
(2014) 12 BOM CK 0168

In the Bombay High Court

Case No : Notice of Motion (L) Nos. 2620, 2621 of 2014 in Summary Suit Nos. 2822 and 2823 of 2010

Nakul Arun Jagjivan and Others

APPELLANT

Vs

Ram V. Tyagrajan and Others

RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 3(1), Order 17 Rule 1, Order 17 Rule 17, Order 17 Rule 2, Order 17 Rule 3

Citation : (2014) 12 BOM CK 0168

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Sharan Jagtiani, K.J. Dwarkadas and Shrivardhan Deshpande instructed by Desai and Diwanji, Advocates for the Appellant; R.M. Tiwari, Advocates for the Respondent

Judgement

S.J. Kathawalla, J.—The Plaintiffs have filed the captioned Summary Suits in respect of a sum that they claimed as a debt or liquidated sum of money due to the Plaintiffs on a contract of guarantee, where the Plaintiffs (as sureties) have paid the debt of Defendant No. 1 (as principal debtor) to Defendant No. 2 bank (the creditor). The Plaintiff in Summary Suit No. 2822 of 2010 seeks to recover a sum of approximately Rs. 2,91,71,938/-. The Plaintiff in Summary Suit No. 2823 of 2010 seeks to recover a sum of approximately Rs. 2,58,97,364/-.

2. The Defendant contested both the Summons" for Judgment. By an Order of this Court (Coram: S.C. Gupte, J.) dated 14th March 2014, the Court granted unconditional leave to the Defendant in both the Summary Suits. These Suits were accordingly transferred to the list of Commercial Causes Suits and the Defendant filed his Written Statements dated 16th April, 2014 in both the Summary Suits.

3. As this Order does not relate to the merits of the claim in the Suits, it is not necessary to set out the facts as regards the merits of the claim.

4. By an Order dated 3rd July 2014, Issues were framed in each of the Summary Suits and the Plaintiffs were directed to file their Affidavit of Evidence and Affidavit of Documents on or before 13th August 2014. The Plaintiffs failed to comply with the said directions. In view thereof, on 2nd September 2014, the Plaintiffs were granted further time of two weeks to comply with the directions dated 3rd July 2014. The Plaintiffs once again failed to comply with the said directions.

5. On 5th November 2014, both the Summary Suits were taken up for directions, at which time the Advocate appearing for the Plaintiffs informed the court that the Plaintiffs had till date not complied with the directions dated 3rd July 2014. Therefore, the Advocate sought an adjournment and a further extension of time to comply with the said directions. This request was rejected. Accordingly, both the Summary Suits were dismissed for "want of prosecution".

6. Thereafter, the Plaintiffs filed and served the present Notices of Motion seeking to recall / set aside the Order dated 5th November 2014 and for restoration of both the Summary Suits.

7. In the Affidavit in Support of the present Notices of Motion, the Plaintiffs explained the reasons why they were unable to comply with the directions dated 3rd July 2014 earlier. Those reasons can be summarized as under:

(a) Both the Plaintiffs are Non-Resident Indians residing in Dubai. They are required under law to reside outside India for more than 182 days in a year to maintain their NRI status. The Plaintiffs have several business interests both within and outside India, for which they are required to travel on various occasions to other countries. The Plaintiffs thus plan their yearly schedule well in advance in order to attend to their businesses. After the order dated 3rd July 2014 was passed, the Plaintiffs were required to travel to Dubai and other places abroad and therefore could not return to India in order to collate all the documents relating to the present Summary Suits and thereafter prepare and affirm affidavits of evidence in support thereof.

(b) The subject matter of both the Summary Suits relates back to 1994 (i.e. over 20 years ago) and therefore, collating information and documents took time. Further, several officers of the company concerned with the transactions are no longer in the employment of and/or in contact with the Plaintiffs. Accordingly, it took the Plaintiffs a considerable length of time to gather the necessary details and documents on the basis of which the affidavits of evidence could be prepared. This process was further delayed owing to the fact that the Plaintiffs were outside India for long lengths of time.

8. The Plaintiffs have annexed copies of the affirmed Affidavits of Evidence, Affidavits of Documents and Compilations of Documents, to the Affidavit in Support of the present Notices of Motion, and sought permission to file the same in both the Summary Suits, upon the same being restored.

