
(2005) 10 BOM CK 0119

In the Bombay High Court

Case No : Civil Rev. Application No. 766 of 1998

UCO Bank

APPELLANT

Vs

Ramchandra Namdeo Shirke and Others

RESPONDENT

Date of Decision : 17-10-2005

Acts Referred:

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

Citation : (2006) 1 ALLMR 454 : (2007) 1 BC 345 : (2006) 1 MhLj 405

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : V.G. Muzumdar, for the Appellant;

Final Decision : Allowed

Judgement

B.H. Marlapalle, J.—The petitioner-bank had instituted Special Civil Suit No. 94 of 1990 and the said suit came to be decreed by the learned Civil Judge, Senior Division at Baramati on 16-11-1992. The defendant Nos. 1 to 7 were directed to pay jointly and severally an amount of Rs. 4,25,073.45 to the plaintiff with the proportionate costs and it was further directed that the principal amount of Rs. 1,50,000/- shall carry interest on the agreed rate of 16.1/2% per annum from the date of the suit till realisation of the amount. The defendant Nos. 1 and 7 are the husband and wife and defendant Nos. 4 and 6 are their sons. The defendant No. 1 was the manager of the joint family and was dealing in the construction business. On his approach, the plaintiff-bank had granted him cash credit facility of Rs. 75,000/- on executing the demand pro note dated 10-7-1981 (Exhibit 52). He had agreed to repay the said amount with interest at the rate of 19.50% per annum with quarterly rests. By way of security, he executed simple mortgage of the agricultural land on 26-7-1981 (Exhibit 35). Thus, the defendant No. 1 was the mortgagor and plaintiff was the mortgagee as per the mortgage deed (Exhibit 57). Defendant Nos. 2 and 3 were the guarantors for the said loan and they had executed deed of guarantee on 10-7-1981 (Exhibit 54). The cash credit payment was renewed and enhanced to Rs. 1,50,000/- on 18-10-1982 on the

request of the defendant No. 1 and defendant No. 2 executed deed of guarantee (Exhibit 63) whereas the defendant No. 1 hypothecated goods and material by executing an agreement of hypothecation (Exhibit 64). The defendant could not repay the loan as agreed and as on 13-2-1988, he had a debt of Rs. 2,178,350.60. He executed an acknowledgment of the said balance (Exhibit 40).

2. It appears that the decree was initially challenged in first appeal No. 253 of 1994 and the defendant No. 2 had received notice in the said appeal on 22-5-1995. He also received subsequent to the notice, notice in special Darkhast No. 1/94 on 19-6-1995. He approached the Court of learned Civil Judge, Senior Division at Baramati and filed special civil suit No. 103 of 1995 on or about 16-11-1995 and prayed for setting aside the decree dated 16-11-1992 passed by the very same Court in Special Civil Suit No. 94 of 1990. The present petitioner filed written statement and opposed the suit. He filed an application in the said fresh suit on 13-1-1997 and prayed for framing criminal issues. This application was filed before the issues were framed at Exhibit 22 by the trial Court on 24-6-1996. The trial Court therefore, passed an order on 26-6-1997 and directed that the issue No. 1 shall be treated as the preliminary issue. The said issue read as under :

"Whether the suit is tenable in law in view of the provision made under CPC for setting aside the decree by preferring appeal or by making an application.

3. After hearing both the parties, the learned Judge of the trial Court was pleased to answer the preliminary issue in the affirmative and thus, in favour of the plaintiff vide her order dated 14-10-1997 and hence this revision application against the said order.

4. According to the petitioner-bank, fresh suit was not maintainable as there was an express remedy available to the plaintiff who was the defendant No. 2 in special civil suit No. 94 of 1990 (referred to as the first) and this remedy was twofold viz. (a) to file an application under Order IX, Rule 13 for setting aside the ex parte decree and to restore the suit to the file or (b) to challenge the decree by filing an appeal. The bank conceded that the original defendant No. 2 also had a remedy of instituting a suit for setting aside the ex parte decree but only on the ground of fraud and not on any other ground. In support of these contentions, the bank relied upon the following decisions :

(i) Nathu v. Singhai, AIR 1976 M.P. 136, (ii) Vali Mohamed Jamal Mansuri Vs. Vali Mohamed Suleman, .

4A. In short, the contention of the bank before the trial Court in the fresh suit was that an independent suit or a fresh suit is maintainable to set aside an ex parte decree only on the ground of fraud or collusion and not on any other ground. As per the bank, the original defendant No. 2 in the fresh suit had failed to make out a case of fraud or collusion and therefore, fresh suit was not maintainable. The learned Judge of the trial Court took the view that the provisions of Order IX, Rule 13 do not provide for a bar to institute a fresh suit

and it provided only an alternate remedy to set aside an ex parte decree. The trial Court agreed that fresh suit can be entertained against an ex parte decree on the ground of fraud or collusion but also added that such a suit can also be entertained on the ground of improper service of suit summons.

