

(2016) 03 BOM CK 0205

In the Bombay High Court

Case No : Appeal (L) No. 897 of 2015 in Notice of Motion No. 1766 of 2011 in Suit No. 4351 of 1996 and Notice of Motion (L) No. 3283 of 2015 in Appeal (L) No. 897 of 2015 in Notice of Motion No. 1766 of 2011 in Suit No. 4351 of 1996

Sunil B. Bhosale

APPELLANT

Vs

Kamal Organic Chemicals

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2016) 03 BOM CK 0205

Hon'ble Judges : V.M. Kanade and Revati Mohite Dere, JJ.

Bench : Division Bench

Advocate : P.K. Dhakephalkar, Sr. Counsel, Y.V. Divekar, Ashwini Pawar and Sayali Gharpure I/b Divekar & Co., for the Appellant; K.R. Bulchandani, Anoop Sharma and Amit Nikam I/b S.M. Kazi, for the Respondent

Final Decision : Disposed off

Judgement

Revati Mohite Dere, J.—1. The appellant has impugned the order dated 20th November, 2015, passed by the learned Single Judge, by which his Notice of Motion, seeking reconsideration of the condition, imposed by the learned Single Court vide order dated 13th November, 2009 inasmuch as, it directs the appellant to deposit a sum of Rs. 1,50,00,000/-, came to be dismissed.

2. It will be necessary to set out in some detail, the factual matrix of the case, as it has a chequered history;

At the outset, we may note that the appellant is the original defendant and the respondent, the original plaintiff. However, for the sake of convenience the parties will be referred hereinafter, as the "defendant" and the "plaintiff".

(a) The plaintiff filed a suit in this Court, being Suit No. 4351 of 1996 as against the defendant. According to the plaintiff, the defendant was appointed as a

Consultant for the project and was entrusted with the work of consultancy - process design, detailed engineering, fabrication and erection of the plant proposed to be set up by the plaintiff at Lote Parshuram. The letter dated 30th October, 1993 appointing the defendant, also set out the scope of work expected from the defendant. Pursuant to the said letter, the defendant is stated to have submitted his quotation for the entire work, as required for setting up of the said plant for the plaintiff. The total price quoted by the defendant for different aspects of the project was Rs. 17.34 lakhs. The defendant is stated to have also guaranteed the design workmanship and MMOC for a period of one year from the date of supply. Accordingly, the plaintiff asked the defendant to proceed with the work; and is stated to have paid a sum of Rs. 11,25,000/- from time to time to the defendant, towards supply of material and services rendered by the defendant, for the erection and commissioning of the plant. It is the plaintiff's case that it was obligatory on the part of the defendant to erect and commission the said plant and to provide back up services, in respect of design, workmanship etc, for a period of one year from the date of commissioning of the plant. The plaintiff has further claimed that the defendant instead of undertaking the work of commissioning of the plant, wrote a letter dated 14th December, 1994 to them, stating that the commissioning of the plant cannot be undertaken, for want of certain on-site facilities as enumerated in the said letter. Thereafter, there was a series of correspondence exchanged between the parties, each one defending their claim. It is the plaintiff's claim, that despite payments being made to the defendant, and the defendant having agreed to provide necessary rectifications and service which were material for successfully running the plant, failed to provide the same, as a result of which, the plaintiff could not successfully run the machinery, resulting in cost escalation and losses to the plaintiff. The plaintiff therefore, vide Advocate's Notice dated 22nd March, 1996 called upon the defendant to pay a sum of Rs. 21,79,175/- being the loss suffered by the plaintiff on account of deficiencies in the erection and commissioning of the plant, as per the debit note sent by the plaintiff to the defendant. The defendant vide letter dated 8.9.1996 stated that the debit note was unwarranted, unethical and unsubstantiated by facts. According to the plaintiff, as the defendant failed and neglected to pay the same, there was no alternative but to initiate legal proceedings for recovery of the said amount. The plaintiff relied on the correspondences exchanged between the parties to show that the defendant had failed to erect and commission the said plant, in accordance with the terms and conditions of the quotation given by the defendant. The plaintiff has claimed that there were several variations, contrary to the terms agreed upon by the parties, in setting up of the plant, resulting in improper and dangerous installation of the distillation column, sub-standard and second hand quality of pipes valves and instruments and the defective fabrication and improper laying of the pipe line by the defendant. The plaintiff has further claimed that as a result of the aforesaid, they were required to carry out the repairs and had to replace various portions of the plant, to get proper results from the same, thus delaying the production. According to the plaintiff, as the

