(2002) 06 BOM CK 0055

In the Bombay High Court

Case No : Summons for Judgment No. 164 of 2000 & Summons for Judgment No. 164 of 2000 in Summary Suit No. 5502 of 1999

Suraj Sanghi Finance Ltd. APPELLANT

Vs

Credential Finance Ltd. and Others RESPONDENT

Date of Decision : 03-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 3
Contract Act, 1872 — Section 176

Citation : (2002) 06 BOM CK 0055

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : G.R. Joshi and N. Engineer, instructed by Desai and Diwanji, for the Appellant; Ravi Kadam and Birendra Saraf, i.b., M.K. Ambalal and Co., for the Respondent

Judgement

1. It is the case of the plaintiffs that they had granted an intercorporate loan to defendant No. 1 which was acknowledged by receipt dated 29-10-1996. The said loan was secured by personal guarantee of defendant No. 2. The intercorporate loan was thereafter acknowledged on several occasions. The documents form part of annexure to the plaint. By way of secured payments, defendants had pledged shares and had also issued cheques. It is the case of the plaintiff that when the cheques were deposited, they were dishonoured. Suit is filed under Order 37 of CPC. Receipt shows interest payable at the rate of 28.15% per annum.

2. On Summons for judgment being taken out, defendants have put in their appearance. Affidavit has been filed by one Deepak. Managing Director of the defend ant. I need not advert to the various averments in the affidavit as at the hearing of the Summons for judgment, on behalf of the defendants, it is principally contended as under :

(a) That the suit as filed is not maintainable as Summary Suit as the plaintiffs had security by way of pledged shares. Once there was security, the plaintiffs could have filed suit only on return of security or sale of securities. Having not so done, the suit as Summary suit would not be maintainable. The shares continue to be in possession of the plaintiffs. The judgment in State Bank of India Vs. Smt. Neela Ashok Naik and another, relied upon by the plaintiff does not support the case of the plaintiffs and they cannot maintain the summary suit while retaining the security. The judgment would be attracted when the suit is filed as a regular suit and not applicable in case of a Summary suit, which is covered by the special procedure under Order 37 of CPC.

(b) It is next contended that the suit against defendant No. 3 is not maintainable as Summary Suit. The mere fact that plaintiffs are not claiming judgment against defendant No. 3 or pressing summons for judgment is no answer. The suit as filed in these circumstances, is not maintainable as a summary suit against one of the parties and as such the summons for judgment will have to be withdrawn with leave to file fresh Summons for judgment after the plaint is properly constituted against defendant Nos. 1 and 2.

(c) Lastly it is contended that once the counterclaim as filed is accepted, it would mean that the suit as summary suit would not be maintainable as the learned Judge has allowed the defendants to file a counterclaim which means that the Defendants are at least entitled to set off against the claim of the plaintiff.

3. We may now deal with the first contention as to whether the suit as filed is maintainable as Summary Suit. The suit filed by the plaintiff is based on the receipt acknowledging receipt of a sum of Rs. 25 lacs. Carrying interest on the intercorporate deposit of 28.50% p.a. The said amount has been secured by defendant No. 2 along with defendant No. 1 by document of 10-6-1977 whereby defendant No. 1 and 2 on demand have jointly and severally promised to pay to the plaintiff the said amount, along with interest as set out therein. The said amount has also been secured by promissory note, cheques for the said amount as also pledge of shares. The suit therefore, is based on an agreement or in the alternative on a Negotiable instrument. The suit therefore, as a Summary suit is maintainable. The argument however, is that the Defendant had secured the plaintiff by pledging of shares and unless those shares were said or returned, the suit as summary suit will not be maintainable. Can it be contended that because collateral securities were given for the due repayment of the loan, it can be said that the suit as filed is not maintainable as a summary suit. On first principles not. Learned counsel for the plaintiff in support of his contention that the suit is maintainable as a summary suit has placed reliance in the judgment of a Division Bench of this Court in State Bank of India v. Nayak (supra). It is true that the said judgment was delivered in a regular suit. That to my mind is immaterial. What is material is the ratio descend of the judgment, no doubt bearing in mind the facts involved. The learned Division Bench of this Court speaking through Sabharwal, C. J. as His lordship then was, has construed the provisions of Section 176 of the Contract Act read with Section 2(7) of the Sale of Goods Act.

