

(1987) 11 BOM CK 0004

In the Bombay High Court

Case No : Civil Revision Application No. 473 of 1987

State of Maharashtra and Others

APPELLANT

Vs

Dnyaneshwar Parkhi

RESPONDENT

Date of Decision : 20-11-1987

Acts Referred:

Citation : (1988) 1 BomCR 628

Hon'ble Judges : A.A. Desai, J

Bench : Single Bench

Advocate : B.P. Jaiswal, A.G.P, for the Appellant; M.G. Bhangade, for the Respondent

Final Decision : Allowed

Judgement

A.A. Desai, J.—This revision is directed against order dated 2nd May, 1987, dismissing the Miscellaneous Judicial Case No. 20 of 1986 filed by the State for setting aside the ex-parte decree. Mr. B.P. Jaiswal, the learned Counsel while assailing the impugned order posed questions of a considerable magnitudes as regards the responsibility of the Civil Court in an adjudication of a claim against the State.

2. The applicant No. 2 the Executive Engineer, on 27th April, 1973 entered into a contract with the non-applicant decree-holder for construction of two wards of Mental Hospital at Nagpur. The work order was issued and construction was agreed to be completed within twenty months therefrom. The decree-holder could not complete the work within the stipulated period. The Superintending Engineer extended period upon 31st July, 1975 without compensation and thereafter with compensation at the rate of Rs. 4.50 per day till completion of the work. On 15th January, 1978 the Contractor decree-holder completed the work. According to the decree-holder, on or about 4th September, 1980 he accepted the final bill under protest. He made a representation to the Chief Engineer for redressal of his grievance towards deductions and payments of various dues. The decree-holder on 24th August, 1983 issued the notices u/s 80 of the CPC to the

applicants the State, the Executive Engineer, the Superintending Engineer and the Chief Engineer claiming total amount of Rs. 40,190.89 towards various items. The State of Maharashtra acknowledged the notice on 29th August, 1983. Postal Acknowledgment bears the stamp of the inward clerk, Public Works Department, Mantralaya, Bombay.

3. The Decree-holder then thought it convenient to file Special Civil Suit No. 439 of 1983 on 31st October, 1983 only against the applicant State of Maharashtra for a claim of Rs. 53,310/-.

The Decree-holder in para 11 to 19 pleaded for various claims. These claims have been summarised in para 20 which reads as under :-

For Item (g) under title damages for delayed payment, the decree-holder in notice u/s 80 of the Code made a claim only of Rs. 10,410.00 whereas in the plaint as can be seen the claim is for Rs. 22,474.83. Moreover, in the notice there is no claim for notice charges. However, Rs. 1,045.29 has been claimed on this count in the suit.

The Chief Superintending & Executive Engineer were not impleaded as parties. However, the decree-holder articulated them in the plaint as defendant's Engineers. He amongst others in para 21 of the plaint pleaded that he made representations to be defendant's Executive, Superintending and the Chief Engineers under whose jurisdiction the contract was performed, to consider the plaintiff's claim. However, they did not care to settle the claim.

For each item of a claim as can be seen from the averment in the plaint; cause of action arose on different dates. However, pleadings in this behalf are delightfully vague and ambitious. The decree-holder in para 23 made general statement that cause of action for suit arose on 4th September, 1980 when he received final bill and on 29th August, 1982 when State received notice u/s 80 of the Code.

4. The learned trial Judge on 11th November, 1983 ordered to issue suit summons to settle the issues to the defendant State. The Decree-holder paid the process fees. He beside this deposited postal stamps of Rs. 4.50 for a service by registered post. Suit was posted to 6th January, 1984. The summons was returned by the Small Causes Court, Bombay with an endorsement dated 20th January, 1984 at time was not sufficient to cause the service. No cognisance was taken of this aspect. It was kept completely out of consideration. No order was made for issue of fresh summons.

The learned trial Court then posted the case to 3rd February, 1984. The learned Judge on the basis of Exh. 7 Postal Acknowledgement of suit summons by registered post, recorded that a defendant has duly been served. The learned judge, since the defendant State was absent, directed the suit to proceed ex parte. The plaintiff was ordered to file affidavit on 18th February, 1984. The decree-holder accordingly filed an affidavit (Exh. 8). The learned Judge on 12th March, 1984 passed ex-parte decree for Rs. 55,310/- against the defendant

State.

5. The decree-holder after a lapse of more than 18 months, on 1st November, 1985 initiated the execution of the ex parte decree. The notice thereof was issued to Collector, Nagpur. The District Government pleader on 17th December, 1985 appeared in the execution proceedings. He sought adjournment and the proceedings were posted to 9th January, 1986, and then to 24th January, 1986. On this date the applicants filed an application under Order 9, Rule 13 of the Code for setting aside of the ex parte decree. The non-applicant decree-holder opposed the application. The applicants by Pursis Exh. 11 and 12 dated 29th April, 1987 stated that they do not wish to adduce any evidence.