9. The Learned Advocate appearing for the Defendants submitted that the Notices of Motion are not maintainable and the Plaintiffs ought to have filed an Appeal challenging the order dismissing the Suits.

10. In view of the above factual background, the issue that arises for my consideration is: Whether an application for restoration of these Suits, that were dismissed for "want of prosecution", by way of a Notice of Motion, is maintainable?; or, Whether the appropriate remedy is to file an appeal challenging the order dismissing the Suits?

11. Before considering the judgments of this Court on the present issue, in my view, it is important to first note the following provisions of the Code of Civil Procedure, 1908 ("CPC") which are relevant for deciding this issue.

12. Order IX of the CPC is titled "Appearance of Parties and Consequences of Non-Appearance". Rules 8 and 9 thereof stipulate as under:

"8. Procedure where defendant only appears. - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit. -

(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

13. Order XVII of the CPC is titled "Adjournments". Rules 2 and 3 thereof stipulate as under:

"2. Procedure if parties fail to appear on day fixed. - Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Explanation. - Where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion proceed with the case as if such party were present.

3. Court may proceed notwithstanding either party fails to produce evidence, etc.
- Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, -

(a) If the parties are present, proceed to decide the suit forthwith; or

(b) If the parties are, or any of them is, absent, proceed under rule 2."

14. In view of the aforesaid provisions of the CPC, in my view, the first question that arises for consideration is what constitutes an "appearance" as contemplated in the CPC and in particular Orders IX and XVII of the CPC extracted above.

15. The Learned Advocate appearing for the Plaintiffs has pointed out that the term "appearance" may be interpreted to mean one of two things. If, on the one hand, "appearance" is taken to constitute mere physical presence, then where the plaintiff appears (either in person or through his pleader) before the Court and seeks an adjournment, if such request is rejected and the suit is dismissed, then an application for setting aside such dismissal cannot be filed before the same Single Judge. However if, on the other hand, "appearance" is taken to constitute an "effective appearance" i.e. not mere physical presence of the party concerned, but instead appearance that is purposeful for the purpose of prosecuting the case or suit pending in the Court then, where the plaintiff appears (either in person or through his pleader) before the Court and seeks an adjournment on the ground that he does not have instructions and/or cannot prosecute the suit, and such request is rejected and the suit is dismissed, then an application for setting aside such dismissal will lie before the same Single Judge.

16. The meaning of the term "appearance" has been more particularly explained and considered by various judgments of this Court, which are discussed below.

17. The Learned Advocate appearing for the Plaintiffs has drawn my attention to two judgments of this Court which take the view that a suit once dismissed for default cannot be restored by way of an application for restoration by way of a Notice of Motion.

18. The first such judgment was delivered by S.A. Bobde, J. in State Bank of India Vs. Kumar Apparel Industries and Others, , In this case, the suit was fixed for framing of issues and at that time, the advocate for the plaintiff appeared and informed the Court that he was not ready to go on with the matter. The suit was accordingly dismissed for non-prosecution. The plaintiff thereafter applied for restoration under Order IX, Rule 9 of the CPC. The arguments advanced by the learned Counsel for the defendants who opposed the application before the learned Single Judge are set out in paragraph 6 of this judgment. It is apparent from the arguments that the learned Single Judge, while dismissing the suit, did not state that such dismissal was for "non-appearance" of the plaintiff. The

learned Single Judge, after placing reliance on certain cases, has held that provisions of Order IX, Rule 8 apply only when the defendant appears and the plaintiff does not appear. The learned Single Judge has given the phrase "does not appear" its plain and natural meaning and has held that in cases where the advocate appeared but could not or refused to go on with the matter, such cases would not fall under Order IX, Rules 8 & 9 of the CPC.

19. The Learned Advocate for the Plaintiffs thereafter pointed out a second, more recent judgment of this Court delivered by Ms. Roshan Dalvi, J. in *The Cotton Corporation of India Ltd. Vs. Sree. Shanmugar Mills and Another*, . In this case, the suit was fixed for cross-examination of the plaintiff's witness and at that time, the plaintiff and the defendant were represented by advocates. However, the plaintiff's witness did not appear for cross-examination. Therefore, the suit was dismissed for want of prosecution. The plaintiff thereafter applied for restoration by way of a notice of motion. The learned Single Judge has inter alia held that:

"6. The suit under the aforesaid provision is dismissed upon seeing that the Plaintiff has not prosecuted the Suit. Restoration of such Suit would mean that this Court sits in Appeal against the order of dismissal. It would mean that what the plaintiff could not obtain from the Court on the date of dismissal, the Plaintiff can obtain from the same Court much later in another application. The entire purpose of Order 17 Rule 3 would be defeated if such application is granted.

