

(2019) 03 BOM CK 0033

In the Bombay High Court

Case No : Notice Of Motion No. 1170 Of 2018, Commercial Summary Suit No. 584 Of 2016

Rupinder Singh Arora

APPELLANT

Vs

A To Z Retail Limited & Ors

RESPONDENT

Date of Decision : 13-03-2019

Acts Referred:

Maharashtra Stamp Act, 1958 — Section 34

Indian Stamp Act, 1899 — Section 35

Code Of Civil Procedure, 1908 — Section 35, 35A, Order 37 Rule 3(6)(b)

Citation : (2019) 03 BOM CK 0033

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Ankita Singhanian, Samridhi Lodha, Kanga, Rohaan Cama, Mahendra V Swar

Final Decision : Disposed Off

Judgement

1. This is a Motion by the original Defendants seeking to set aside what is, in my view, wrongly described as an ex parte decree of 19th June 2018 (AK Menon J) and a previous order of 5th June 2018 (also by AK Menon J). The second prayer is to stay the operation of the decree.

2. To begin with, this is not an ex parte decree properly so called at all. What happened was this. SC Gupte J heard the Plaintiff's Summons for Judgment No. 95 of 2016 and made a conditional order on it. He required the Defendants to deposit Rs. 80.82 lakhs within six weeks as a condition precedent to the grant of leave to defend. He disposed of the Summons for Judgment in these terms.

3. The Defendants appealed. That appeal was filed just before court's summer vacation of 2018. The matter was stood over to after the vacation. On 7th June 2018, none appeared before the Appeal Court, and the appeal was adjourned again.

4. On 5th June 2018, the matter was listed before AK Menon J. The Plaintiffs were represented. The Defendants were not; and there is no explanation for their absence. On that day, Ms Singhanian for the Plaintiffs pointed out to the Court that there was no compliance with SC Gupte J's order. She tendered a certificate of non-deposit. This was taken on record. AK Menon J directed the plaintiffs to keep their documents properly compiled ready by the next date, and stood the matter over to 12th June 2018.

5. It was next listed before Menon J on 19th June 2018. The order reads that it was called for an ex parte decree, but in truth this was a final order and judgment squarely within Order XXXVII Rule 3(6)(b) of the Code of Civil Procedure 1908, one to which the Plaintiff is entitled upon failure of a Defendant to meet the condition precedent set by the Court for leave to defend. The rule reads: "(6) At the hearing of such summons for judgment,- (a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or (b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

6. Menon J thus decreed the suit on that date. He said the drawn up decree was to be lodged within four weeks.

7. This Motion was filed on 26th June 2018. Three days later, the Defendants appeared before the Division Bench, said they had filed this Motion, and took an order by which the appeal was disposed of by keeping their rights and contentions open with liberty as permissible in law. The appeal was disposed of in those terms.

8. Mr Cama would have it there are compelling reasons to set aside the two orders of Menon J. Had the Defendants been present, he says, they would have pointed out that the document on which the suit is based required stamping or was inadequately stamped. But that is not a reason to set aside the decree at all. Nothing prevented the Defendants from appearing on both dates before Menon J. This is not a case where the Defendants were prevented from appearing or inadvertently failed to appear and let the matter go by default. There is no good explanation at all for the Defendants' absence not once, but twice, before Menon J.

9. Further, as SC Gupte J's order of 19th March 2018 shows, the matter was very seriously contested at the stage of the Summons for Judgment. Ms Singhanian points out that this defence of the document on which the summary suit being inadequately stamped was one of the objections taken in the Affidavit in Reply in paragraph 10 at page 8. It was not, she says, pressed at the hearing of the

Summons for Judgment. If the document to which Mr Cama refers, a settlement agreement, could not have supported a decree for being inadmissible for want of stamp, then it could not have been used at all, and, logically, could not have allowed Gupte J to hold in favour of the Plaintiffs on the Summons for Judgment either.

