

(1997) 12 BOM CK 0022

In the Bombay High Court

Case No : Notice of Motion No. 3344 of 1995 in Summons for Judgment No. 770 of 1993 in Suit No. 3629 of 1993

Saraswati Tin Containers Pvt. Ltd.

APPELLANT

Vs

Meta Cans and others

RESPONDENT

Date of Decision : 05-12-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 4, Order 39 Rule 1, Order 39 Rule 2, Order 9 Rule 13
Contract Act, 1872 — Section 10
Limitation Act, 1963 — Article 164 , 181

Citation : (1998) 2 ALLMR 12 : (1998) 1 BomCR 137 : (1998) 1 BOMLR 14

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

Bench : Single Bench

Advocate : S.K. Nair, instructed by S.K. Nair and Co, for the Appellant; S.N. Fadia, instructed by K.J. Hakani, for the Respondent

Judgement

S.S. Nijjar, J.—The plaintiffs have filed this summary suit under the provisions of Order XXXVII, Rule 2 of the CPC claiming that the defendants be ordered and decreed jointly and severally to pay to the plaintiffs a sum of Rs. 9,48,000/- as per particulars of the plaintiffs claim together with further interest at the rate of 18 per cent per annum on the aggregate principal sum of Rs. 7,37,857/- from the date of filing of the suit till the judgement and thereafter at the same rate till payment or realisation.

2. The plaintiff is a Company registered under the Companies Act, 1956 doing business of manufacturing tin plate, containers iron scraps etc. The defendants are carrying on business of tin and/or metal containers. Defendant No. 1 is a partnership firm registered under the Indian Partnership Act, 1932. Defendant Nos. 2 to 5 are the partners thereof. According to the plaintiffs, pursuant to the orders placed by the defendants from time to time the plaintiffs sold and delivered to the defendants goods from time to time. In particular pursuant to the order the plaintiffs sold and delivered goods to the defendants as follows.

Date Bill No. Amount (Rs.)

7-2-92 124 2,53,925.00

25-2-92 130 2,56,690.00

27-2-92 131 1,93,800.00

27-2-92h 132 1,87,530.00

8,91,945.00

The defendants have received the goods mentioned in the aforesaid invoices as well as other invoices. It is further stated that on repeated demand the defendants issued cheque for Rs. 1 lakh bearing No. 935634 dated 8th June, 1992 drawn on Syndicate Bank towards part discharge of the aforesaid debts. The Cheque, however, was not honoured and was returned unpaid containing the reasons "referred to drawer". Consequently the plaintiffs were ultimately constrained to file criminal complaint in the Court of Additional Chief Metropolitan Magistrate, 11th Court at Kurla, Bombay under the provisions of section 138 of the Negotiable Instruments Act. It is accepted by the parties that the defendants have been convicted in the said complaint and punished. A decree came to be passed against the defendants on 12th September, 1995. The present Notice of Motion has been taken out under Order XXXVII, Rule 4 for setting aside the said decree. The present suit was filed on 27th September, 1993. Writ of Summons was served upon the defendants on 29th November, 1993. On 8th December, 1993, the defendants entered appearance through Mr. Bagwe, Advocate. Vakalatnama was filed by Mr. Bagwe on 8-12-1993. On 16th December, 1993 the plaintiffs took out Summons for judgment No. 770 of 1993. No application for leave to defend was taken out by the defendants. Therefore, Summons for judgment were made absolute and decree was passed on 12th September, 1995. On 5th October, 1995 the plaintiffs lodged with the decree department draft of the decree.

3. In the affidavit in support of the Notice of Motion it is stated that the decree came to be passed on account of the lapse of the Advocate. It is stated that defendant is a lay person and he was always informed by the Advocate that the plaintiffs had not yet given inspection of the documents. Every time he enquired from the Advocate the same answer was given that he is awaiting inspection to be given by the plaintiffs. On the basis of the voluminous pleadings it is further submitted that the Advocate was justified in asking for inspection of the documents as the entire defence depended on the genuineness of the document on which the plaintiff's suit has been filed, it is further submitted that the suit itself was not maintainable as it is based on running accounts. There is a dispute as to whether or not the goods under the invoices have been received by the defendants. It is submitted that the challans which have been filed along with the plaint contain blanks and do not have any details which are necessarily required. Furthermore, goods have started from Silvassa to the State of Maharashtra.

