final hearing today.

3. The petitioner of both these Special Civil Applications is defendant No.1, against whom the respondent, Messrs.Jyoti Limited, filed a suit, being Regular Civil Suit No.1526 of 2001. The said suit is filed for a declaration and injunction.

4. The case of the respondent-plaintiff in the said suit is that the plaintiff is a Public Limited Company, registered under the Companies Act, 1956 and is engaged in the manufacture and marketing of Pumps, Motors, Generators, etc. According to the plaintiff, defendant No.1 (the present petitioner herein) placed an order with the plaintiff, vide Purchase Order / Contract Agreement dated 9.1.1998, for supply, erection and commissioning for Electro-mechanical equipments, the description of which is given in paragraph 1 of the plaint. The plaintiff had furnished bank guarantee to the tune of Rs.33,80,000/- on 23rd

April, 1998, which was valid upto 20th December, 1999 and which was extended from time to time, and, lastly, it was valid upto 20.12.2001. As per the averments in the plaint, defendant No.1 was not releasing the outstanding amount as per the terms of the Purchase Order and the amount of Rs.68.74 lacs is due and payable by defendant No.1. It is also the case of the plaintiff that defendant No.1 is intentionally trying to encash the performance bank guarantee issued by defendant No.2-bank on behalf of the plaintiff.

5. On the above and such other averments, the plaintiff filed the aforesaid suit. In the plaint, the following prayers have been made by the plaintiff :-

" 15. The plaintiff therefore prays for the following relief :-

(a) Permanent injunction restraining defendant No.1, its Agents, Servants and Officers from demanding and / or recovery of any amount from defendant No.2 Central Bank of India, Vadodara may be granted.

(b) Permanent injunction restraining defendant No.2, its Agents, Servants and Officers from encashing and / or making any payment whatsoever under the said Bank Guarantee No.24/10 dated 23/4/1998 which was extended from time to time and it is now valid upto 20/12/2001 to the defendant No.1 or any other party may be granted.

... .."

5. Both the prayers in the plaint are in connection with permanent injunction. By asking for a decree for permanent injunction, it is prayed that defendant No.1 may be restrained from demanding / recovering any amount from defendant No.2, Central Bank of India. A further injunction was prayed for to the effect that defendant No.2 may be restrained from encashing / making any payment towards the said bank guarantee No.24/10 dated 23.4.1998, the time limit of which was extended upto 20.12.2001.

6. It is required to be noted that the plaint was presented on 19th December, 2001 and at that time, the bank guarantee was in existence upto 20th December, 2001. The trial Judge, on that very day, granted ex parte injunction, restraining defendant No.2-Bank from releasing / making any payment of the aforesaid performance bank guarantee till the returnable date, i.e. 27.12.2001. Surprisingly, the learned Judge has not even placed any condition, asking the plaintiff to extend the period of bank guarantee at least till the next date. However, Mr.Naik, learned Advocate appearing for respondent No.1, states that his client, i.e. the plaintiff, had informed the bank to extend the time limit of the bank guarantee and that, accordingly, the bank guarantee was extended upto 20th July, 2002.

7. The trial court, thereafter, after hearing both the sides, allowed Exhibit 5 Application and ad interim relief granted earlier, restraining the bank from encashing the bank guarantee, was confirmed by the trial court during the pendency of the suit.

8. It is required to be noted that the trial court allowed Exhibit 5 Application by its order dated 17.7.2002. The petitioner, who is defendant No.1 in the suit, thereafter, carried the matter by way of an appeal, being Civil Miscellaneous Appeal No.117 of 2002, before the Court of Joint District Judge, Vadodara. The said appeal was heard by the learned Joint District Judge, 6th Fast Track Court, Vadodara, who, by his order dated 14th October, 2003, dismissed the said appeal. The appellate court came to the conclusion that the bank guarantee was extended upto 20.7.2002 and that, it is not extended thereafter. Since the bank guarantee was not extended subsequently, the appellate court came to the conclusion that the appeal has become infructuous and that the cause no longer survives.