actual production started late, there was an escalation in the costs of the production, resulting in net losses. Pursuant thereto, the plaintiff filed the aforesaid suit on the premise, that the defendant had committed breach of the terms and conditions and prayed that the defendant be ordered to pay a sum of Rs. 1,87,81,685/- with further interest on Rs. 1,50,24,900/- at the rate of Rs. 10.5% per annum from the date of the suit till payment and/or realisation. The said suit as filed on 7th November, 1996;

(b) On 23rd August, 2007, the suit was placed before the learned Single Judge under the caption "Undefended Suit for Ex-parte Decree". The learned Single Judge proceeded to hear the said suit by observing that the defendant was served, however, he had chosen not to contest the suit and that no written statement was filed. Accordingly, the learned Single Judge decreed the suit in terms of prayer clause (a) of the plaint with modification of the rate of further interest i.e. at the rate of 6% per annum instead of 10.5% per annum from the date of suit till payment of Rs. 1,50,24,900/-. The suit was accordingly disposed of and decreed ex-parte;

(c) Pursuant to the ex-parte decree passed by this Court vide order dated 23rd August, 2007, the defendant took out a Notice of Motion, being Notice of Motion No. 3207 of 2009 in Suit No. 4351 of 1996 seeking setting aside of the ex-parte decree. A preliminary objection with regard to the maintainability of the said Notice of Motion was taken by the plaintiff, however, the said objection was not accepted and the Notice of Motion was held to be maintainable. The learned Single Judge vide order dated 13th November, 2009 allowed the Notice of Motion and set aside the ex-parte decree, on the condition that if the defendant deposits a sum of Rs. 1,50,00,000/- within 12 weeks, the ex-parte order dated 23rd August, 2007 shall stand set aside. The aforesaid sum of Rs. 1,50,00,000/- was directed to be deposited with the Prothonotary & Senior Master, High Court, Bombay, and invested in a Fixed Deposit with a Nationalized Bank. Upon depositing the amount, the defendant was permitted to file a written statement within eight weeks from the date of the deposit. As per the order, if there was a default in compliance of the deposit of the aforesaid amount, the decree would stand and the plaintiff would be entitled to execute the same in accordance with law;

(d) The said order dated 13th November, 2009, inasmuch as, it directed the defendant to deposit a sum of Rs. 1,50,00,000/-, was challenged by the defendant before the Division Bench of this Court, vide Appeal No. 100 of 2010. It appears that the plaintiff too had challenged the order dated 13th November, 2009, which set aside the ex-parte decree. The Division Bench of this Court was pleased to dismiss the said Appeals vide order dated 12th April, 2010.

(e) Being aggrieved by the aforesaid orders, to the extent that it directed the defendant to deposit a sum of Rs. 1,50,00,000/-, the defendant approached the Apex Court by way of an SLP, being Special Leave to Appeal (Civil) No. 24070 of 2010. On 6th December, 2010, the Apex Court issued notice to the plaintiffs,