Lorry number given is of a lorry which belongs to the defendant. This lorry does not have a licence to travel outside Maharashtra. Apart from this, the maximum load permitted in the said lorry is not more than 11 tons whereas the weightage of the goods shown in the various invoices and challans is 14 tonnes. The goods are said to have been received by the defendants on the basis of a signature which is stated to have been that of one S. Sayed. This person is neither a partner in the business nor is he an employee of the defendants. Even the stamp evidencing receipt of the goods is totally dissimilar to the stamp which is used by the defendants, it is further submitted that no consignments can possibly come from Silvassa without the accompanying documents evidencing payment of octroi, consignment notes, weighment slips etc. Even the certified copies of the bills taken from the Court of the Magistrate did not tally with the original bill. On the basis of the above it is submitted that the decree ought to be set aside firstly on the ground that the leave to defend was not taken due to the lapse of the Advocate and secondly because the defendants have a very good case on merits.

4. The Notice of Motion came up for hearing on 2nd November, 1995. The application for stay of the execution of decree was refused, it was observed that defendants were admittedly served with the Writ of Summons as well as Summons for Judgement. No affidavit in reply was filed for a period of one year and nine months. The defendants were duly served with the Summons for Judgement in December, 1993. The decree was passed on 12th September, 1995. In view of the Rules of this Court as well as the provisions of the C.P.C. the defendant were obliged to file an affidavit in reply within 10 days from the service of Summons. Therefore, it was ordered that if the defendants are willing to deposit the entire decretal amount, the defendants are at liberty to renew this application. This order was carried in Appeal No. 11 of 1996 before the Division Bench. By an order dated 6-2-1996 parties had agreed that if the defendants deposit a sum of Rs. 9,48,000/- then the application for stay of the execution before the Single Judge can be renewed. In view of the above, the defendants have deposited a sum of Rs. 9,48,000/- as ordered by the Division Bench. On the basis of this also it is submitted by the Counsel for the defendant that not only there are special circumstances for setting aside the ex parte decree but the defendants are very keen that the matter should be decided on merits. Their bona fides have been established by deposit of Rs. 9,48,000/- which was only about Rs. 2 lakhs short of the decretal amount at the time when the order was passed by the Division Bench. Counsel for the plaintiffs has vehemently opposed the grant of this relief on various grounds. Firstly it is submitted that this Notice of Motion itself is not maintainable as the only remedy open to the defendants is to file an appeal under Clause 15 of the Letters Patent of this Court. Furthermore it is submitted that the claim put forward by the plaintiff has been justified and that the defendants have been convicted on the same facts and circumstances by the Court of Additional Chief Metropolitan Magistrate. The defendants therein had made statements u/s 313 of the Criminal Procedure Code in which they had admitted that a sum of Rs. 27,07,857/- was due to the plaintiffs. The

defendants, however, thereafter tried to resile from the said statement and claimed that it was a typographical error in that the statement which ought to have been made as follows.

"It is not true that the plaintiff Company supplied the goods at Rs. 2,77,857/- towards the Bill Exhibit C-1 Colly."

The statement actually recorded was as follows :

"It is true that Complainant Company supplied goods valued at Rs. 27,7,857/- towards bill Exhibit C-1 Colly."

The plea put forward by the defendants has been negated by the Criminal Court and their application for review has been dismissed.

5. In replying to the aforesaid submissions, Counsel for the defendants has submitted that the Notice of Motion is maintainable. In support of his submissions Counsel has cited a number of judgements of this Court and other High Courts. However, in my view, the proposition has been squarely answered by two Division Bench judgements of this Court. First in point is the Judgement of P.N. Films Ltd. and Another Vs. Overseas Films Corporation Ltd., wherein it has been held that Order XXXVII, Rule 4 is a self contained order which deals not only with the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, but also with the procedure to be followed if the defendants wishes to have a decree, passed in a summary suit, set aside. It has been held that the power is not similar to the power which is vested in the Court under Order IX, Rule 13 which applies to setting aside of ex parte decree. In paragraph 3 of the judgment Chagla, C.J., speaking for the Court has observed as under:

"It is then urged by Mr. Gupte that even assuming the present application of the appellant does not fall under O. 9, R. 13 and even assuming that no ex parte decree was passed as contemplated by O. 9, R. 6, Art. 164 does not in terms limit the application covered by that Article to an application made under O. 9, R. 13 and Mr. Gupte says that although the decree that we have before us may not be an ex parte decree within the meaning of O. 9, R. 6 it is still an ex parte decree as generally understood and there is no reason why the connotation of an ex parte decree in Art. 164 be restricted and limited to an ex parte decree as understood by O. 9, R. 6. Now that seems to be a little more difficult contention to decide. It is true that in one sense the decree was passed against the defendant in his absence, but that absence was an enforced absence and it was enforced by law. In our opinion, even giving to the expression "ex parte" its plain natural meaning, the expression "ex parte" does carry with it the connotation that a Court or a Judge or a Tribunal has proceeded in the absence of other party when it could have had the other party before it or when it was not prevented by law from having the other party before it. But perhaps it is better to decide this point on the other aspect of the matter. Both the Law of Limitation and the CPC are procedural laws and we must try and give the same meaning to expressions

used in these two laws. If the CPC has understood an ex parte decree in one particular definite sense, there is no reason why we should take the view that the Limitation Act has understood it in a different sense. Apart from that, the Limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a valuable right and unless the provision in the Limitation Act was clear and beyond doubt, a benevolent construction, a construction favourable to the party whose valuable right is being taken away, must always be given and therefore in our opinion Art. 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. In our opinion, such an application falls under O.37 R. 4 and the Limitation Act has not dealt with any such application. Therefore, the article that would apply would be the residuary Art. 181.

Similar view is taken by another Division Bench of this Court in the case of Ramchandra Dhondu Dalvi Vs. Vithaldas Gokuldas, . The complete answer to the submissions made by the Counsel for the plaintiff is given in paragraphs 4 and 5 of the said judgment. The said paragraphs 4, 5 and 6 read as under :

"4. No one can deny the fact that the provisions of Order 37 are made in the general interest of the public with a desire to speedy disposal of simple suits. Consistent with this object, it cannot be denied that such decrees, if once made, ought not lightly to be set aside. Yet the words are of wide application and must be given their natural meaning. There can be no reason to restrict their meaning by construction unless the language used in the rule justifies such a construction. As stated above, it is clear that Order 37 deals only with the summary procedure. If leave is granted and the condition complied with, if it is conditional leave, the defendant becomes entitled to defend the suit and then, the suit ceases to be a summary suit and must be transferred to the regular list, in which case there is no question of the application of any of the other rules contained in O. 37 Rule 4 must apply to a suit as has resulted into a decree under the summary procedure and it enables the Court to set aside "the decree" which must mean " the decree" made under Rule 2. Rule 2 contemplates two circumstances under which a decree can be made- one, where the defendant fails to obtain leave to defend, and second where having obtained such leave, he does not appear and defend the suit in pursuance of the leave. On satisfaction of either of these conditions, the consequence provided by sub-rule (2) of Rule 2 must follow and result into a decree. The words are "after decree the Court may" in Rule 4; they must mean after such decree as is made under Rule 2. The word "decree is applicable" to a decree obtained in either eventuality and in the absence of anything else either kind of decree can be set aside by the Court if conditions laid down in the rule are satisfied.

(5) Mr. Jadhav for the plaintiff relies on the words" and may give leave to the defendant to appear to the summons and to defend the suit,.....and on such