7. A Notice of Motion for restoration is maintainable only for a Suit dismissed for default. Such a Suit would have to be dismissed under Order 9 Rule 3 of the Code of Civil Procedure

8. If a party fails to appear and shows cause for such non-appearance, the decree or order passed under Order 9 Rule 3 would be set aside under Order 9 Rule 13

9. Order 9 can never apply to Suits which have come up for hearing in which the plaintiff appears and fails to carry out the directions of the Court or otherwise prosecute the suit."

20. On the basis of the above findings, the learned Single Judge held that the notice of motion for restoration was misconceived, and consequently, refused to restore the suit.

21. Neither of the above cases takes note of an earlier judgment delivered by a Division Bench of this Hon"ble Court comprising of Palekar & Vaidya, JJ. in *Fertilisers and Chemicals Travancore Ltd. Vs. Rajkumar Lines Limited*, . In this case, the Division Bench was considering the maintainability of an appeal filed by the plaintiffs challenging an order passed by the learned Single Judge dismissing the plaintiffs' notice of motion for restoration of the suit. Originally, when the admiralty suit was called out, the plaintiffs' advocate applied for an adjournment for one week on the ground that he was not ready to go on with the matter. The

learned Single Judge refused to grant an adjournment and dismissed the suit. The plaintiffs filed a notice of motion for restoration and for setting aside the order passed by the learned Single Judge. The notice of motion was dismissed with costs. Hence the appeal. In appeal, the Division Bench considered the various provisions of the CPC, including in particular Order IX, Rules 8 and 9 and Order XVII, Rules 2 and 3 and also considered the question as to what constitutes "appearance" for the purpose of the CPC. The Division Bench, on pages 274, 276 of the judgment, inter alia, held that:

"...In these circumstances, we are emphatically of the opinion that there was no effective appearance whatsoever on behalf of the plaintiffs before Mr. Justice Mody on September 10, 1969.

...

"on September 10, 1969, the plaintiffs themselves or their agents were not present in court. The plaintiffs' attorney was not present in Court. They were only represented by a junior counsel whose instructions were only to ask for an adjournment or to consent to [an] adjournment asked for by the other side. The counsel was unable to answer any questions asked by the Court with regard to the conduct of the suit. In these circumstances, it is impossible to hold that the plaintiffs in either of the suits had "appeared" in Court within the meaning of that expression as used in the Civil Procedure Code.

...

Apart from that, we find that it is settled law that where parties are not personally present and are represented by pleaders, appearance by a pleader within the meaning of O. IX does not mean mere presence in Court. It means appearance by a pleader "duly instructed and able to answer all material questions relating to the suit" or by a pleader "accompanied by some person able to answer all such questions," as stated in O. V, r.1.

...

The words "appear" and "appearance" are used in several places in the Civil Procedure Code including O. III, r. 1, O. V, r. 1, O. IX, rr. 1, 6, 8, 9 and 13 and O. XVII, r. 2 and considering the scheme of these provisions, it is, in our opinion, clear that there cannot be any difference between the meaning of appearance by a pleader on behalf of the plaintiff and appearance by pleader on behalf of the defendant. The effective appearance by the pleader is possible only when he is duly instructed to answer all material questions or is accompanied by a person who is able to answer all material questions, whether the pleader is appearing for the plaintiffs or for the defendants."

22. In view of the aforesaid findings of the Division Bench, in my view it is evident that the term "appearance" as used in the CPC cannot be given a narrow and restrictively literal meaning so as to be construed as mere physical presence. On the contrary, the term "appearance" must be construed to constitute an

effective appearance i.e. an appearance for the purpose of prosecuting the case or suit pending in Court. Neither of the above judgments noticed the view of the Division Bench in Fertilisers & Chemicals Travancore Ltd. (supra). That judgment is, in my view, directly on the point as to the meaning to be given to the word "appearance" under the CPC. I am therefore of the view that the two judgments in the case of State Bank of India, Mumbai (supra), and in the case of The Cotton Corporation of India Ltd. (supra) are per incuriam.