subject to the defendant depositing a sum of Rs. 50,00,000/- with the Prothonotary and Senior Master of the Bombay High Court, within eight weeks from the date of the order. During the pendency of the said SLP, the execution of the decree was stayed. Pursuant to the said order, the defendant deposited a sum of Rs. 50,00,000/- as directed by the Apex Court with the Prothonotary and Senior Master within the stipulated period. On 13th May, 2011, when the matter came up before the Apex Court, the learned counsel appearing on behalf of the defendant sought permission to withdraw the SLP with liberty to move the learned Single Judge for reconsideration of the condition imposed for setting aside the ex-parte decree. Accordingly, the SLP was dismissed as withdrawn. It was noted in the said order dated 13th May, 2011 that if the defendant files an application as proposed by him by 17th June, 2011, the learned Single Judge of the High Court shall pass appropriate orders on it, after hearing both the sides, in accordance with law. It may be noted, that the learned senior counsel appearing for the plaintiff made a statement before the Apex Court that the plaintiff will not execute the decree till the final order is passed on the application filed by the defendant;

(f) Pursuant to the aforesaid order dated 13th May, 2011, the defendant filed an application before the learned Single Judge on 16th June, 2011 seeking reconsideration of the order of deposit of Rs. 1,50,00,000/- passed by the learned Single Judge;

(g) The aforesaid Notice of Motion which was filed by the defendant came up before two learned Single Judges, who vide orders dated 5th September, 2013 and 12th October, 2015 directed the defendant to take steps to place the Notice of Motion before the same Judge who had passed the order dated 13th November, 2009, more particularly, as it was for reconsideration of the order dated 13th November, 2009. Accordingly, the said Notice of Motion No. 1776 of 2011 filed in Suit No. 4351 of 1996 was placed before the learned Single Judge, who had passed the order dated 13th November, 2009. The learned Single Judge, after hearing the parties, dismissed the Notice of Motion vide order dated 20th November, 2015, observing that it was not a fit case for modifying the condition of deposit already imposed vide order dated 13th November, 2009. The present appeal is filed against the said order dated 20th November, 2015.

3. Mr. Dhakephalkar, learned Senior Counsel for the defendant submitted that ex-parte was set-aside by the learned Single Judge, after accepting the defendants explanation for not remaining present in the proceedings. He contended that once having accepted that the defendant was not served with the writ of summons as required by law, the conditional order directing deposit of Rs. 1,50,00,000/- for setting aside the ex-parte decree was harsh and unwarranted. He submitted that the condition directing the defendant to deposit a sum of Rs. 1,50,00,000/- was exorbitant and as such prayed for reconsideration/modification of the said condition. He submitted that the Apex Court vide order dated 13th May, 2011 had permitted the defendant to file an application before

the learned Single Judge for reconsideration of the order of deposit of Rs. 1,50,00,000/- and as such, the learned Single Judge ought to have considered the prayer of the defendant for modification of the condition of deposit. He further submitted that the suit filed by the plaintiff was a suit for damages which could be quantified, only after the evidence was recorded and that it would be travesty of justice, if the defendant is directed to deposit the said amount, without the damages being assessed. He further submitted that the defendant with respect to the same transaction has also filed proceedings in the City Civil Court, being BCC Suit No. 7617 of 1997, as against the plaintiff, which is pending. He further submitted that the machinery which was supplied by the defendant to the plaintiff admittedly was for a sum of Rs. 17.34 lacs and as such the condition seeking deposit of the decretal amount of Rs. 1,50,00,000/- was exorbitant and harsh. He submitted that pursuant to the order of the Apex Court, the defendant has deposited a sum of Rs. 50,00,000/- before the Prothonotary and Senior Master, Mumbai in 2011 and that the defendant is ready to deposit a sum of Rs. 25,00,000/-, without prejudice to his rights and contention. According to Mr. Dhakephalkar, the secured amount as of today, is over and above the actual machinery sold by the defendant to the plaintiff. He therefore prayed that the condition imposed by the learned Single Judge of deposit of Rs. 1,50,00,000/- before the Prothonotary and Senior Master, Mumbai, be reconsidered/modified in the peculiar facts and circumstances of the case.

