

(1998) 12 BOM CK 0031

In the Bombay High Court

Case No : Summons for Judgement No. 748 of 1996, in Summary Suit No. 4283 of 1995

The United Western Bank Ltd.

APPELLANT

Vs

Marmago Steel Ltd.

RESPONDENT

Date of Decision : 11-12-1998

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 227

Citation : AIR 1999 Bom 202 : (1999) 1 ALLMR 385 : (1999) 2 BomCR 149 : (1999) 1 MhLj 730

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

Bench : Single Bench

Advocate : Sanglikar, instructed by S.W. Kulkarni, for the Appellant; D. Madon and J.P. Sen Advs., instructed by Federal and Rashmikan, for the Respondent

Judgement

S.S. Nijjar, J.—The present suit was filed on 30th October, 1995. Summons for Judgment was taken out on 30th December, 1996. Writ of Summons was also stated to be served on 16th December, 1995. Clearly thus Summons for Judgment have not been taken out within six months. Thus under Rule 227 of the High Court. O.S. Rules, the suit ought to have been placed on Board for dismissal. Furthermore. Mr. Sanglikar very fairly points out that there is a mistake about the calculation of interest. In view of the above he points out that it would be necessary to withdraw the present Summons for Judgment and to take out fresh Summons for Judgment after making the necessary amendment in the plaint.

2. Mr. Madon, learned Counsel appearing for the defendants, on the other hand points out that in view of the gross delay in taking out the Summons for Judgment, the defendants are entitled to unconditional leave. In support of this proposition he cites a judgment of this Court in the case of Central Bank of India Vs. Femme Pharma Ltd. and Others, . In the aforesaid judgment in paragraph 4 it is held as follows :

"In view of the fact that the summons for judgment has been taken out after such delay, unconditional leave to defend. Suit transferred to the list of long causes. Written statement within 8 weeks. Usual orders for discovery and inspection."

This judgment has also been followed by Justice Deshpande in his order dated October 6, 1998 in Summons for Judgment No. 385 of 1997 in Summary Suit No. 1584 of 1995. Mr. Sanglikar, however, relies on a judgment of Justice N.D. Vyas dated 26th February, 1994 in Summons for Judgment No. 731 of 1991 in Suit No. 2684 of 1990. In this judgment, it is noticed that the first defence which was canvassed was that the Summons for Judgment not having been taken out within six months unconditional leave should be granted. Justice Vyas held that Rule 227 of the High Court, O.S. Rules gives wider discretion to the Court especially in view of the fact that there is no defence on merits. Mr. Sanglikar submits that the aforesaid observation of Justice Vyas is in conflict with the view taken by Justice Mody. In paragraph 2 of the order in the case of Central Bank of India (supra) Justice Mody has held as under :

"2. Under the old rules, the Court's discretion was limited to sufficient cause being shown and if it was not shown the suit had to be dismissed. As against this the present rule only provides that the suit shall be placed on board for dismissal but it does not provide as to what is to happen thereafter. In my view the Court will, therefore, have a wider discretion now than before and the Court is not bound to dismiss the suit."

3. A perusal of the passages reproduced above shows that Justice Vyas has held that the Court has a discretion to decree the suit ex-parte even if the Summons for Judgment is taken out after six months, if the Court on examination of the defences find the same to be frivolous or of technical nature. Mr. Justice Mody, however, held that Rule 227 does not provide as to what is to happen when the suit is placed on Board for dismissal. It was held that the Court will have a wider discretion now than before and the Court is not bound to dismiss the same. The submissions made by Mr. Sanglikar with regard to the conflict in the view expressed by the two learned Judges do not survive in view of the decision given by a Division Bench of this Court in the case of M/s. Randerian & Singh (Pvt.) Ltd. v. Indian Overseas Bank, Appeal No. 1060 of 1986 in Summons for Judgment No. 307 of 1986 in Summary Suit No. 3212 of 1985 (S.K. Desai & N.K. Parekh, JJ.). The Division Bench held as follows:

"Under the Rules of this Court strict conditions are imposed on the defendants in a summary suit. They must file their appearance in Court within a very short specified period and failure to do so entitles the plaintiffs to obtain an ex-parte decree against them. It must logically follow that there must be equally stringent requirements postulated on the plaintiffs. One of these requirements would be that they must not in the suit make a claim not warranted by the contract or under a statutory provision. If it can be demonstrated, as it can be in the instant case, that the plaintiffs have in the plaint made a claim for interest not warranted

by the statutory provision or by the contractual document, then the suit must be one which cannot be accepted as a summary suit. Once this is demonstrated, one of two consequences must follow. The first and the more obvious is to grant to defendants unconditional leave to defend the suit and transfer the same to the appropriate cause list long cause, short cause or commercial cause. The present case would fall in the last category. There is another way open and that is for the plaintiffs who are faced with such defence in the affidavits made on the Summons for Judgment to apply for permission to withdraw their Summons for Judgment with liberty to take out a fresh Summons for Judgment after amending the plaint and putting their house in order. Recording of a statement to give up or accept reduced interest is not sufficient."