What, therefore, was in issue before the learned Division Bench was the construction of Section 176 of the Contract Act and Section 2(7) of the Sale of Goods Act. In that case, it was contended on behalf of the defendants who were the respondents in appeal, that as they had given instructions to the plaintiff/ appellants, to adjust the amount of F.D.s. lying as security with the appellant/ plaintiff and as the plaintiff had failed to adjust the same, they were not liable. The judgment of the Delhi High Court in Bank of Maharashtra Vs. Racmann Auto (P) Ltd., cited in respect of the legal duty cast on the plaintiff bank in respect of pledged goods was relied upon. The learned Division Bench construed the ratio of the judgment as set out below :

"Construing Section 176, it was held that the very wording of the section makes it clear that it is the discretion of the Pawnee to sell the goods in case the pawnor makes default but if the Pawnee does not exercise that discretion no blame can be put on the Pawnee and Pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security."

This submission of law was approved by the Division Bench as set out in Paragraph 13 in the following words :

"We are in respectful agreement with the legal proposition propounded in the aforesaid decision and thus there would be no question of judicious or arbitrary exercise of discretion by the Bank as to the time of appropriation of the amount from the collateral security to it in the form of FDRs."

The learned Division Bench also relied on the judgment of this Court in case of Gulamhusain Lalji Sajan v. Clara D''souza, AIR 1929 Bombay 471 where it was held that in case of a pledge the creditor has two rights which are concurrent and the right to proceed against the property is not merely accessory to the right to proceed against the debtor personally and on the same lines.

Even otherwise, to my mind the distinction sought to be made on behalf of the defendant is not apt. Defence available towards adjustment is distinct as to whether the suit is maintainable under Order 37. An adjustment of security perhaps could be a good defence available for granting conditional leave considering the nature of security and the amounts involved. It however, does not mean that the Summary suit cannot be filed if otherwise the other predicates of Order 37 of CPC. are satisfied. To maintain a summary suit all that plaintiff must show is that the suit falls within the predicates of Order 37. In the instant case, the suit is based on the receipt and agreement acknowledging the intercorporate loan and is secured by collateral securities as referred to earlier. To my mind therefore, the argument advanced on behalf of the defendant that the plaintiff had securities available and they had to first proceed against securities and or release them before maintaining a suit as summary suit, is clearly devoid of merits. Also not sustainable is the argument that the security had to be given up. u/s 176 of the Indian Contract Act, Plaintiff has a right to retain pledged goods, until such time defendants makes payments and then only need return of the pledged goods. The judgment of the Division Bench of this Court construing Section 176 has clearly held that a plaintiff has a right to file a suit for recovery of money without proceeding against pledged goods or other collateral securities. This right conferred on the plaintiff u/s 176 to my mind does not whittle down the right to maintain a suit as summary suit as long as plaintiff satisfies the Court that the suit is based on a written agreement, acknowledgment of debt or based on the negotiable instrument. That contention therefore, has to be rejected.

4. Insofar as second argument is concerned, plaintiffs have not pressed their claim for judgment against defendant No. 3. It is not possible to accept that the suit as filed against defendant Nos. 1 and 2 by the plaintiff is not maintainable as a Summary suit as reliefs against defendant No. 3 cannot be granted and as such he suit itself cannot be maintained as a summary suit. The suit against Defendant Nos. 1 and 2 is maintainable as summary suit. The fact that defendant No. 3 was not party to the agreement or had not given any collateral security at the highest would confer discretion to the Court to grant unconditional leave in favour of defendant No. 3. Reliefs in the Summary suit could have been granted to the Plaintiffs independently even in the absence of Defendant No. 3. Joinder of Defendant No. 3 or that such a suit would not be maintainable as a summary suit, is no answer to the maintainability of the summary suit against Defendant Nos. 1 and 2. It is only if the grant of relief against Defendant Nos. 1 and 2 is dependent on the presence of Defendant No. 3 or answering an issue against the said Defendant would the argument have merit. This is not so on the facts of the present case. In the instant case, defendant No. 3 at the highest will be entitled to unconditional leave to defend the suit which will then proceed against defendant No. 3 in regular course.