23. In fact, the Learned Advocate appearing for the Plaintiffs has drawn my attention to the fact that three subsequent decisions of this Hon"ble Court have taken a view on the relevant provisions of the CPC that accords with the view of the Division Bench in Fertilisers & Chemicals Travancore Ltd. (supra).

24. The first such judgment was delivered in the case of Prashant Vagaskar and Others Vs. Municipal Corporation of Greater Bombay and Others, (Coram: V.C. Daga, J.). In this case, issues were framed in the suit under Order XV , Rule 3(1) of the CPC. Thereafter, the suit was adjourned to 30.8.2001 for dismissal of the suit instead of adjourning it for further hearing under sub-rule (2). On the adjourned date, the counsel for the plaintiffs, along with plaintiff no. 2 was present in Court. However, the counsel for the plaintiffs requested for adjournment on the ground that none of the plaintiffs except plaintiff no. 2 were present and plaintiff no. 2 was not ready with the evidence, so as to proceed with the suit. This request was refused by the trial Court and the suit was dismissed. Against such order of dismissal, the plaintiff filed an appeal under Section 96 of the CPC. In appeal, the learned Single Judge of this Court framed inter alia the following issue: "whether mere physical presence of a litigant is sufficient for the purposes of prosecuting suit wherein he is interested?" After considering certain provisions of the CPC, including Order IX, Rules 8 and 9 and XVII, Rules 1, 2 and 3, as well as decisions of other High Courts, the learned Single Judge allowed the appeal and held inter alia that:

"21... In all these cases, it has been uniformly held that appearance (mere presence) does not mean physical presence of the party concerned, but appearance must be purposeful for the purpose of prosecuting the case or suit pending in the Court. In other words, appearance / presence should be for the purposes of taking part in the proceedings and that it includes preparedness to cite evidence and/or to produce documents or to take any other step for disposal of the suit / case as may be considered necessary. Therefore if a party to a suit for some reason or other is precluded from being ready to take part in the prosecution of the suit but somehow manages to come with a view that the case should be got adjourned for some other day, his appearance in such a circumstance will not amount to an appearance as contemplated under Order 17, Rule 2 of the Civil Procedure Code. In this view of the matter, the appearance of the plaintiff on 30-8-2001 was no appearance for the purpose of the suit.

...

25... The only way out left to the Court was to proceed under Order 9, Rule 8 of the Civil Procedure Code treating the plaintiffs as absent when the suit was called on for hearing."

25. The second judgment of the Nagpur Bench of this Court is in the case of Subhash Mataji Pulate Vs. Laxmibai Somaji Khillare, . In this case, the suit was fixed by the trial Court for evidence, at which time the counsel for the plaintiff applied for an adjournment. The application was rejected and the suit dismissed for default. The plaintiff preferred an application for restoration under Order IX, Rule 9 of the CPC which was allowed by the trial Court. Thereafter, defendant no. 2 filed a civil revision application challenging such decision on the ground that a restoration application was not maintainable. When deciding such revision application, the learned Single Judge has considered several decisions of various High Courts. In fact, the learned Single Judge even considers the judgment delivered by S.A. Bobde, J. in S.B.I. v. Kumar Apparel Industries, supra, and finds that because the meaning of the term "appearance" was not involved and considered in that case, it has no application. In this background, while deciding that a restoration application is in fact maintainable, the learned Single Judge has, inter alia, held that:

(i) if on the date fixed, one of the parties remains absent and for that party no evidence has been examined up to that date, the Court has no option but to proceed to dispose of the matter in accordance with Order XVII, Rule 2 in any one of the modes prescribed under Order IX of the CPC;

(ii) appearance does not mean physical presence, but appearance must be purposeful for the purpose of prosecuting the case or suit pending in the Court;

(iii) though both the parties were present, because they were not ready and willing to go on with the trial of the suit and their purpose was only to obtain an adjournment their presence cannot be construed as an "appearance"; and

(iv) therefore, the impugned order cannot be read as an order under Order XVII, Rule 3(a) of the CPC but must instead be construed an order under Order XVII, Rule 2. Accordingly, an application for restoration under Order IX, Rule 9 is maintainable.

