

(1962) 06 BOM CK 0003

In the Bombay High Court

Case No : Civil Revision Application No. 59 of 1962

Ramaben Bhagubhai Patel

APPELLANT

Vs

The Hindustan Electric Co. Ltd.

RESPONDENT

Date of Decision : 20-06-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2(2), Order 37 Rule 4, Order 9 Rule 13, 151

Income Tax Act, 1961 — Section 10, 11, 12, 6, 66(1)

Citation : AIR 1963 Bom 85 : (1962) 64 BOMLR 794 : (1962) ILR (Bom) 655 : (1963) MhLj 251

Hon'ble Judges : Chandrachud, J

Bench : Single Bench

Advocate : S.T. Tijoriwal, instructed by Mulla Mulla and C.B.C. Attorneys, for the Appellant; G.N. Daji, instructed by Amarchand Mangaldas and Malvi Ranchhoddas and Co. Attorneys, for the Respondent

Judgement

1. A question of some importance arises in this revisional application. The question is whether a decree passed in a Summary Suit, on the failure or the defendant to comply with the terms of conditional leave, can be set aside by the Court which passed the decree, on the ground that the defendant had sufficient reasons for not complying with the terms of the conditional orders.

2. A suit was filed by the petitioner against the respondents to recover a sum of Rs. 10,000/- on a deposit receipt alleged to have been executed by the respondents. On the 20th of July 1960 a summons for judgment was taken out in the suit, in reply to which the respondents put in their affidavit on the 16th of October 1960, on the 10th of March 1951 the summons for judgment was heard when the respondents were given conditional leave to defend the suit, the condition being that they should deposit a sum of Rs. 7,500/- within a period of four weeks. The respondents did not comply with the condition whereupon the suit was set down for hearing and on the 13th of April 1961 3 decree was passed in favour of the petitioner. On the 12th of June 1961 a Notice of Motion was

taken out by the Respondents for setting aside the decree on the ground that they could not deposit the amount on account of financial difficulties. The Notice of Motion has been made absolute by the learned Judge of the City Civil Court, Bombay. The learned Judge has held that a decree which is passed under Order 37 Rule 2(2) of the CPC cannot be set aside either under Order 9, Rule 33, the decree not being an ex parte decree, nor under Order 37, Rule 4, that provision, according to the learned Judge, being applicable to cases in which the defendant has not appeared at all in answer to the summons for judgment. The learned Judge has, however, taken the view that by reason of the absence of a specific provision in the CPC which will govern the case, a decree passed under Order 37, Rule 2 (2) can be set aside under the inherent powers of the Court u/s 151 of the Code. So holding, the learned Judge has set aside the decree and has directed that the suit should be restored to the file on condition that the defendants deposited the entire decretal amount in the Court as also the costs incurred by the plaintiff in the suit and in the Notice of Motion.

3. The question which arises in these circumstances is whether the learned Judge has jurisdiction to set aside the decree which was earlier passed for failure of the defendants to comply with the terms of the order of conditional leave. It is important to mention that this is not, a case in which the defendants have failed to appear in answer to the summons for judgment. The summons for judgment was duly served on the defendants, who appeared in answer to the same and contended that unconditional leave to defend the suit should be granted to them. After hearing the parties, an order was passed by Judge Vimadala that conditional leave be granted to the defendants on their depositing a sum of Rs. 7,500/- within four weeks from the date of the order. The first question which arises is whether there is any specific provision in the CPC which applies to cases of the present kind. The only provisions on which reliance was placed on behalf of the defendants are those contained in Order 9, Rule 13 and Order 37 Rule 4 of the Civil Procedure Code. The learned Judge has held that neither of these two provisions can have any application. Mr. Daji, who appears on behalf of the defendants, concedes that Order 9, Rule 13 cannot possibly apply to the case of the present kind. The concession is rightly made, because a decree which is passed in a summary suit, on default of the defendant to comply with the terms of the order of conditional leave, cannot strictly be described as an ex parte decree. Mr. Daji, however, contends that the learned Judge was in error in holding that Order 37, Rule 4 does not cover a case of the present nature. Order 37, Rule 4, provides that after a decree is passed under Order 37, Rule 2(2),

"the Court may, under Special circumstances, set aside the decree and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit".