10. The response from Mr Cama is that in this very matter, another Bench once observed that the question of stamp would not matter much at the hearing of the Summons for Judgment. As we shall presently see, that does not seem to be the correct frame of the law. Second, he mentioned, albeit in passing, that there are times when, taking such an objection, he has been confronted with an opposition that 'it is not the practice on the Original Side' to raise such objections as to stamp. In fairness, Mr Cama does not himself subscribe to this; indeed, he says it is plainly wrong. I propose to deal immediately with both questions straightaway, and I do so because Mr Cama is not alone in this experience. I will take the second point first, and the answer to that will encompass the first question.

11. First, then, as to the often invoked so-called 'Original Side practice', and why it can never be invoked. Usually, it is put like this: 'it is not the practice on the Original Side to raise objections as to stamp'. This is an utter and complete myth and wholly apocryphal. There is no such generalized prohibition. This is, I fear, one of those nuggets of received wisdom distorted through the ages and now assuming a form and a direction wholly unintended. The origin is this. The rules prescribed by the General Council of the English Bar in the late 1800s said it was 'unprofessional conduct' for counsel to raise objections. In any case, the standard or rule referenced applied to counsel, i.e. barristers, not to pleadings or averments. - and this is important - to the admissibility of a document on the ground that it was not stamped; but there was never any such standard applied to counsel's objection that a document was, for want of stamp, invalid in law. The distinction is that in the first case, the objection is 'merely in the interest of the revenue', and does not affect the merits of the case; whereas in the other case, the objection is to validity of the document, goes to the root of the matter, and is therefore clearly relevant. There is, therefore, no omnibus interdiction against every objection as to stamp; and, in any case, this was at best a recommendation hewing to a perceived standard of professional conduct in England: see: *Gulzari Lal Marwari v Ram Gopal*. ILR (1937) 1 Cal 257 : AIR 1937 Cal 765 : 1936 SCC Online Cal 275 In that decision, Lord-Williams J referred to two very early English decisions in *Home Marine Insurance Co v Smith*, [1898] 1 QB 829 and *Genforsikrings AKG, etc v DaCosta*. [1911] 1 KB 137. This does not make it a statutory or absolute prohibition in any sense at all. Neither of the English decisions was rendered in the context of a statutory bar of the kind we find in Section 34 of the Maharashtra Stamp Act 1958, and its almost exact parallel in Section 35 of the Indian Stamp Act, 1899.

12. *Gulzari Lal Marwari* is, in fact, most instructive. The case before Lord-Williams

J was, as he put it, 'embarrassing' because it was entirely unclear whether the plaintiff sued the defendants as partners or as members of a joint family carrying on business. Having gradually adopted the former position, the plaintiff claimed against the defendant on an account stated and adjusted in writing in Calcutta. He did not say whether the agreement to pay was in writing or not. Of the defendants, one stayed away. The other two did not enter appearance or file a written statement, but both appeared at the trial and asked to be heard. They were allowed to cross-examine, state their case, and give evidence on their behalf. In itself, this is another point against the present Defendants. By failing to appear before Menon J they lost even this opportunity, assuming they could yet overcome the words 'judgment forthwith' in O 37 R 3(6)(b). Two other defendants entered appearance, filed a written statement and were represented by counsel. They denied any adjustment in writing. Through counsel, they also urged that the document was invalid because it was not properly stamped. They did raise the objection as to stamp. Lort-Williams J rejected this submission - not because it was improper, unethical, or unprofessional, but on merits, returning a finding that the document did not need stamp. He went on to hold that the effect of Section 35 of the Indian Stamp Act is to make any such unstamped document inadmissible in evidence, and unable to be acted upon by persons authorised to receive evidence. The document itself was not invalidated for want of stamp. There is, he said, a clear distinction between a document's inadmissibility in evidence and its invalidity in law. He illustrated this by pointing to some statutory bars that rendered a document invalid for want of stamp, something no section of the Indian Stamp Act does. It was in this context that he referred to the rules of the English Bar, and explained them; but he then went on to say that it is for the Court to take notice of the absence of necessary stamps on a document and to refuse to admit it in evidence, although, as the two English cases he referred to said, the Court generally views with disfavour an objection taken merely on account of the absence of stamps. Such an objection, when taken, may deprive the objector of costs. But that is all; and that is the whole of it. In the case before him, Lort-Williams J found the document in question to be a promise to pay requiring stamp. Being unstamped he held it to be inadmissible in evidence.