26. The third judgment is in the case of Davidayal Sales Pvt. Ltd. Vs. State Trading Corporation of India and Another, . In this case, evidence in the suit had been recorded and arguments had been partly heard. When the suit was called out for further arguments, a junior advocate appeared for the plaintiffs and sought an adjournment as the counsel was hospitalized. This request was rejected and the suit was dismissed for non-prosecution. Thereafter, the plaintiffs filed a notice of motion for restoration of the suit. After considering the provisions of Order XVII, Rules 2 and 3 of the CPC, the learned Single Judge while allowing the motion for restoration has inter alia held that:

"15. Thus, presence of a Counsel has to be an effective presence, not mere

physical presence. The Counsel should be ready with the matter and be able to assist the Court. The appearance of a Counsel who has instructions only to apply for an adjournment or to have the matter kept back cannot be considered as an appearance at all in the context of Order 17, Rule 2 or Order 9, Rule 8 of Code of Civil Procedure. If one peruses the Vakalatnama, it ordinarily mentions the words "act appear and plead" for and on behalf of the party. The appearance of a Counsel who is not able to or unwilling to plead the cause of his client can hardly be termed as an appearance. It may be mentioned that it has become a matter of routine and everyday practice in this Court to let juniors appear and seek adjournments or have the matter kept back and many a times they are not even aware about the subject-matter. Their presence cannot be termed as their "appearance" for the purposes of Order 17, Rule 2."

27. These judgments were also not considered in the case of The Cotton Corporation of India Ltd. (supra). The Division Bench as also the abovementioned decisions of Single Judges of this Court fortify the view that I have taken that an "appearance" within the meaning of the CPC cannot mean only the mere physical appearance of a party through an appointed pleader or in person. This view is also consistent with the larger objective of construing the CPC and procedural rules as a hand maiden of justice, rather than a set of rules that are rigid that would drive litigants to further costly and time consuming litigation, such as, in the form on an appeal.

28. If the restrictive meaning of the term "appearance" is adopted, i.e. only physical appearance, it would mean that a party, by absenting itself from a proceeding, would be able to take advantage of its own wrong and have two remedies available to it, namely, an appeal or an application for restoration before the same Single Judge. Whereas a party who appears physically through a pleader or in person, though not effectively, would only have the remedy of an appeal. This would discourage parties from appearing and requesting for an adjournment on those occasions when they are unable to prosecute the suit/case. Such an interpretation would impede rather than facilitate the course of justice. This would lead to an absurdity.

29. In view of the aforesaid decisions, I hold that:

(a) Under the CPC, "appearance" of a party does not mean physical presence, but such appearance must be purposeful for the purposes of prosecuting the case or suit pending in Court;

(b) Where a party appears in person or through a pleader, and the party-in-person or the pleader is not in a position to proceed with the suit on merits, either for want of instructions or for want of preparedness by not having complied with directions as to filing of evidence etc., their presence cannot be construed as an "appearance";

(c) If the pleader appears only to seek an adjournment and such request for adjournment is refused and the suit is dismissed for default, then such an order

cannot be read as an order under Order XVII, Rule 3(a) of the CPC but must instead be construed an order under Order XVII, Rule 2;

(d) Accordingly, an application for restoration of the suit, if filed, is to be treated as an application under Order IX, Rule 9 of the CPC and is maintainable under the said provision;

(e) Needless to say that restoration of the dismissed suit is not as a matter of course but only on "sufficient cause" being shown by the applicant.

30. In view of the aforesaid, I hold that in the facts of the present case, the applications for restoration of the Suits by way of Notices of Motion are maintainable. The reasons set out in the Affidavit in Support mentioned above constitute sufficient cause for the restoration of the above Suits. The Plaintiffs/Applicants have annexed their affirmed Affidavits in lieu of Examination in Chief and the Compilation of Documents to the present Notices of Motions.

31. In the circumstances, I pass the following order:

The Notices of Motion are allowed in terms of prayer clauses (a) and (b), which are once again reproduced hereunder:

"(a) that this Hon"ble Court be pleased to recall/set aside its Order dated 5th November, 2014 passed in Suit No. 2822 of 2010 and restore Suit No. 2822 of 2010;

(b) that this Hon"ble Court be pleased to recall/ set aside its Order dated 5th November, 2014 passed in Suit No. 2823 of 2010 and restore Suit No. 2823 of 2010;

(c) that this Hon"ble Court be pleased to allow the Applicant/ Plaintiff to file his Affidavit in lieu of the Examination-in-Chief, Affidavit of Documents, and Compilation of Documents".