terms as the Court thinks fit". He says that these words can apply to only one eventuality under which the decree was made i.e. where the defendant had not appeared in answer to the summons and therefore the rule must be construed to be limited in scope. This is not so. What the rule means is that the power is general to set aside the decree and any of the other things including the granting of leave may be done if necessary. The power given to the Court is discretionary and the words could not have been intended to limit the power of the Court to set aside decrees only as are made in the absence of the defendant in answer to the summons. The Court while setting aside the decrees may exercise any of the several powers which it thinks fit. If the decree is made in the absence of the defendant in answer to the summons, then only the Court may consider whether he is entitled to leave in terms of Rule 3 and either refuse it or grant it on such conditions as it deems necessary. In a case where (conditional leave is granted, but the conditions are not complied with and if the Court sets aside the decree, the suit must be proceeded with from the stage it was, and the Court cannot review the earlier decision, rule of res judicata applying. Of course while setting aside the decree the Court is entitled to impose such terms as it deems fit. In our view there is nothing in the rule itself which limits the power of the Court to set aside the decree only if it is made against a defendant, who has failed to appear in answer to the summons. 6. In the above case the learned Judge observes that if the construction adopted by us above were accepted it would produce startling consequence. Reference is to the judgement of Chandrachud, J., in Ramaben Bhagubhai Patel Vs. The Hindustan Electric Co. Ltd., He says that in a case where conditional leave were granted but the defendant failed to comply with the same and a decree followed, if the decree were set aside, it would be open to the Court not only to set aside the decree, but also the conditional leave which cannot be done except by the High Court in its revisional jurisdiction and that too in exceptional cases. With respect, it is not possible to accept that such result must necessarily follow. As pointed out above the power to give leave to defend has to be exercised only, if necessary, as the other power of staying the suit or setting aside the execution of the decree and not otherwise. If, therefore, a case arises where conditional leave is granted and the condition is not complied with and the decree follows, and if the Court is satisfied that there are special circumstances which require the setting aside of the decree then it has to set aside the decree, and the only effect would be to enable the Court to extend the time for complying with the condition, which it otherwise has u/s 148 of the Civil Procedure Code, if an application were made before the expiry of the period. If the ambit of the rule is to be limited we have necessarily to add words qualifying "the decree" which the Court cannot do. Additions to the language of the statute would be permissible only when it is meaningless or absurd. When the language is clear the Court cannot import limitations on the basis of supposed intentions of the legislation. With respect we must therefore differ from the interpretation of the learned Judge and hold that, Rule 4 applies to all decrees which are made under Rule 2 and the Court can pass such orders as required by the circumstances of the case as indicated by us above."

The above observations have been made with reference to the question of law formulated by the Court viz.

"Whether the power of the Court to set aside a decree is limited to a case in which the defendant has failed to appear in answer to the summons for judgement or is wider?"

To be fair to Mr. Fadia, he has relied upon two judgements of Justice Kapadia given in (Notice of Motion. No. 2707 of 1995 decided on 4th November, 1997), and (Notice of Motion No. 3234 of 1995 decided on 7th November, 1997). A perusal of the said judgements would show that the two aforesaid judgements of the Division Bench were not brought to the notice of Justice Kapadia. This Court is bound by the judgements given by the Division Bench. In view of the above I hold that the Notice of Motion is maintainable under Order XXXVII, Rule 4.

6. Coming now to the question of whether or not there are any special circumstances for setting aside the ex parte decree. The Criminal Court has virtually decided the same issue as has been agitated in the present suit. This apart, examining the facts and circumstances of this case independently I am of the considered opinion that the defendants have been wholly remised in pursuing the matter. The defendants were admittedly served with the writ of summons as well as Summons for Judgement. No affidavit in "reply was filed for a period of one year and nine months. The defendants were duly served with the Summons for judgement in December 1993 and the decree was passed by this Court on 12th September, 1995. A perusal of the order dated 12th September, 1995 also shows that the (sic) stated by the defendants for non-appearance or not seeking leave to defend are altogether bona fide. In the said order it is noticed that one Mr. Mirajkar made a statement that Mr Bagwe, the advocate retained by defendants has not received any instructions from the clients and he wants to intimate his clients and also wants to withdraw the appearance On this ground the adjournment was refused. It is only thereafter that the "ex parte" decree came to be passed. However, keeping view the observations made by the Division Bench in Ramchandra's case (supra) in paragraph 6, I am of the view that the interest of justice require that the defendants be permitted to defend the case on merits. This leave can only be granted if the defendants are prepared to deposit the entire decretal amount in Court to be calculated by the Decree Department on the last date for the deposit of the same. The defendants shall, however, deposit only the difference between the total decretal amount after deducting the amount already deposit which is Rs. 9,48,000/- with accrued interest .The defendants are three months time to deposit the said amount. Upon the deposit being made, the "ex parte", decree shall stand set aside. Conditional leave is granted in the aforesaid terms. Written statement to be filed within a period of eight weeks after the last date of deposit. The matter be transferred to the list of commercial causes. The plaintiffs" shall be permitted to withdraw a sum of Rs. 9,48,000/- along with the accrued interest on furnishing Bank guarantee/security to the satisfaction of the Prothonotary and Sr. Master. Notice

of Motion is made absolute in the aforesaid terms with no order as to costs.