5. Surprisingly, in the impugned order, though the trial Court discussed about the principles in entertaining the fresh suit, it failed to record any finding as to whether the ex parte decree, prima facie, appeared to be by way of fraud or collusion or the decree came to be passed in the absence of proper service of suit summons. Mr. Muzumdar, the learned Counsel for the petitioner-bank relied upon the decision of the Division Bench of this Court in the case of Ibrahim Harun Jaffer v. Jusuf Hussain Jaffer, BLR 22 798 and also the decision of Single Bench of Calcutta High Court in the case of Chiranjilal Agarwalla and Another Vs. Jai Hind Investments and Industries Pvt. Ltd. and Another, . In Jaffer's case (supra) this Court stated, "Now it is perfectly well-recognised that it is only on certain grounds that the Court will entertain a suit to set aside a decree, and that is if it can be proved that the decree has been obtained by fraud. Order IX, Rule 13 of the Code prescribes the course which should be followed by a party against whom a decree has been passed ex parte. He has to apply to the Court which passed the decree for an order to set aside. If he succeeds in satisfying the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court is entitled to make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, or the party against whom an ex parte decree is passed may appeal, but he certainly cannot start a fresh proceeding to set aside the decree.

6. Rule 13 of Order IX of CPC states that in any case in which a decree is passed ex parte against the defendant, he may apply to the Court by which the decree was passed for an order to set it aside and if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such term as to costs, payment into Court or otherwise as it thinks fit, or the party against whom an ex parte decree is passed may appeal, but he certainly cannot start a fresh proceeding to set aside the decree. Language of this provision clearly shows that it provides for a remedy against an ex parte order if the Court is satisfied that the summons was not served or the defendant concerned was prevented by any sufficient cause from appearing when the suit was called out for hearing and the application could be submitted by any other defendant who was not so served or who could not appear when the suit was called out for hearing. Similarly, there is a remedy of appeal against the ex parte decree by any or all other defendants. A copy of the plaint of the fresh suit has been placed on record and prima facie, the pleadings do not show the case of fraud made out by the plaintiff/defendant No. 2. On the other hand, it is averred by the plaintiff that the summons was not served in special civil suit No. 94 of 1990 and therefore, he could not defend the

suit. The plaint also alleges that the plaintiff-bank and the defendant No. 1 and 4 to 7 joined hands with the bank and manipulated the proceedings so as to obtain the decree. It is also pertinent to note that the original defendant No. 8 i.e. the Maharashtra State Co-operative Land Development Bank had challenged the decree passed in Special Civil Suit No. 94 of 1990 by filing First Appeal No. 253 of 1994 and the said appeal came to be dismissed in default and interlocutory order was passed in the First Appeal on 4-12-1996 and the petitioner-bank appeared on notice and filed C.A. No. 7713 of 1999 praying for vacating the interlocutory order. The First Appeal came to be dismissed in default due to the conditional order passed on 11-6-2002 by this Court and thus the appeal was pending for about eight years.

7. The trial Court held that the provisions of Order IX, Rule 13 of CPC do not operate as a bar to file a fresh suit. That may be so, but a fresh suit can be filed on limited ground of fraud so as to set aside the ex parte decree or on the ground of collusion. As noted earlier, in the instant case, the pleadings in the fresh suit do not make out any case of fraud or collusion and, therefore, the learned Counsel for the petitioner was right in his submission that the provisions of Order IX, Rule 13 of CPC would act as an implied bar against the fresh suit lest in every case of ex parte decree fresh suits will be filed and entertained as a matter of rule and as observed by the Division Bench of this Court in the case of Ibrahim Harun Jaffer (*supra*), there would be no end to litigations and an unsuccessful party cannot file another suit to set aside an ex parte decree because he is not satisfied with it on any other ground. If the unsatisfied party succeeds in satisfying the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called out for hearing, the Court, is entitled to make an order setting aside the ex parte decree by entertaining application under Order IX, Rule 13 of Civil Procedure Code, but certainly he cannot start a fresh suit/proceedings to set aside such an ex parte decree. Thus, the view taken by the trial Court in the impugned order is not in keeping with the law laid down by this Court in Ibrahim Harun Jaffer's case and, in fact, it is a contrary view which cannot be sustained.

8. Hence, this revision application succeeds and the same is hereby allowed. The impugned order dated 14-10-1997 passed by the learned Civil Judge, Senior Division at Baramati is hereby quashed and set aside. It is held that Special Civil Suit No. 103 of 1995 is not maintainable in view of the remedy to file an application under Order IX, Rule 13 of CPC so as to set aside the ex parte decree. Rule made absolute accordingly with no order as to costs.