

ingale

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2703 OF 2015

Gammon India Limited ... Petitioner

Vs.

The Bengal Mill Stores Supply Company ... Respondent

Dr.Abhinav Chandrachud i/b Kurdukar Associates, Advocate for
Petitioner.

Mr.Nitesh V.Bhutekar, Advocate for Respondent.

CORAM : R. G. KETKAR, J.

DATE : 28th JULY, 2015

P.C. :

. Heard Dr.Abhinav Chandrachud, learned Counsel for
petitioner and Mr.Nitesh V.Bhutekar, learned Counsel for respondent
at length.

2. By this Petition under Article 227 of the Constitution of
India, original defendant has challenged the judgment and order
dated 10/10/2014 passed by the learned Judge, City Civil Court at
Greater Bombay in Notice of Motion No. 534 of 2014 in Summary
Suit No. 4176 of 2008 (High Court Suit No. 1976 of 2008). By that
order, the learned trial Judge allowed the Notice of Motion taken out
by the respondent, hereinafter referred to as plaintiff, for restoration
of the Suit which was dismissed on 21/09/2013.

3. In support of this Petition, Dr.Chandrachud submitted

that plaintiff had instituted Suit for recovery of Rs.31,39,405/- against the petitioner, hereinafter referred to as defendant, alongwith interest @ 24% per annum. He submitted that the Suit was originally instituted in this Court. In October 2012, it was transferred to the City Civil Court Bombay. The Suit was listed on various dates namely 09/11/2012, 15/03/2013 & 30/08/2013. On these dates, none appeared for the plaintiff. Even plaintiff was not present. On 30/08/2013, matter was adjourned to 21/09/2013.

Roznama of 21/09/2013 reads as under :

“CORAM : H.H.J.SHRI A.S.MAHATME (C.R.NO.27)
Adv.Mr.Bhute for plaintiff present. Adv. A.Kurudkar for deft. present. Adv.Mr.Bhute is not on record and prayed for adjournment on the ground, he is going to file Vakilpatra. I do not find substance in the submission made by adv. Therefore, suit is dismissed. Accordingly, the suit is disposed of.”

4. Perusal of above roznama shows that Advocate Bhutekar (wrongly mentioned as Bhute) was present for the plaintiff. Advocate A. Kurudkar was present for the defendant. It was observed that Bhutekar (wrongly typed as Bhute) was not on record and prayed for adjournment on the ground that he was going to file Vakilpatra. The learned trial Judge did not find any substance in the submission made by advocate Bhuteka and, therefore, dismissed the Suit.

5. Dr. Chandrachud submitted that the Suit was dismissed on merits and was not dismissed in default. The plaintiff thereafter

took out Notice of Motion for condoning the delay of 115 days in filing the Motion as also for setting aside order dated 21/09/2013 thereby restoring the Suit to the file. Dr.Chandrachud submitted that basically the Motion is filed under Order 9 Rule 13 of the Code of Code of Civil Procedure, 1908 (for short 'C.P.C.') itself is not maintainable as the Suit was dismissed on merits. He, therefore, submitted that plaintiff ought to have instituted substantive First Appeal challenging the decree dated 21/09/2013. He submitted that in any case, no sufficient cause is made out for condoning the delay as also for setting aside the order dated 21/09/2013. In support of his submissions, he relied upon following decisions.

- i) State Bank of India Vs. M/s.Kumar Apparel Industries, AIR 2003 Bombay 128.
- ii) Harsukh B.Gohel Vs. Vinod Kumar Bindlish in Notice of Motion No. 946 of 2011 in Summary Suit No. 2388 of 1997 decided on 27/01/2014 (Coram: S.C.Gupte, J.)

6. He submitted that in case of **State Bank of India** (*supra*), the learned Single Judge of this Court observed in paragraph 9 that on a plain construction of scheme of Order IX, Rules 8 and 9 of the C.P.C., it is clear that those provisions apply only where the defendant appears and the plaintiff does not appear. The phrase does not appear must be given its plain and natural meaning and cannot include a case where advocate appeared but cannot or refuse to go on with the matter. Dr.Chandrachud submitted that in that case, Suit

appeared on daily board on 29/11/2001 for framing issues. The advocate for the plaintiff appeared before the Court. He, however, stated that he is not ready to go on with the matter. The Court did not find any valid reason and accordingly, learned Single Judge dismissed the Suit for non-prosecution. Dr.Chandrachud submitted that in the present case, Mr.Bhutekar appeared for the plaintiff on 21/09/2013 and sought time for filing vakalatnama. Applying tests laid down by this Court in the case of **State Bank of India** (*supra*), it has to be concluded that plaintiff was represented by an advocate and consequently, provisions of Order 9 Rules 8 & 9 of C.P.C. are not applicable.