4. Mr. Bulchandani, learned Counsel for the plaintiff vehemently opposed the prayer for reconsideration/modification of the condition of deposit of Rs. 1,50,00,000/-. He submitted that the defendant has all around being procrastinating the case which was filed by the plaintiff in 1996. He submitted that despite liberty being granted by the Apex Court in 2011, to file an application before the learned Single Judge for reconsideration of the prayer for deposit on/before 17th June, 2011, the defendant filed the said application only on 16th June, 2011 and took no steps thereafter, to have the said application listed before the appropriate Court. He submitted that although he had not raised an objection before the learned Single Judge, with regard to the maintainability of the application filed by the defendant, seeking reconsideration of the order dated 13th May, 2011, he now wishes to raise an objection with regard to the maintainability of the application. He submits that the said application seeks review of the order dated 13th May, 2011 and as such is not maintainable. He submitted that the plaintiff had suffered huge losses, due to the failure of the defendant to install the machinery as per the terms and conditions, resulting in the plaintiff having to shut down the plant. He submitted that considering the conduct of the defendant, no indulgence whatsoever was warranted in the order, which is impugned before us.

5. At the outset, we may mention that Mr. Bulchandani, learned counsel for the plaintiff, had raised a preliminary objection regarding the maintainability of this appeal. In view of the objection raised, we heard both the learned counsel for the defendant and the plaintiff and decided the said issue vide order dated 28th

January, 2016, and held that the said appeal is maintainable.

6. Perused the papers and the impugned order. It appears that the plaintiff had filed the suit in the year 1996 and as none appeared for the defendant, the suit was placed before the learned Single Judge under the caption of "undefended suit for ex-parte decree". It was observed in para 16 of the Judgment and order dated 23rd August, 2007 passed by the learned Single Judge that the defendant was served, however, he has chosen not to contest the suit and that no written statement was filed by the defendant. The learned Single Judge having regard to the averments of the plaint and the affidavit of Mr. Kanagali, Director of the plaintiff and the documents on which the plaintiff placed reliance by leading his evidence, decreed the suit in terms of prayer clause (a) of the plaint with modification in the rate of interest. Accordingly, the defendant was directed to pay a sum of Rs. 1,50,24,900/- with interest at the rate of 6% per annum from the date of the suit till payment of the said amount.

7. Pursuant to the aforesaid ex-parte decree, which was passed by the learned Single Judge on 23rd August, 2007, the defendant filed a Notice of Motion seeking setting aside of the said ex-parte decree, alongwith a motion for condonation of delay. The learned Single Judge was pleased vide order dated 13th November, 2009 to condone the delay, as the delay was explained satisfactorily and in the larger interest of justice and also directed the defendant to pay costs of Rs. 5,000/- to the plaintiff's advocate. After condoning the delay, the learned Single Judge heard the parties and allowed the notice of motion, and set aside the ex-parte decree vide order dated 13th November, 2009. The Learned Single Judge in the said order dated 13th November, 2009 observed in paras 7, 10 and 11 as follows :

"7] This takes me to the application itself. Mr. Kumbhakoni submits that although the suit is instituted in the year 1996, the writ of summons. has been served on 2nd July 2003. That writ of summons is served in July 2003 is apparent from the endorsement on the original writ of summons. He submits that even the endorsement on the packet will show that the writ of summons is served at an addressed from where the defendant had already shifted business. Inviting my attention to the acknowledgement card, Mr. Kumbhakoni submits that in the affidavit in support of the notice of motion, the defendant has pointed out on 3rd April 2000 that the partnership firm in the name and style of which the defendant was carrying on business sold the office premises which were located at the address mentioned in the acknowledgement card to one M/s. Sterling Engineering and Consultancy Services Pvt.Ltd. The physical possession was also handed over. Since April 2000, the defendant is not in possession of the said premises. The office has shifted to the address mentioned in the title of the present notice of motion. The suit is filed against the defendant in his personal capacity. The suit summons does not indicate that it was served upon the defendant inasmuch as the acknowledgement/ signature is not that of the defendant. In these circumstances, this is a fit case where the ex parte decree

passed in the subject suit be set aside and an opportunity be given to the defendant to defend the suit. It is also contended that there is a cross suit filed by the defendant against the plaintiff and the same is pending in this Court. In such circumstances, interest of justice would be sub served if the ex parte decree is set aside."