13. Closer home, and nearer to our time, is the decision of a learned single Judge of this Court, Dr DY Chandrachud J (as he then was) in *Wolstenholme International Ltd v Twin Stars Industrial corporation & Ors.* (2001) 4 Bom CR 114 : (2002) 5 Mah LJ 121 : AIR 2001 Bom This was under the Indian Stamp Act, 1899. I refer to it only because here, in a summons for judgment - and therefore no very great distance from the present case - on the Original Side of this Court an objection to stamp was taken in regard to negotiable instruments, saying they were inadmissible for want of stamp. This was a specific plea taken in the affidavit in reply to the summons for judgment. As it happens, those bills were subsequently adjudicated, and the discussion was whether this later adjudication would cure an initial defect to render the bills of exchange admissible in evidence. We are not concerned with the actual finding returned,

but only whether there is a bar to taking such an objection at all. As it happens, Dr Chandrachud J held that an instrument chargeable with stamp duty can be admitted in evidence on payment of duty and penalty, but this would not apply to those instruments specifically excepted in proviso (a) to Section 35. Chandrachud J cited the observations of JC Shah J speaking for the Supreme Court bench in *Hindustan Steel Ltd v Dilip Construction Co*(1969) 1 SCC 597. that the Stamp Act is essentially fiscal, to secure revenue to the State. It is not meant to arm an opponent with technical weaponry.

14. This actually answers the first question as to the raising an objection of stamp at the stage of the summons for judgment. Wolstenholme was precisely such a case, and I find nothing in it to indicate that an objection of this kind is immaterial at the hearing of a summons for judgment.

15. In fact, there is absolutely no dearth of cases, even on the Original Side, where objections to admissibility for want of stamp have been taken and decided; and these go back over 100 years. One of the earliest is *RD Sethna v Mirza Mahomed Shirazi*, 9 Bom LR 1034, which holds that stamp objections are the care of the Court, and when they are raised, it is for the Court to decide whether they should be sustained, even if that be the sole objection. Even a cursory trawl throws up a listing of over 50 reported cases of this Court alone where such objections have been taken. If the suggestion is - and again, this is not Mr Cama's suggestion, but rather one with which he was elsewhere confronted -that standards of 'professional conduct' on the Original Side of this Court differ from those on the Appellate Side, or at our Benches in Aurangabad and Nagpur, or at the seat in Panaji, then it is a suggestion of the most egregious hubris. For that reason alone, it is only to be stated to be rejected. No proclamation (or declamation) of some arcane or esoteric Original Side 'practice', unmoored (as it invariably is) is to any law or statute, can be of the slightest value. No different standard applies only to the Original Side of this High Court at its seat in Bombay. Claims to any such exquisite delicacy are best abandoned, and quickly. This court is one, on all its sides, in all its jurisdictions. The same law applies everywhere. The same standards of professional conduct apply everywhere - one court, one law, one standard.

16. But this only means that the stamp objection ought to have been pressed at the earliest possible opportunity. His clients did take this defence in their Affidavit in Reply to the Summons for Judgment. But the order Gupte J made on the Summons for Judgment is not Mr Cama's focus at all. He does not assail that order; he cannot. He does not say the inadmissibility of the document (for want of sufficient stamp) rendered Gupte J's decision erroneous; he cannot, at least not here. Consequently, to say that the resultant order of Menon J (on Mr Cama's clients' failure to comply with the conditions imposed Gupte J imposed) is, or could have been, altered is pointless.