6. The learned trial Court observed that the State got the knowledge of an ex parte decree on 17th December, 1985 when the Government Leader appeared in the execution proceedings and the present application filed on 24th January, 1986 is beyond a period of 30 days. It was further observed that there is no evidence justifying the absence of the defendant State. The learned trial Court, therefore, by an order dated 2nd May, 1987 dismissed the application. This order has been impugned before me.

7. Mr. Jaiswal made a submission that the Executive, Superintending and the Chief Engineers were the necessary parties. The decree-holders purposefully with a mala fide intention kept them in dark. They are thus prevented from appearing. According to him, only on inspection of the original record of the suit it was revealed that service of suit summons was held to be by the Postal Acknowledgement Exh. 7. Nothing is legible therein and creates a prima face doubt of its service. According to Mr. Jaiswal, the defendant State was not duly and properly served and fraud was played on the Court. The applicants got the knowledge of ex parte decree after due verification of original suit proceedings by the Government Pleader some time on 31st December, 1986. Hence the application is within limitation.

8. Mr. Bhangade submitted that the applicants Nos. 2 and 4 have no locus standi as they were not party to the suit proceedings. He contended that-the defendant State has not made a positive averment that no suit-summons was received by them. According to him, a Postal Acknowledgement Exh. 7 is a proof of valid service and no sufficient ground or cause has been disclosed for setting aside the ex parte decree. He contended that even from the date of knowledge, according to him, on 17th December, 1985, the application presented on 24th January, 1986 is beyond period of limitation. Hence the application is liable to be rejected. With the assistance of learned Counsel I perused the record of suit proceedings.

9. Exh. 7 is said to be an acknowledgement of service of suit summons by registered post. It bears the date as 29-12. Seal or signature thereon is not identifiable. It does not bear any stamp indicating the designation of an official who said to have received the summons. The learned trial Court has not compared Exh. 7 with the Postal Acknowledgement of notice u/s 80 to the

defendant State, filed by the decree-holder. This Postal Acknowledgement as observed bears the stamp of a inward Clerk of the Department, Mantralaya Bombay. However, as pointed out, Exh. 7 does not contain any such stamp nor the same is identifiable by a seal.

Process form for a summons through Court, carries a note-copy of plaint is enclosed. Process form for service by Registered Post does not carry any such note. It is expressed at the Bar that postal stamp of Rs. 4.50 only is not even sufficient to carry registered Post article of Court summons with 18 pages full scope paper of a plaint. It appears that the copy of plaint was not accompanied with suit summons by registered post. As such summons was invalid in view of provisions laid down under Rule 2, Order V of the Code. The learned trial Court failed to verify all the material and pertinent aspects.

10. The learned trial Court before proceedings ex parte omitted to take into account provisions laid down in Order 27 which deals with the topic of suit by or against the Government. Rule 4 provides that the Government Pleader in any Court shall be the agent of the Government for the purposes of receiving process against the Government. When on 6th January, 1971 or on 3rd February, 1974 none appeared for the State it was the duty of the learned Judge to invite attention of the District or Assistant Government Pleader. No endeavour has been made in this behalf.

11. Rule 6 provides for attendance of a person able to answer questions relating to suit against Government. A plain reading of the plaint amply suggests that the cause of action for the decree holder arose due to act or omission of the Executive, Superintending and Chief Engineers whose offices are located at Nagpur. They were also served with notice u/s 80 of the Code. The learned trial Court was further under obligation to summon these officers of the Government who were in a position to answer the allegations of the decree-holder. They were not only proper but necessary parties for justice and fair adjudication. The learned Judge failed to exercise jurisdiction under Order 1, Rule 10(2) of the Code, to direct these officers of the Government to be added as parties.

The Division Bench of the Gujarat High Court in *Union of India v. Messrs Pankaj Oil Cake Industries*, 1985(2) Guj LJ 1293, in the similar circumstances has observed that "In the very nature of the things and having regard to the huge monolithic and impersonal organisation of the Government, it would be very difficult for the officer who receives the summons locate the proper officer who would be in charge of the subject matter of the suit or proceeding in question. That is the reason why the Legislature has made specific provisions of Order XXVII, Rule 5 and has enjoined a duty upon the Courts to see that the Government gets reasonable time for necessary communication through the proper channel. Whenever such suits are filed, the Courts should insist and direct the plaintiffs to join the officer concerned whose order is challenged or who is likely to take action for and on behalf of the Government. Whenever such officer is not joined, the Court should be reluctant to proceed further with the suit or

proceeding against the Government unless proper representation is made on behalf of the Government. In all such cases as far as possible the Court should not proceed further at all with the proceedings against the Government unless representation is made through proper officer or through the Government Pleader. If this is not done, it would be very easy for dishonest people to snatch a decree against the Government by keeping the Government and all other concerned in dark. The Court cannot become a party to such a fraud."