According to Mr. Daji, the language of Order 37 Rule 4 is reasonably capable of the construction that what is intended by the Legislature is that the Court which

passes a decree, in default of the defendant to comply with the conditions on which he was permitted to defend the suit, must have jurisdiction to set aside that decree if the Court is satisfied that there are special reasons or special circumstances which make it necessary to set aside the decree. I find it difficult to accept the argument of the learned Counsel because, in the first place, to accept the construction canvassed by the learned Counsel is to frustrate the very object for which provision has been made in Order 37 for the trial of Summary Suits. Secondly, what is specifically provided in Order 37, Rule 4, is that after the decree is passed, the Court may set aside the decree and "may give leave to the defendant to appear to the summons...." This clause clearly shows that the power conferred by Rule 4 of Order 37 can be exercised only in cases in which the defendant has initially failed to appear in answer to the summons for judgment. What follows this clause is also important because what is mentioned thereafter is that the Court, after setting aside the decree in view of special circumstances, may give leave to the defendant to defend the suit on such terms as the court thinks fit. In other words, the Court has been given the power not only to permit the defendant to appear in answer to the summons but the Court has also been given the power to fix the terms on which the defendant, at whose instance the proceedings are reopened, should be permitted to defend the suit. If the construction which Mr. Daji wants me to place on Rule 4 of Order 37 were to be accepted, then a somewhat startling consequence WILL ensue and the consequence is that the defendant who fails to comply with a conditional order will be in a more favourable position than the defendant who complies with a conditional order. Take a case in which an order of conditional leave is passed and the defendant complies with the condition. If the defendant were to make a grievance of the condition on the ground that the condition was harsh oppressive no interference would normally be made in the exercise of revisional jurisdiction with the discretion of the trial Court. If, on the other hand, the defendant were to fail to comply with the order passed by the trial Court, then, according to Mr. Daji, it would be open to the Court not only to set aside the decree which followed the refusal of the defendant to comply with the order of conditional leave, but it would also be open to the defendant to have the matter reopened and to ask the Court to pass a fresh order of leave to defend the suit, regardless of what order was passed on the earlier occasion. Such a consequence, involving a double opportunity to a defaulting defendant, could not have been intended by the Legislature. In my opinion, the limited object of Order 37 Rule 4 is to empower Courts to set aside decrees passed in cases in which the defendant has failed to appear in answer to the summons for judgment, if it appears to the Court that there are special circumstances by reason of which the defendant could not appear in answer to the summons. In other words, what is provided by Order 37, Rule 4, is that the position which obtained at the institution of the summary suit should revive, an advantage of which the defendant could not avail himself should be made available to him because he had good reasons for not appearing in answer to the summons for judgment and that the defendant should be given leave to defend the suit on such conditions as the Court deems

fit. For these reasons, I am of the opinion that the learned trial Judge was right in holding that the provisions of Order 37, Rule 4 cannot apply to a case in which a decree has been passed under Order 37, Rule 2(2) for failure of the defendant to comply with the terms of the conditional order.

4. The next question which arises is whether the learned Judge was justified in invoking his jurisdiction u/s 151 of the Civil Procedure Code. It is well-settled that Section 151 does not counter any new powers on the Courts. What that section does is to maintain intact such powers as are possessed by the Courts and to provide that those powers can be exercised in the interest of justice or to prevent abuse of the process of the Court. It is equally well-settled that if there is any specific provision in the CPC which governs a case then the power conferred by section 151 should not be resorted to. Lastly, it must be borne in mind that the powers conferred by Section 151 must be exercised with circumspection and sparingly as they are not intended to be exercised as a matter of ordinary routine. The learned Judge has held that there is no provision in the CPC which governs the case of the present kind and that therefore the powers under Section 151 can be invoked. The question which arose before the learned Judge was whether a decree in a summary suit, which was passed by reason of the de- for these years on that basis. In the appeal, which the assessee-company filed before the Appellate Assistant Commissioner, the view taken by the Income Tax Officer was confirmed. When the matter came before the Income Tax Appellate Tribunal, there was a difference of opinion between the two members of the Tribunal. According to the Judicial Member the company had leased out its premises to the Vault-holders and the income which it obtained was the income from the house-property, which appropriately fell u/s 9 of the Act, and according to him, therefore the Department was right in taxing the income u/s 9 of the Act. In view of the President, the Agreements of the Vault-holders with the company were not leases but merely licences and that the company in granting these licences to the Vault-holders was carrying on business in the premises of a type similar to that carried on by banks in safe-deposit vaults. According to him, therefore, the income, which the company obtained, was the income from its business and was, therefore, taxable u/s 10 of the Act. In view of this difference between the two members of the Tribunal, the following question arising on the difference was referred to the third Member:

"Whether on the facts and circumstances of the case, the vaults were used for the purposes of the business, and income arising therefrom is assessable u/s 10 or Section 9".