A perusal of the aforesaid observations of the Division Bench shows that if a claim is made by the plaintiffs in the plaint for interest not warranted by the statutory provision or by the contractual document, then the suit must be one which cannot be accepted as a summary suit. Once this is demonstrated, one of the two consequences must follow. The first and the more obvious is to grant the defendants unconditional leave to defend the suit. The second is to permit the plaintiffs to withdraw the Summons for Judgment with liberty to take out a fresh Summons for Judgment after amending the plaint and putting their house in order.

4. The aforesaid Division Bench Judgment has been followed by another Division Bench in the case of Hydraulic and General Engg. Ltd., and another v. U.C.O. Bank 1998(1) L.J. 793. In that case the learned Single Judge had accepted the statement made by the Counsel for the plaintiff to the effect that the plaintiffs shall restrict their claim only to the amount of Rs. 44,91,631.94 and seek decree only in the said sum which was the amount of guarantee. Earlier, however, the learned Single Judge had accepted the defence of the defendants therein that the claim towards interest as made by way of Exh. BB to the plaint could not have been included in a summary suit. Counsel appearing for the plaintiffs before the learned Single Judge, on instructions, stated that in case the order of conditional deposit is passed and non-compliance therewith will entitle the plaintiffs to get the suit set down for ex-parte then in that event the plaintiff shall restrict their claim as mentioned above. The learned Judge accepted the statement and recorded the same. Thereafter conditional leave was granted to the defendants to defend the suit on deposit of Rs. 25 lakhs within ten weeks from the date of the order. This order of the learned Single judge was challenged in the appeal. The Division Bench allowed the appeal. In para 6 of the said judgment, the submission made by the Counsel for the defendants is noticed. In paragraph 7 of the judgment, the Division Bench accepted the aforesaid contentions. It was held that the observations made by the Division Bench in Appeal No. 1060 of 1986 as reproduced in para 3 above covers the controversy before the Division Bench in favour of the appellants. The Summons for Judgment was, therefore, dismissed. It was further directed that it would be open to the plaintiffs to amend the plaint and then take out Summons for Judgment after putting their house in order. The

plaintiffs were granted four weeks time to complete the exercise. It was further directed that if not, unconditional leave to defend is granted to the defendants.

5. Keeping the aforesaid observations in view, I am of the considered opinion that the Court has a discretion as to whether to permit the Summons for Judgment to be the withdrawn and enable the plaintiffs to take out fresh Summons for Judgment after amending the plaint or to grant unconditional leave. As noticed above, Justice Vyas has refused to exercise discretion and decreed the suit.

6. In my view, the interpretation placed by Justice Vyas on Rule 227 of the High Court, O.S. Rules, is contrary to the law laid down by the Division Bench in Appeal No. 1060 of 1986 (supra). The aforesaid Division Bench judgment was given on 24th February, 1987 whereas Justice Vyas has given the judgment on 28th Feb. 1994. The aforesaid judgment of the Division Bench was not brought to the notice of Justice Vyas. On the other hand the view taken by Justice Mody seems to be in consonance with the view taken by the Division Bench in Appeal No. 1060 of 1986 which has been confirmed subsequently by another Division Bench in the case of Hydraulic and General Engg. (supra). The view taken by Justice Mody has also been followed by Justice Deshpande in order dated 6th October, 1998 in Summons for Judgment No. 385 of 1997 in Summary Suit No. 1584 of 1995. In the present case Mr. Sanglikar has himself admitted that the plaint in the present form could not be entertained as a summary suit. He had submitted that since there is a conflict between the views taken by Justice Vyas and Justice Mody the matter deserves to be referred to a larger Bench. In view of the fact that two Division Benches have already laid down the law, the submission made by Mr. Sanglikar has to be rejected.

7. In view of the above, I am of the considered opinion that the defendants are entitled to unconditional leave to defend the suit. The plaintiff will be at liberty to take out any necessary amendments, if so advised. In view of the above, the request for withdrawal of the Summons for Judgment is declined.

8. Unconditional leave to defend the suit is granted to the defendants. Suit transferred to the list of Commercial causes. Written statement to be filed within 12 weeks from today. Affidavit of documents within eight weeks thereafter. Usual order as to discovery and inspection. Suit to come up on Board in usual course.

Summons for Judgment is disposed of accordingly. No order as to costs.

Prothonotary to act on the copy of the order certified by the Chamber Registrar of this Court.

Certified copy expedited.

9. Order accordingly.