12. The learned trial Court, taking into account involved amount of Rs.53,310/- and nature of the claims ought not to have decreed the suit on the basis of the affidavit filed by the decree-holder. It was necessary to examine the decree-holder. His oral evidence should have been recorded. The learned trial Court ought to have directed the production of correspondence referred to in the list of documents on which the decree-holder placed reliance. The learned Judge even though proceeded ex parte was under an obligation to verify whether the suit claim is in conformity with the claim set out in the notice u/s 80 of the Code. The learned Judge has not examined whether the various claims arising out of a contract which was completed on 15th February, 1978 are within the period of limitation in the suit filed on 31st October, 1983. The learned Judge has also not examined the entitlement of the decree-holder to such claims. In the judgment the learned Judge has merely summarised the case of the decree-holder even without any reference to the relevant provisions of the agreement. The learned Judge was under obligation to ascertain the availability of the claims to the decree-holder and the right accrued in his favour as per the relevant clauses of the contract.

13. The learned Judge conducted the proceedings in a most unsatisfactory manner. His entire approach was totally without application of mind. Its adjudication by neglecting the legislative mandate as discussed earlier is really unfortunate. There was no emergent situation on 3rd February, 1984 to proceed ex parte. In passing decree on 12th March, 1984 the learned trial Court has exhibited undue haste. He acted in an unjust and unreasonable manner which has resulted in substantial failure of justice. While passing ex parte judgment he has demonstrated an utter disregard towards the legal norms. Having regard to the facts and circumstances as surfaced, they lead to numerous unpleasant inferences against all concerned. Under the set of circumstances enumerated above, an inference that the decree-holder has some how managed to prevent the appearance of the defendant State has become most probable. The learned Judge by neglecting to perform the mandatory duties seems to have contributed to such ill designs.

14. Mr. Jaiswal while severely criticising the entire conduct, pointed out that the learned trial Court made an order of issue of summons which is ordinarily and normally the summons to be served by personal service through the process of Court as contemplated under Rules 9 to 19 of Order V of the Code. No direction was given under Order 5, Rule 19-A for a service of suit summons through the

postal agency. Mr. Bhangade, the learned Counsel for the decree-holder made a submission that for a service by post no separate order is necessary. According to Mr. Bhangade, the order to issue suit summons also comprehends the service as provided under Order V, Rule 19-A of the Code. Rule 19-A came on the Statute by the Amendment of 1976 where Rule 20-A has been deleted. As per Rule 20-A as then prevailing such postal service could be ordered only on return of suit summons unserved. Rule 19(A) as prevailing reads thus:

"19-A. The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in Rules 9 to 19 (both inclusive) also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant....." (Emphasis is supplied by me.)

According to these provisions, now service by post can be directed simultaneously and also in addition to the service under Rule 9. However proviso to sub-Rule (1) of Rule 19-A empowers the Court to dispense with such service by post if considered to be unnecessary. In view of this, specific direction for service by post is necessary. Such direction cannot be presumed or implied in the order merely directing suit summons to that defendant. No direction in this behalf was ordered. In the instant case, service by post does not seem to be necessary. The decree-holder does not appear to have applied claiming such service. The decree-holder was not entitled to effect service of suit summons by post.

15. I have gone through the application for setting aside ex parte decree. Pleadings are not happily worded. Having regards to the set of circumstances, facts and discussion made here in before, the learned Judge grossly erred in holding that the defendant State has duly been served on the basis of Exh. 7. As observed Exh. 7 on the face of a record was not a valid service. The Government Pleader is an agent of the State, his appearance on 17th December, 1985 in execution proceedings can not said to be a knowledge of State affairs in the original ex parte decree proceedings. The knowledge of the proceedings can only be had subsequently after verification of the relevant record of suit proceedings. As such, the applicants are justified in contending that they got the knowledge on 1st January, 1986 about the ex parte decree and reasons therefore. As such an application filed on 24th January for setting aside the ex parte decree was within time. The applicant No. 1 State since not duly and validity served could not appear on the date of hearing. The ex parte decree is liable to be set aside even at the instance of the defendant State. Other applicants though necessary parties were not impleaded. Consequently they could not appear and defend. They have locus standi to claim setting aside of ex parte decree since prevented from appearing in the proceedings. The trial Court omitted to look into glaring and pertinent aspects which are apparent on record and does not appear to have acted reasonably in rejecting the application for setting aside the ex parte decree.

16. In the result, the revision is allowed with cost. Application dated 24th February, 1986 is allowed. Impugned decree dated 2nd February, 1984 and order

dated 2nd May, 1987 are set aside.

The parties are directed to appear before the trial Court on 15th December, 1986. The trial Court shall proceed with suit according to law.

The non-applicant/decreed-holder is directed to pay exemplary cost of Rs. 2,500/- to the applicants, before 15th December, 1987. In case of default, the Court shall take action as provided under the Law. Record be sent to trial Court forthwith.