5. It is lastly contended that as the counter claim has been filed and has been accepted the suit as Summary suit would not be maintainable. Order 37 contemplates a specific procedure. The first step in the procedure is for plaintiff to file suit and cause summons to be served for appearance. Within the time stipulated appearance has to be filed. It is on filing of the appearance that the plaintiff thereafter have to take out summons for judgment and serve it on the defendants. It is only at the stage then the Court grants leave conditional or unconditional to contest the suit that the stage of filing written statement arises. A counterclaim can be filed along with the written statement. Therefore, merely because a counter claim has been filed, would not detract or result in the suit filed, as summary suit being treated as regular suit. Even otherwise the counterclaim was not taken on record by any speaking order. The issue was not in issue before the Court. It was not for consideration before the Court. Therefore, merely accepting the same, to my mind is of no consequence. In the instant case, the counter claim is for damages. It is not yet an ascertained amount or "debt". To my mind, therefore, it is not material for the purpose of considering the amount to be deposited in the event Court has to grant conditional leave. The Apex Court has settled the law that damages are not debt

as decided in Union of India (UOI) Vs. Raman Iron Foundry, . That contention must also be rejected.

6. It is lastly contended on behalf of the defendants that the plaintiff should not be allowed to withdraw the money. Withdrawal of money cannot be made a condition of granting leave to defend; in a case where the Court grants conditional leave to defend the suit. Plaintiffs, therefore, should not be allowed to withdraw the amount and the money should be deposited. It is contended that this flows from a bare reading of the provisions of Order 37, Rule 3 of the CPC Reliance is also placed on a unreported judgment of the Division Bench of this Court dated 14-2-1994 in Appeal No. 109 of 1994 in Summary Suit No. 1618 of 1991, in the case of Classic Strips Pvt. Ltd. v. Arrow Converters Pvt. Ltd. Let us therefore, first consider whether this Court can impose as a condition of leave to defend, a condition permitting the plaintiff to withdraw the amount against security or otherwise. Order 37, Rule 3(3) as amended by this Court in State of Maharashtra reads as under :

"The Defendant may at any time within ten days from the service of such summons to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as the Judge appears just."

Similarly Sub-rule 3(5) as amended by the Amendment Act, 1976 reads as under :

"The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitled him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just : . . ..

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

The issue of grant of leave to defendant is no longer res integra in view of the decision of the Apex Court in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . In Paragraph 8, the principles applicable to cases covered by Order 37 of CPC have been set out. These principles have been reiterated in M/s. Sunil Enterprises and Another Vs. SBI Commercial and International Bank Ltd., . They may be summarized as under (at page 2318 of AIR) :

"(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bone fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defendant is illusory or sham or practically moonshine, then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