10] With the assistance of the learned Counsel for both sides, I have perused this notice of motion and the affidavits in support and reply. I have also perused the Annexures thereto as well, including the writ of summons. While it is true that the suit is instituted in the year 1996-97 and that there was a letter addressed by defendant's Advocate, then engaged, yet, it is not clear as to whether a vakalatnama was filed by the said Advocate in terms of his letter. The record indicates that in a suit filed in the year 1996, the writ of summons was served in the year 2003 and, thereafter, the suit came to be placed for ex parte decree. Thus, there is some substance in the contention of Mr. Kumbhakoni that the plaintiff cannot proceed on the basis that the defendant had knowledge of the suit and the proceedings. The record, prima facie, indicates that the suit summons was served at an address set out in the cause title of the plaint. Defendant claims to have shifted his business from this address. Although, Ms. Castellino would urge that the shifting is nothing but to next door premises, the Court cannot straight away ignore the pleas raised by the defendant. In these circumstances, the presumption about the regularity of service and knowledge of the institution as well as hearing of the suit cannot be raised. Assuming that the communication from the defendant's Advocate takes the matter out of the first part of Order IX Rule 13 of CPC and the second proviso to the same is attracted, et, it is not as if the ex parte decree cannot be set aside. The Court can also set it aside if the defendant was prevented by any sufficient cause from appearing when the suit was called out. I am satisfied that this case on account of shifting of his premises and by the Advocate's inaction the defendant is prevented from appearing and defending the claim on merits. The defendant has made out a cause for setting aside the ex parte decree.

11] The law on the point is well settled. Unless the conduct is exhibiting utter negligence, callousness and complete lack of bonafides, the Court must grant an opportunity to the parties to prove their case and also defend a claim. Such an opportunity should not be denied merely because there is some omission on the part of the Pleader or Advocate engaged. In the present case, it is not the case of the plaintiff that before the year 2003, the copy of the plaint was served on the Advocate who had addressed a letter and it is, thereafter, the negligence of the defendant and their Advocate for which plaintiff cannot be blamed. The defendant has pointed out on oath that he became aware of the proceedings and the decree only when the attachment notice was served. It is, thereafter, that he took steps and when he inspected the record, it is revealed as aforementioned."

(Emphasis supplied)

8. It thus appears, that the learned Single Judge had accepted the contention of

the defendant, that on account of shifting of his premises and due to the inaction of the Advocate, the defendant was prevented from appearing and defending his claim on merits and on this count, set-aside the ex-parte decree. The learned Judge while allowing the Notice of Motion, imposed a condition directing the defendant to deposit a sum of Rs. 1,50,00,000/- within twelve weeks, pursuant to which, the ex-parte decree would be set-aside. It was further observed that if there was a default in compliance of the said condition, the decree will stand and thereafter the plaintiff was at liberty to execute the same in accordance with law.

9. It is also not in dispute, that the said order, only to the extent that it imposed a condition of deposit of Rs. 1,50,00,000/- on the defendant, was challenged by the defendant before the Division Bench of this Court. The Division Bench of this Court was pleased to dismiss the appeal, preferred by the defendant essentially on the premise, that neither had the defendant deposited the money within the stipulated period nor had he got the time to deposit the money extended, nor had he secured any interim relief, as a consequence of which the order never took effect and the decree remained as it is. Consequently, the appeal preferred by the plaintiff against the very same order, setting aside the ex-parte decree, was also dismissed. Against the said orders, the defendant filed an SLP in the Apex Court. Vide order dated 6th December, 2010, the Apex Court was pleased to pass the following order :

"Issue notice subject to the petitioner depositing Rs. 50,00,000/- (Rupees fifty lakhs only) with the Prothonotary and Senior Master of the Bombay High Court within eight weeks from today.