7. Dr.Chandrachud relied upon the decision of learned Single Judge of this Court in the case of **Harsukh B.Gohel** (*supra*). In that case, the learned Single Judge of this Court (**Coram:S.C.Gupte, J.**) considered following decisions.

- i) Prashant Vagaskar Vs. Municipal Corporation of Greater Bombay, 2002 (4) Bom C.R. 363.
- ii) Satish Chandra Mukerjee Vs. Ahara Prasad Mukerejee, (1907) ILR 34 Cal.403.
- iii) Shri Subhash Mataji Pulate Vs. Smt. Laxmibai Somaji Khillare, 2005(3) ALL MR 828.
- iv) M/s.Devidayal Sales Pvt.Ltd.Vs. The State Trading Corporation of India, Notice of Motion No. 4424 of 2007 in Suit No. 725 of 1979 decided on 25th February 2009 (Coram: A.S.Sayed, J.)
- v) Bhalchandra Ganesh Naik Vs. Sona Hotel, 2009(3) Bom.C.R.780.

vi) Prakash Chander Manchanda Vs. Smt.Janki Manchanda, AIR 1987 SC 42.

vii) ICICI Bank Ltd. Vs. Vikram Seth, 2012(3) LJSOFT 22.

viii) State Bank of India (*supra*).

8. Dr.Chandrachud submitted that in paragraph 34, the learned Single Judge held that decisions referred by the two learned Single Judges of this Court in **State Bank of India** (*supra*) and **ICICI Bank Ltd.** (*supra*) were rendered per incuriam since they did not consider the decisions of coordinate jurisdiction of our Court as also decision of the Apex Court in the case of **Prakash Manchanda** (*supra*). Dr.Chandrachud submitted that the learned Single Judge ought to have referred the matter to a Larger Bench if he was not agreeable to the ratio laid down in these cases. In support of his submission, he relied upon decision in the case of *State of Bihar Vs. Kalika Kuer* (2003)5 Supreme Court Cases, 448. He also relied upon decision of this Court in the case of *Balu @ Madhavrao Shankarrao Vs. Radhakkabai Panditrao Ghorpade*, 2004(1) Bom.C.R. 77. In this case, the defendants did not appear though they had filed written statement. No evidence was laid on their behalf. The learned Single Judge of this Court held that case is covered by Order 17 Rule 2. The said rule requires the Court to fall back on any of the modes prescribed in Order 9. It was further observed in paragraph 14 that since the plaintiffs appeared and the defendants

did not appear when the suit was called on for hearing the provisions of Order 9 Rule 6 will apply to the case. In any case, Dr.Chandrachud submitted that though the learned trial Judge has allowed the Motion by observing that heavy costs are required to be imposed, costs imposed is illusory and not realistic.

9. On the other hand, Mr.Bhutekar supported the impugned order. He submitted that though earlier dates, namely on 09/11/2012, 15/03/2013, 30/08/2013 neither plaintiff nor his advocate appeared, he appeared on 21/09/2013. He sought time for filing vakalatnama. The learned trial Judge observed that Mr.Bhutekar was not on record and therefore, did not find substance in the submissions made by him. The Suit was dismissed. He submitted that order of dismissal cannot be said to be on merits of the case and the Suit was dismissed in default and accordingly, Motion was taken out under Order 9 Rule 13 of C.P.C. which is perfectly maintainable. He further submitted that the learned trial Judge came to the conclusion that cause set out in the affidavit in support constitutes a sufficient cause and accordingly, allowed the Motion subject to imposing costs of Rs.10,000/- He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the