17. Why did the Defendants not appear before Menon J? The Affidavit in Support of the present Notice of Motion says the Defendants' Advocates missed the first

date of 5th June 2018, and on the second date, 19th June 2018, the attorney was in some personal difficulty due to ill health of a young family member. But this surely raises more questions than it answers. It was not the Advocate on record who argued the matter at any stage. Counsel was briefed. There was no explanation why after Menon J made his final order on the adjourned date, nobody on behalf of the Defendants' attorneys applied to the learned Judge on that date or the very next. The present Motion was filed a week later on 26th June 2018. Ms Singhania submits that this so-called 'inability' on the part of the Defendants' advocates is inaccurate. They were diligently following up the Defendants' appeal and were in correspondence with the Plaintiffs' attorneys in that regard.

18. This is really where I take strenuous exception to the description of Menon J's order as 'ex parte'. That phrase, as we know, means 'without notice'. Nothing that Menon J did was without notice. No court is bound to endlessly adjourn cases, nor can advocates or parties presume that cases they are defending will be automatically adjourned, or that they need do nothing except remain absent.

19. In fact, what the submission really means is that the Defendants must be allowed to constantly invent some new objection at every stage, and must be allowed to succeed in their endeavour to ensure that nothing is ever deposited. It seems to me that having now suffered a final decree, the Defendants have appellate remedies open; but those appellate remedies come with a condition attached, viz., the requirement of a deposit, this being a money decree. That is the only thing the Defendants are so anxious to avoid. That is the one thing they strain every nerve to avoid. And that is why the Defendants do not instruct Mr Cama even now to offer a deposit of the entire amount ordered by Gupte J. There is no reason why the Defendants should be allowed to avoid the consequences of their failure to comply with Gupte J's conditional order.

20. The Notice of Motion is frivolous. It is without any merit. It is dismissed.

On 13th March 2019

21. I posted the matter again and heard Mr Cama and Ms Singhania briefly on some aspects of the matter and, in particular, Mr Cama on the question of costs. This question of costs arises because this is a Motion in Commercial Division. Section 35 of the Code of Civil Procedure 1908 was entirely substituted by the Commercial Courts Act 2015. That amendment deleted Section 35A and made extensive provision for payment of costs. The underlying principle of amended Section 35 is that the losing party pays. What these costs are to be is also set out. Mr Cama submits that Section 35, correctly read, is restricted to costs in the suit. I do not think there is anything in Section 35 that warrants any such interpretation. The explanation to subsection (1) speaks also of legal fees and expenses incurred and any other expenses incurred in connection with the proceedings. Indeed subsection (2) makes it clear that the general rule is that the losing party must pay. If costs are not to be awarded, this must be for good

and stated reason. Subsection (3) sets out the various circumstances to which a Court must have regard and this includes the conduct of the parties and whether the party has made a frivolous claim or instituted a vexatious proceeding wasting time of the Court. Finally subsection (4) sets out what I believe is the ambit of costs and clarifies that the order of costs may in the discretion of the Court be confined to costs relating to a particular step in the proceedings or the costs relating to a distinct part of the proceedings.

22. Had Menon J not made an order in terms of prayer clauses (a) and (b) of the suit, conceivably, I could, therefore, have made an order today for costs overall from the time of summons of judgment onwards. I believe, however, that I must restrict myself to an order of costs on the present Notice of Motion and not travel beyond. I cannot accept Mr Cama's submission that the provisions of Section 35 apply only at the final disposal of the commercial suit or an appeal, but do not apply to costs at an interim stage. There is nothing in section 35 to support any such interpretation.

23. As I have noted, the conduct of the Defendants is far from satisfactory. This Motion is, in my view, is quite deliberately vexatious. It entirely lacks bona fides. It is, as I have said, frivolous and has certainly resulted in a considerable waste of time - especially given that the Defendants now have their remedy, as I have earlier noted, in an appellate proceeding against the final decree. The entire attempt is only to thwart the order of deposit and to defeat the decree.

24. I will, therefore, make an order of costs on the Motion in favour of the Plaintiff and against the Defendants in the amount of Rs.1.50 lakhs. The Plaintiff will be at liberty to execute this order separately from the decree. Drawn up order dispensed with.

25. The order of costs will not carry interest.