The Third Member agreed with the view taken by the President. According to him, the agreements entered into by the company with the vault-holders amounted to licences and not leases and having regard to the terms of the Agreement, the objects for which the company was incorporated and the conduct of the company including the various services rendered by it to the vault-holders, it was clear that the company was carrying on business in the premises and the

income which it obtained was its income from business assessable u/s 10 of the Act in accordance with the view taken by the President and the Third Member, to whom the question was referred, the Tribunal allowed the assessee's appeal, set aside the orders of assessment passed by the Department and directed that the income be computed u/s 10 of the Act. On an application by the Department u/s 65(1), the tribunal has drawn up a statement of the case and referred the following two questions to this Court:

1. "Whether on the facts and circumstances of the case, the vaults were used for the purposes of the business and income arising therefrom is assessable u/s 10?
2. If the answer to question 1 is in the negative, whether the income is assessable u/s 9 or Section 12?".

(2) The dispute, which arises on the present reference, is whether on the facts and circumstances of the case, the income of the company is taxable under the head of "income from business" u/s 10 or under the head "Income from property" falling u/s 9 of the Act. The contention of the assessee-company is that it falls under the former, while the Department contends that it falls under the latter. Counsel for revenue has contended that the income falls u/s 9 because the source of the income is ownership of the property. According to him, the company has invested money in the construction of certain special type of buildings and in granting the licences to the vault-holders, it has exploited its property and earned income therefrom. There is no business activity of the company other than the activity of any property owner letting out his property and earning income therefrom. According to him therefore, the income which the company gets from its property is income which falls u/s 9 of the Act.

(3) It is contended on behalf of the assessee-company on the other hand that the income in the present case is not derived either wholly or even substantially from the ownership of the property. The income is not derived from the mere letting of a tenement but the income is derived from a complex letting the substantial part of which is other than the bare tenement. It is argued that the income is obtained for providing facilities for the storage of the films and for the services rendered in that connection: the providing of the vault for storage of the films being merely a small part of the transaction. The further argument is that the arrangement in the present case is in the course of and as a part of the business of the company and the enterprise which it has entered upon is of providing special facilities for the storage of films in accordance with the rules and specifications of the Indian Cinematograph Film Rules 1948 and thus carry on the business of storage of films, etc. The activity of the company, therefore, in granting licence for the use of the vaults to the vault-holders on the facts and circumstances of the case is a business activity and the income derived by the company is its income from business. The alternative argument of the assessee-company is that even if the income would have otherwise fallen u/s 9, its case is covered by the exception to the said section since the premises are occupied by the assessee for its own business.

(4) The counsel for the revenue in support of his submission that the income in the present case falls u/s 9 of the Act has argued that the classification of income heads of income u/s 6 of the Income Tax Act is exclusive and exhaustive and the income which falls under each of these specific heads must be computed in the manner as provided in Sections 7 to 12 and no other. Thus, according to him, if the income falls under the head "income from property", it must be brought to tax u/s 9 and could not be taxed either u/s 10 or Section 12 of the Act. It does not matter, he contends, whether the property is held in the course of trade, or the business, of the assessee consists of dealing in property. The income so long as it is income from property, its source is the ownership of the property and not the business and must, therefore, be taxed u/s 9 of the Act. In the present case, he argues, the income is from property: the company might have been started with the object of constructing property of the kind which it had constructed and given or licences to the vault-holders and it may be that that is the business of the company. However, since the income, which the company is getting, is from the letting of the property or giving it for use and occupation on licence basis, its income is income from property taxable u/s 9 of the Act. The primary nature of the source of the income, according to the learned counsel, is the ownership and that nature is not in any way altered or changed because of certain additional services rendered by the property owner to the persons to whom it is let or given for use and occupation. According to him the services rendered by the company in the present case to the licence-holders are incidental and of a minor character and are not such as would render the transaction not one of letting of property but carrying on a business activity apart from the letting of property. In support of these submissions he has invited our attention to the following cases:

The United Commercial Bank Ltd., Calcutta Vs. The Commissioner of Income Tax, West Bengal, ; In Re: Commercial Properties Ltd., ; Ballygunge Bank Ltd. Vs. Commissioner of Income Tax, ; Salisbury House Estate Ltd. v. Fry (1929) 15 Tax Cas 266 ; East India Housing and Land Development Trust Ltd. Vs. Commissioner of Income Tax, West Bengal, was a case not u/s 9 but u/s 8 of the Indian Income Tax Act. The Question considered in that case was whether the income from interest on securities which were held by the assessee as part of its trading assets in the course of its business fell u/s 8 or u/s 10 of the Indian Income Tax Act. It was held in that case that it fell u/s 8, which was a specific head and not u/s 10. Mr. Joshi has relied on this case for the purpose of his argument that the heads u/s 6 of the Act are specific heads, which are exclusive and exhaustive and if the income fell under any of these specific heads, it had to be taxed under that head alone in the manner provided under the Act and not under any other head. If the interest was obtained on securities, it made no difference whether the securities were used as trading assets in the course of trade or not. The income still had to be taxed u/s 8 because there was a specific head to which the income belonged. Mr. Joshi has argued that similarly in the case of income from property whether the income from property was obtained in the course of business or not, did not make any difference and it had to be taxed u/s 9 and no other head. It is

true that if the income in the present case can be said to fall, under the head "income from property", it will be taxable u/s 9 unless it comes within the exception provided in the said section. The question, however, which has to be determined is whether in the first place the income, which the company has obtained in the present case, is income from property and secondary whether in obtaining the income from property, the property has not been in the use and occupation of the company, for the purposes of its business.

5. In *Re: Commercial Properties Ltd.*, cited by Mr. Joshi was a case u/s 9 of the Act. It was held in that case that a company owning house property and carrying on only the business of letting out such houses is liable to Income Tax u/s 9 of the Indian Income Tax Act in the same way as a private individual owning such property. The company in the said case was a registered company of which the sole object was to acquire land, build houses and let premise"s to tenants in Calcutta or elsewhere in India. The assets of the company consisted of three properties and its sole business was the management and collection of rents from the said properties. It was contended in that case that since the company was formed with the object of carrying on business, the income which it received from the properties was income from business u/s 10. That contention, however, was negatived and it was pointed out that the company was carrying on no other business except such activity as was carried on by every landlord or owner of that type of property in exploiting the same. It was held that the income came directly and specifically under the head "property" and the mere fact that the house-owner was a company did not change the incidence of the tax and make it income not from property. This was a case of mere letting out of house property without anything more, and what was held in this case was that even if such letting was done by a registered company, which had been formed with the object of carrying on such business, the nature of the income would still be income from property and not income from business. In the case be-fore us what the assessee-company has done is not merely letting out of a tenement, but it has in the first place constructed a special type of tenement and fitted it with several special devices so as to conform with the several specifications contained in the Cinematograph Film Rules and, it has further provided the licence-holders with several other facilities and maintained a staff and incurred expenses for maintaining the special and mechanised devices and other facilities suitable to the trade of storage of films.

6. In the next case *BALLYGUNGE BANK LTD., CALCUTTA Vs. COMMISSIONER OF Income Tax, BENGAL.*, cited by Mr. Joshi, it was held, following the decision in *Dina Nath Saha Roy and Others Vs. Jadu Nath Biswas and Others*, , that

"income derived from ownership of buildings is chargeable to tax u/s 9 of the Indian Income Tax Act irrespective of whether an individual or a company is the owner and also irrespective of whether one of a company"s objects, or its sole object, is to acquire and let out buildings at rents; ownership itself is the criterion of assessment under that section."

The Company in that case was a limited company, which had as one of its objects to acquire land, build houses and let them to tenants. It had obtained the lease of a plot of land for a period of 40 years, and had constructed buildings thereon, which it had let out to tenants. This case, like the previous case, was one where the income was received from the ownership of the property and the activities of the company were nothing afferent than the activities of a private individual owning property end letting it out to tenants. These two cases cited by Mr. Joshi would only lead to the conclusion that where the income is derived from the letting out of the bare tenements, the source of income is the ownership of the property and the income appropriately falls u/s 9 of the Act. It makes no difference whether the letting is by a private individual or by a company and it also manes no difference even if the company has been formed with the object of indulging in the activity of building houses and letting them out to tenants.