Mr. Dayan Krishnan, counsel accepts notice on behalf of the contesting plaintiff.

Counter affidavit, if any, may be filed within eight weeks.

Put up immediately thereafter.

During the pendency of the special leave petition execution of the decree shall remain stayed."

10. On 13th May, 2011, the Apex Court, was pleased to pass the following order :

"In pursuance of order passed by this Court on December 6, 2010, the petitioner has deposited a sum of Rs. 50,00,000/- (Rupees fifty lakhs only) with the Prothonotary and Senior Master of the Bombay High Court.

After some arguments Mr. Ranjit Kumar, learned senior counsel appearing for the special leave petition with liberty to move the learned Single Judge for reconsideration of the condition imposed for setting aside the ex-parte decree.

The special leave petition is dismissed as withdrawn.

In case, the petitioner files an application as proposed by him by June 17, 2011, the learned Single Judge of the High Court shall pass appropriate orders on it, after hearing both sides, in accordance with law.

Mr. Mukul Gupta, learned senior counsel appearing for the respondent states that the respondent shall not execute the decree till the final order is passed on the application filed by the petitioner."

11. Admittedly, the defendant filed an application on 16th June, 2011. It appears prima-facie, that no steps were taken by the defendant to have the matter listed on Board. Thereafter, the matter appeared on 5th September, 2013 and 12th October, 2015. The learned Single Judges were of the opinion that since the application was for modification of the order dated 13th November, 2009, it would be appropriate to place the said application before the same Judge who had passed the order dated 13th November, 2009. Accordingly, the matter was placed before the learned Single Judge, who after hearing the parties, passed the impugned order dated 20th November, 2015. The learned Single Judge after hearing the parties observed that it was not a fit case for modifying the condition of deposit of Rs. 1,50,00,000/-, for setting aside the ex-parte decree dated 23rd August, 2007. The learned Single Judge refused the request for reconsideration of the condition of deposit, essentially on the ground, that the initial order dated 13th November, 2009 was passed, after considering the contentions of the parties and that merely because the matter was carried to the Apex Court and liberty was granted to approach the Single Judge, does not mean that the condition should be modified. It was also observed that no material was brought on record to seek modification of the condition of deposit of Rs. 1,50,00,000/-.

12. No doubt, the defendant has not been diligent in pursuing the motion filed for reconsideration of the condition of deposit, inasmuch as, he did not take any steps to pursue the motion, which was filed pursuant to the liberty granted by the Apex Court in 2011. It also appears, that neither had the plaintiff taken any steps to have the motion listed on board, more particularly, as the statement made by the plaintiff's counsel before the Apex Court, had bound them. However, certain facts cannot be ignored or overlooked; (i) that the ex-parte decree was set-aside by the learned Single Judge vide order dated 13th November, 2009, after observing that there was no proper service on the defendant and that the defendant had made out a case for setting aside the ex-parte decree; (ii) that the plaintiff's suit, is a suit for damages, which will have to be assessed and quantified by leading evidence.

13. The plea raised by the learned Counsel for the plaintiff, before us, that the motion seeking reconsideration of the condition of deposit was infact, a review application and as such was not maintainable in law, cannot be accepted, as admittedly no such objection was raised by the learned Counsel for the plaintiff, before the learned Single Judge. Even otherwise, a motion seeking reconsideration/modification of the condition of deposit of Rs. 1,50,00,000/- cannot be said to be not maintainable.

14. It is not in dispute, that pursuant to the order passed by the Apex Court, the defendant had deposited a sum of Rs. 50,00,000/- before the Prothonotary and Senior Master, High Court, Bombay. The said amount of Rs. 50,00,000/- has

been invested by the Prothonotary and Senior Master, in the year 2011 and as such, a substantial interest thereon must have accrued till now. The learned counsel for the defendant has also made a statement that the defendant is ready to deposit a further sum of Rs. 25,00,000/-, without prejudice to his rights.