9. It is surprising that, on the one hand, the appellate court has observed that the cause for filing appeal no longer survives; yet, made some half-hearted observations on merits by observing that the trial court has passed a discretionary order on merits allowing the interim injunction application and that the appellate court, under limited jurisdiction, cannot interfere with such order. The observations of the appellate court in this behalf are worth reading. The said observations read as under :-

" 10. This being interim orders passed by the Ld. Trial Judge is purely on merits by using discretion in allowing interim injunction application Exh.5, I see no reason as to why this Court under the limited jurisdiction under Order Order-43, Rule 1(r) of C.P. Code should interfere with the order of the Ld. Trial Court. Under these circumstances, I decide Point No.1 in the Negative and while dismissing the appeal, I propose to pass the following order :

O R D E R

The appeal is hereby dismissed with costs.

The appellant is hereby ordered to pay Rs.1,000/- (Rupees one thousand only) to the each respondent as a cost.

R & P to be sent back to the Trial Court immediately.

... .."

10. On the one hand, the appellate court has come to the conclusion that the appeal has become infructuous since the bank guarantee was not extended after a particular date, and, on the other hand, in a casual and half-hearted manner, observations have been made regarding the merits of the case. It is the aforesaid order of the appellate court, which is impugned in this petition at the instance of original defendant No.1.

11. So far as Special Civil Application No.6074 of 2004 is concerned, the same is filed with a prayer that on the face of it, the suit is under-valued and, hence, the Civil Judge (Junior Division) has no jurisdiction to proceed with the suit under the guise of a suit for declaration and injunction. It is, therefore, prayed that the

plaint may be returned for presentation to the appropriate court, as, according to the petitioner, the plaintiff, by virtue of the aforesaid injunction, has, ultimately, benefited to the tune of Rs.33,80,000/- since such suit is required to be valued on the basis of the aforesaid amount. It is pointed out that appropriate court fees on the aforesaid amount of Rs.33,80,000/- is required to be affixed on the plaint and in that case, such suit is required to be instituted before the Court of Civil Judge (Senior Division) and the Court of Civil Judge (Junior Division), will not have jurisdiction to try the suit in view of the pecuniary limit of the Court of Civil Judge (Junior Division). Looking to the prayer in the plaint, it is clear that, by virtue of the injunction, the plaintiff is asking defendant No.1 not to recover Rs.33,80,000/- by encashing the bank guarantee. Under the circumstance, the suit was required to be valued for the purpose of court fees on the basis of valuation under Article 7 of Schedule 1 of the Bombay Court Fees Act, and not u/s 6(iv)(j) of the Court Fees Act. In this connection, the learned Advocate for the petitioner has relied on the decision of this Court in Gujarat Electricity Board and Another Vs. Patel Manguben Khemabhai, wherein this Court has held as under :-

" 9. Considering the averments in the plaint and also considering the pleadings as a whole, it is clear that the plaintiff has tried to put his case under Sec.6(iv)(j) of the Court Fees Act. However, as stated earlier, in substance, he is avoiding the liability of payment of fixed amount and for which he is subjected to bill issued by the G.E.B. The subject-matter, therefore, is fit for the purpose of calculation of monetary loss and monetary evaluation. The subject-matter, therefore, is clearly susceptible of monetary evaluation and would fall under Art. 7 of Schedule I of the Bombay Court Fees Act, inasmuch as, this is a suit capable of being valued in terms of prevention of monetary loss and, therefore, ad valorem Court fees would be payable on the amount of monetary loss sought to be prevented by means of the present suit. The plaintiff, therefore, is liable to pay Court fees on the said average bill of Rs.41,836/- and is accordingly liable to pay Court fees of Rs.2,260/- and after deducting the amount of Court fees which he has already paid, i.e. Rs.30/-, he is liable to pay rest of the amount towards insufficient Court fees. The learned trial Judge has, therefore, committed a clear error of jurisdiction and has also misread the provisions of law as well as pleadings of the parties. the aforesaid order is required to be set aside. Accordingly, the order passed by the learned 3rd Joint Civil Judge (J.D.), Himatnagar, below Exh.19 in Regular Civil Suit No.19 of 1993 is hereby quashed and set aside. The Reference of the Inspecting Officer, Court Fees, being Court Fees Reference No.1 of 1996, is upheld. The plaintiff is directed to pay deficit Court fees on the basis of the aforesaid report of the Inspecting officer, Court Fees, on or before 31st January, 2001.