7. The next case cited by Mr. Joshi is the decision of the House of Lords in 1929 15 Tax Cas 266. In that case the assessee-company was a company the main objects of which were acquisition, development, management, leasing and letting of land and properly. It took over some lands with a block of buildings upon it in the City of London, known as Salisbury House. Salisbury House was at the time when it was taken over by the company in the course of erection or had been recently completed and the object for which the company was formed was to hold the same and let it out as offices and turn it to account in any way which might be possible or expedient. Salisbury House had a very large floor space and contained some 800 rooms. These rooms were let out by the company to some 200 tenants Singly or in suites, which may or may not be self-contained. The company provided and operated the lifts in the building, which was of nine floors and also provided uniformed staff of 25 persons for that purpose and to act as porters and watch and protect the building. The company also engages cleaners and a house-keeper. It provided radiators for heating purposes and also supplied lights in the passages of the building. The question, which had to be considered in that case, was whether the rents which the company received from the tenants were covered by Schedule ft which related to tax on income from property or tell under Schedule D which related to the Income from business. It was held that the rents received by the company fault of the defendant to carry out the conditions which were imposed upon him could be set aside u/s 151. Before a Court can exercise the powers u/s 151 of the Civil Procedure Code, it is at least necessary that the Court must be possessed of the matter and must have jurisdiction to pass orders in the case. It is trite law that except in cases in which the jurisdiction of the Court is expressly preserved in that behalf the Court which tries a suit loses all jurisdiction over it with the passing of a decree. That the decree is passed under Order 37, Rule 2(2) should, in principle make no difference to that position. A decree may come to be passed under Order 37 Rule 2(2) either because the defendant has not appeared in answer to the summons for judgment or because leave to appear and defend the suit was not granted to the defendant at all, or, lastly, because the defendant has not complied with the

terms of the conditional order of leave, the first of these three cases is covered by Order 37, Rule 4 which preserves the jurisdiction of the Court, despite the passing of a decree, to set aside the decree "under special circumstances", and to give leave to the defendant to appear to the summons and to defend the suit on such terms as the Court thinks fit. In the last two of the three cases, the Court which has passed the decree under Order 37 Rule 2(2) would become functus officio with the passing of the decree, like any other Court which passes a decree under Order 20 of the Code. If the defendant is aggrieved by the decree in any one of the last two cases, his proper remedy is to file an appeal against the decree. Order 37 of the CPC is, in a sense, a self-contained Code and with the consciousness of these decisions, when the Legislature wanted to make provision with regard to the circumstances in which a decree passed under any of the provisions of that Order should be set aside, the Legislature expressly provided by Order 37, Rule 4 that the decree could be set aside in the circumstances mentioned in that rule, if it was intended that a decree which is passed by reason of the default of the defendant to comply with the terms of the conditional order could also be set aside by the Court which passed the decree, the Legislature would have made a suitable provision (similar to the one which is found in Order 37, Rule 4. It is clear from the absence of any such provision that what was intended was that a Court which passes a decree in a summary suit should have jurisdiction to set aside the decree in cases covered by Order 37 Rule 4, only and in no other case. In exercising his inherent jurisdiction u/s 151 the learned Judge has in effect exercised it so as to contravene an implied prohibition and it is settled law that the powers preserved by Section 151 should not be exercised so as to overcome a prohibition enjoined by the Code. The sole function of section 151 being to preserve the powers to act in the interest of justice, it must follow that Section 151 cannot be invoked so as to enlarge or widen the scope of one's jurisdiction.

(5) For these reasons, I am of the opinion that the learned Judge was in error in setting aside the decree which was passed on the 13th of April, 1961. The rule in the revisional application will, therefore, be made absolute, the order passed by the learned Judge will be set aside and the decree passed on the 13th of April 1961 will be restored. The plaintiff will be at liberty to withdraw the amount which has been deposited by the defendants in the trial Court after a period of six weeks from today.

(6) The petitioner will get the costs of this petition from the respondents.

8. Rule made absolute.