If one looks at predicate (e) even if the defendant has no defence or defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence. It is therefore, clear that even in those cases of moonshine defence or whether the defence is illusory or sham, leave to defend may be granted on the defendant''s paying the amount into the Court or otherwise securing the amount would it be therefore, within the jurisdiction of the Court in such a case where leave to defend is granted purely as a mercy, to impose a condition to permit withdrawal of the money by the plaintiff on furnishing security of otherwise. In M/s. Classic Strips Pvt. Ltd. (supra) the judgment in Mechalec Engineers & Manufacturers v. Basic Equipment Corporation (supra) had not been taken into consideration. Similarly the attention of the learned Division Bench was not invited to the judgment of the Apex Court in AIR 1990 2218 (SC) . In M/s. Classic Strips Pvt. Ltd. (supra) conditional leave was granted without leave to withdraw the money. Leave was granted on the defendant''s depositing the money with Prothonotary & Senior Master. An appeal was preferred against the said order. The appeals was dismissed." Matter then came up before the Chamber Judge. At that stage, an oral application was moved for withdrawal of the moneys. That was granted. It was that order that was challenged. The learned Division Bench observed that the Chamber Judge would have no jurisdiction to pass such order. To my mind, the Judgment would be clearly distinguishable for reasons to be stated. Firstly in granting conditional leave, it is open to the Court to Impose conditions. There is no reason as to why one of the conditions should not be as to withdrawal of the money on furnishing security. Secondly, in Raj Duggal v. Ramesh Kumar Bansal, the Apex Court in the matter arising out of order 37 in a case where the defence can be described as more than "shadowy" but less than "probable" had granted leave to defend. While granting leave to defend, a condition was imposed that the amount of Rs. 20,000/- deposited in the case during the pendency of the suit be paid to and retained by the Respondent-plaintiff subject to the condition that if ultimately respondent-plaintiff fails in the suit, he shall be liable to restitute the said sum of Rs. 20,000/- to the appellant defendant with interest thereon at 9 per cent per annum. It is therefore, clear that there is jurisdiction in the Court to direct withdrawal of money and hold it towards the suit account. Thirdly the matter before the Division Bench of this Court arose in a case where no condition was imposed while granting leave to the defendant to defend the suit, to withdraw the money. On the contrary it was directed to be deposited. That judgment based on those facts, therefore, would be of no assistance as it is clearly distinguishable. The issue in issue in that case, was whether in a case where leave to defend had been granted with a condition to deposit the money, but without a direction for withdrawal, could the Chamber Judge direct withdrawal of the money on furnishing security or otherwise. In my opinion, when this Court grants leave to defend purely as an act of mercy, or where part claim is admitted, considering the relief, it will be open to impose a condition, to permit the plaintiff to withdraw the money on furnishing bank guarantee or security or otherwise to the satisfaction of the Court, pending the hearing and final disposal of the suit. This flows from the judgment in Mechalec (supra). The plaintiff who otherwise would be entitled to judgment, merely because leave is granted as mercy should not be denied the right to retain the money during the pendency of the suit subject to further orders in the suit as to interest or otherwise. Even otherwise considering justice, the money remains invested in the Court. The plaintiff who otherwise is entitled to the money because of laws delay will be denied the use of the money for a long period. Why should in a cases where there is no legal bar, the plaintiff be denied the same. The ends of justice could be met by imposing suitable conditions as to security, so that the money is brought back and is available for refund to the Defendant, if the suit is dismissed or otherwise.

7. In this case, really speaking the defences are moonshine but as the defendant Nos. 1 and 2 seeks trial, conditional leave is granted on the defendants depositing in this Court the sum of Rs. 35 lacs, within twelve weeks from today. On such amount being deposited, liberty to the plaintiff as a condition of leave to defend to the Defendants, to withdraw the amount on furnishing bank guarantee to the satisfaction of the Prothonotary & Senior Master and to keep it alive during the pendency of the suit.

It may be made clear that this Court by the present order has merely considered whether the suit is maintainable as a summary suit based on receipt and acknowledgment and the reliefs to be granted. The issue of issuance of cheques and the condition on which the cheques were to be encashed or deposited has neither been considered nor decided and it will be left open to the Court considering the issue to decide the same uninfluenced by any observations in this order on that count.

In the event the defendant Nos. 1 and 2 deposit the aforesaid amount, the suit to be transferred to the list of Commercial Causes. The defendants to file their written statement within six weeks of deposit. Discovery and inspection within four weeks thereafter.

In the event, the Defendant Nos. 1 and 2 fail to deposit the aforesaid amount, liberty to the Plaintiffs to apply for further orders.

Defendant No. 3 is granted unconditional leave to defend the suit. Defendant No. 3 to file written statement within 12 weeks from today. Inspector and discovery within four weeks thereafter.

Summons for judgment disposed off accordingly.