... .."

12. In the instant case also, on the face of it, the suit is under-valued for the purpose of court fees and if appropriate court fee is to be paid on the basis of proper valuation of the subject matter, naturally, on Rs.33,80,000/-, maximum

court fee is required to be paid and in such cases, the suit would be triable by the Court of Civil Judge (Senior Division), and not by the Court of Civil Judge (Junior Division).

13. I have also heard all the concerned Advocates, who are appearing in these matters. Since there is a consensus prevailing between them, it is not necessary to give detailed reasoning in both these cases.

14. Mr.Naik, learned Advocate appearing for respondent No.1-original plaintiff, has fairly stated that the plaintiff will affix appropriate court fees on the basis of valuation for the purpose of court fees at Rs.33,80,000/- and such deficit court fees will be paid on or before 10th August, 2004. He submitted that he is making this submission on the basis of instructions received by him from Mr.Suresh Singhal, who is the Company Secretary of the plaintiff-Company. Since the plaintiff himself has shown willingness to pay deficit court fees on the basis of claim of Rs.33,80,000/-, it is not necessary to ask the Court Fee Inspector to examine this aspect. For this purpose, the plaintiff may amend the valuation clause of the plaint. In that view of the matter, the plaintiff may affix appropriate court fees, which is required to be paid on the basis of the valuation of the claim of Rs.33,80,000/-. As agreed and undertaken by the Company Secretary, such deficit court fee is to be paid on or before the aforesaid date.

15. Since the subject matter of the suit now, in view of the court fee valuation, falls within the purview of the Civil Judge (Senior Division), it is agreed by both the sides that appropriate order may be passed for returning the plaint from the Court of Civil Judge (Junior Division) to the Court of Civil Judge (Senior Division), Vadodara. It is agreed by both the sides that the plaint may accordingly be returned to the Court of Civil Judge (Senior Division) after payment of deficit court fees and, thereafter, the Court of Civil Judge (Senior Division) may take up the issue of hearing Exhibit 5 again on its own merits. For that purpose, it is agreed by both the sides that they will remain personally present before the Court of Civil Judge (Senior Division), at Vadodara, on 16th August, 2004 for the purpose of hearing of Exhibit 5 de novo. The learned Judge, to whom the suit is transferred by the District Judge may thereafter proceed with the aforesaid suit, treating it as a Special Civil Suit and may decide Exhibit 5 on its own merits and after hearing both the sides. While deciding Exhibit 5, the learned Judge may not take into consideration the observations made either by the trial court while deciding Exhibit 5 or by the Joint District Judge, Vadodara while deciding the Civil Miscellaneous Appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, and the learned Civil Judge (Senior Division) will have to decide Exhibit 5 Application de novo on its own merits.

16. Mr.Naik, who is appearing for the original plaintiff, at this stage, submitted that the plaintiff would like to amend the plaint by taking certain grounds, after such transfer of the plaint from the Court of Civil Judge (Junior Division). It would be open for the plaintiff to make appropriate application and if any amendment is pressed into service, the concerned Judge may decide the same

after hearing all concerned parties and in accordance with law. Mr.Naik, learned Advocate, after taking instructions from Mr.Suresh Singhal, Company Secretary, who is present in the Court, states that the plaintiff will take fresh bank guarantee for the subject matter of the suit for Rs.33,80,000/-. Mr.Jani, learned Advocate for the Bank, has also fairly stated that the bank will issue fresh bank guarantee in connection with the subject matter of the suit for the amount of Rs.33,80,000/-. The plaintiff has voluntarily made this statement for getting fresh bank guarantee so that the present proceedings may not become infructuous by virtue of the interim injunction granted by the trial court in this case. It is agreed by the plaintiff that the fresh bank guarantee will be initially obtained for a period of one year and it is submitted that before the parties appear before the Court of Civil Judge (Senior Division) on 16th August, 2004, such fresh bank guarantee also will be produced before the learned Civil Judge (Senior Division). The learned Civil Judge (Senior Division) will ensure, before taking the matter on hand, that fresh bank guarantee is produced by the plaintiff in connection with the subject matter in dispute, for which, initially, bank guarantee was given by the plaintiff. It is agreed by both the sides that till Exhibit 5 is decided again by the learned Civil Judge (Senior Division), Vadodara, defendant No.1 shall not encash the aforesaid bank guarantee and will maintain the status quo regarding encashing the bank guarantee till Exhibit 5 is decided by the learned Civil Judge (Senior Division).