15. We are conscious of the fact, that the defendant by his conduct has tried to protract the hearing of the motion seeking reconsideration of the condition of deposit, filed pursuant to the liberty granted by the Apex Court. However, what cannot be ignored is the fact, that the ex-parte decree was set-aside by the learned Single Judge, on the premise, that the defendant was not served with a copy of the writ of summons and after being satisfied that on account of shifting of premises, due to Advocate's inaction, the defendant was prevented from appearing and defending the case. The defendant's plea in seeking to set aside the ex-parte decree also cannot be said to be not bonafide, looking at the observations of the learned Single Judge in setting aside the ex-parte decree. What also cannot be ignored is that the plaintiff's suit is for damages, which will have to be quantified by leading evidence and not on some admitted liability. What also cannot be ignored is the fact, that the defendant has also filed a recovery suit in the City Civil Court against the plaintiffs in 1997, with respect to the same transaction, which is the subject matter of the Suit filed by the plaintiff. It is well settled principle of law that a money decree is not stayed unconditionally. The conditions must be reasonable, having regard to all relevant factors and not onerous, harsh and unreasonable. We are fortified, in our view, with the decision of the Apex Court in the case of V.K. Industries and Others v/s M.P. Electricity Board, Rampur, Jabalpur , (2002) 3 SCC 159. In para 5 of the said judgment, it is observed thus :-

"5. Ordinarily, a money decree is not stayed unconditionally and the judgment-debtor would be put on terms. Even so, such conditions must be reasonable having regard to all relevant factors. Although ex parte decree was passed against the appellants, once it is set aside on the ground of non-service of suit summons the money decree did not exist for execution. It is no doubt true that in restoring a case the court may impose conditions to deposit costs or the decretal amount or some portion thereof or to ask the defendant to give security but such conditions should be reasonable and not harshly excessive. In the impugned order the appellants are put on terms to deposit a sum of Rs. 2,00,000/- and to furnish a bank guarantee for the remaining suit claim within a period of two months. In our view these terms are onerous, harsh and unreasonable in the facts and circumstances of the case and that too even before the trial of the suit on merits."

16. The defendant has already deposited Rs. 50,00,000/- in 2011. Mr. Dhakephalkar had made a statement that the defendant without prejudice to his rights, is ready to deposit a further sum of Rs. 25,00,000/-. Keeping the aforesaid principles in mind, we are of the opinion, in the peculiar facts and circumstances of this case, that it would be necessary and in the interest of

justice, to modify the condition of deposit of Rs. 1,50,00,000/- imposed vide order dated 13th September, 2009. Accordingly, the defendant shall in addition to Rs. 50,00,000/- which is deposited in 2011, deposit an additional sum of Rs. 25,00,000/- with the Prothonotary and Senior Master, High Court, Bombay within six weeks from today. The Prothonotary and Senior Master, High Court, Bombay to invest the said amount in Fixed Deposit with a nationalized Bank, initially for a period of one year, and which shall be renewed from time to time. Upon depositing the said amount, the defendant is permitted to file his written statement within one week from the date of deposit. Considering that the Suit is of the year 1996, it would be open to the parties to approach the learned Single Judge to request for an early hearing which would be considered by the learned Judge, on its own merits. Needless to state, that if there is a default in compliance of the deposit of the said amount of Rs. 25,00,000/- the decree would stand and the plaintiff will be entitled to execute the same in accordance with law.

17. Considering the defendant's conduct in not taking the motion seeking reconsideration of the order dated 13th September, 2009, directing deposit of Rs. 1,50,00,000/- on Board for almost 4 years, we deem it appropriate to impose costs on the defendant, which is quantified at Rs. 1,00,000/-. The said costs be paid to the plaintiff within three weeks from today.

18. Appeal stands disposed of on the aforesaid terms.

19. In view of the aforesaid, Notice of Motion does not survive and is accordingly disposed of.