17. It is also agreed by both the sides that, in case the decision of the learned Civil Judge (Senior Division) is against the plaintiff and if the injunction is refused, the defendant will not encash the bank guarantee for a period of one week thereafter in order to enable the original plaintiff to prefer appropriate appeal in accordance with law. So far as the earlier bank guarantee is concerned, in view of the fresh bank guarantee given by the plaintiff, such earlier bank guarantee would not survive, as it is not in existence as on today. On this point, defendant No.1 itself has given concession and, therefore, that concession is recorded in this order. It is clarified that so far as the earlier bank guarantee is concerned, naturally, since the time limit has expired, it is no longer in existence and, there is no question of encashing the said bank guarantee, especially when the plaintiff is giving fresh bank guarantee for the very same subject matter.

18. Both the parties have accordingly agreed to appear before the learned Civil Judge (Senior Division), Baroda on 16th August, 2004. The Civil Judge (Senior Division), Baroda, may thereafter fix appropriate date for hearing Exhibit 5. However, Exhibit 5 may be disposed of expeditiously, preferably by 31st October, 2004.

19. At this stage, it is pertinent to refer to Order VII Rule 10-A of the Code of Civil Procedure, which reads as under :-

" ORDER VII

Plaint

xxx xxx xxx 10-A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.-(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,-

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3),-

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

... .."

20. Accordingly, this order may be construed as an order passed under Order VII Rule 10-A of the Code of Civil Procedure. The date asking the parties to appear before the Court of Civil Judge (Senior Division), Baroda is fixed also in view of the agreement prevailing between the parties for appearing on a particular date.

21. The Civil Judge (Junior Division), before whom the suit is pending is accordingly directed to return the plaint immediately after appropriate court fee stamp is affixed by the plaintiff on the plaint and the party may accordingly appear before the Civil Judge (Senior Division) on the aforesaid date, as

indicated in the order. Mr.Naik, on the basis of instructions received by him, undertakes before this Court that the deficit court fee stamp will be paid before the aforesaid date and according to him, in view of the valuation at Rs.33,80,000/-, the suit now may be treated as one to be instituted before the Court of Civil Judge (Senior Division). He further submits that for the purpose of court fees and jurisdiction, maximum amount of court fee is required to be paid and such amount will be paid.

22. In view of the consensus as recorded above, now, nothing further is required to be done in these matters. Both the Special Civil Applications are allowed to the aforesaid extent. Rule is accordingly made absolute. Accordingly, the order passed by the trial court below Exhibit 5 as well as the order of the appellate court in Civil Miscellaneous Appeal No.117 of 2002, is also quashed and set aside and Exhibit 5 is now required to be heard de novo by the Court of Civil Judge (Senior Division), Baroda, accordingly.

23. It is clarified that on the merits of the issue regarding the interim application, this Court has not expressed any opinion, and it is for the learned Civil Judge (Senior Division) to decide the same, after hearing all the concerned parties.

24. Before parting with this order, it is required to be noted that the way in which the appellate court has dealt with the matter reflects a very sorry state of affairs, as, on the one hand, the appellate Judge finds that the appeal has become infructuous since the time limit given in the bank guarantee is already over, and, on the other hand, in a very casual manner, only a few statements here or there have been made on the merits of the case. When the Court is required to decide the matter, on merits, appropriate points are required to be dealt with on the merits of the case, dealing with all the points, which are canvassed before the appellate court. In fact, it is for the concerned court to ascertain whether the valuation put in the plaint is proper or not. No such care has been taken by the Civil Judge (Junior Division), while entertaining the plaint, nor in the first order, while granting injunction he has taken care of protecting the interests of the other side asking the plaintiff even to extend the time limit of the bank guarantee. In such type of cases, the Courts should take reasonable care to see that the suit may not become infructuous and, therefore, necessary precautions are required to be taken at the time of even granting such injunction, so that by granting such ad interim order, the suit may not become infructuous.

25. Writ to be sent to the Court of Civil Judge (Junior Division), Baroda, forthwith.