material on record. The moot question is whether the Motion taken out by the plaintiff under Order 9 Rule 13 of C.P.C. is maintainable and if so, whether plaintiff has made out a sufficient cause for restoration of the Suit. I have already extracted order dated 21/09/2013 passed by the learned trial Judge. As noted earlier, the learned trial Judge noted that advocate Bhutekar (wrongly mentioned as Bhute) was present for the plaintiff and advocate A.Kurudkar was present for the defendant. The learned trial Judge thereafter observed that advocate Bhutekar was not on record and prayed for adjournment on the ground that he was going to file vakalatnama. The learned trial Judge did not find substance in the submission made by advocate for the plaintiff and accordingly, dismissed the Suit. In my opinion, dismissal cannot be said to be on merits of the case. The learned trial Judge did not advert to merits of the case at all. The purport of the order is that since Bhutekar was not on record, none appeared for the plaintiff and accordingly, the learned trial Judge proceeded to dismiss the Suit in default. In my opinion, the said dismissal cannot be said to be dismissal on merits. The learned trial Judge did not record any finding touching the merits of the case. It is, therefore, required to be held that Suit was dismissed in default.

11. The question is whether the appearance of Mr.Bhutekar can be said to be an effective appearance. In the case of **Hasrukh**

B.Gohel (*supra*) , the learned Single Judge has considered this aspect in some what great detail. In paragraph 21 of that report, the decision of the learned Single Judge of this Court in the case of **Prashant Vagaskar** (*supra*) was considered. In that case, the learned Single Judge has observed thus :

“When the plaintiffs were found to be not ready with their evidence, can it be said that the trial Court was justified in treating the mere physical presence of the litigant as appearance for the purposes of prosecuting the suit. This point has been elaborately dealt with by some of the High Courts in India like those in *Manannisa vs. Ramkalpa Gorain* (1907) ILR 34 Cal. 235, *Satishchandra vs. Ahana Prasad*, (1907) ILR 34 Cal 403 (F.B.), *Lalji Sahu vs. Lachmi Narain*, AIR 1918 Patna 351. In all these cases, it has been uniformly held that appearance (mere presence) does not mean physical presence of the party concerned, but appearance must be purposeful for the purpose of prosecuting the case or suit pending in the Court. In other words, appearance/presence should be for the purposes of taking part in the proceeding and that it includes preparedness to cite evidence and/or to produce documents or to take any step for disposal of the suit/case as may be considered necessary. Therefore, if a party to a suit for some reason or other is precluded from being ready to take part in the prosecution of the suit but somehow manages to come with a view that the case should be got adjourned for some other day, his appearance in such a circumstance will not amount to an appearance as contemplated under Order 17, Rule 2 of Civil Procedure Code. In this view of the matter, the appearance of the plaintiff on 30-8-2001 was no appearance for the purpose of the suit.”

12. In paragraph 22, the learned Single Judge referred to the Full Bench decision of the Calcutta High Court in the case of **Satish Chandra Mukerjee** (*supra*) and quoted paragraph from that decision which is to the following effect :

“The term 'appearance' is nowhere defined in the Code and as pointed out by Benson, J. in *Seeley V.*

Evans (1838-19 Wendell 459) has several significations the word must always be understood in reference to the particular subject matter to which it relates and the purpose or end to be answered by the appearance has an important bearing in determining what is sufficient to constitute appearance in a particular case. It seems to me that having regard to the scope of section 556 of the Civil Procedure Code and the object to be gained by the attendance or appearance of the appellant on the day fixed for the hearing of the appeal the mere appearance of the counsel to make an application for adjournment ought not to be treated as appearance so as to oust the application for adjournment ought not to be treated as appearance so as to oust the jurisdiction under section 558 of the Civil Procedure Code, if proper cause is shown. Upon refusal of the application for adjournment, if counsel declines to go on with the case, there is at that time no appearance on behalf of the party. I do not feel much pressed by the reference made to the case in which evidence may have been taken and which has been partially argued.”

13. In paragraph 23, the learned Single Judge reproduced paragraphs 22 & 23 from **Prashant Vagaskar's** case (*supra*) which are to the following effect :

“22. In this view of law, therefore, mere fact that the plaintiff No.2 was present in the Court at the time when the suit was called for dismissal on 30-8-2001, cannot on the facts of this case, provide for any valid ground for holding that the plaintiffs were present in the Court and in spite of that, they defaulted in taking part in proceedings or were guilty of bypassing the Court. In the facts and circumstances, the plaintiffs were justified in praying for adjournment and, therefore, in my opinion, the Court below was wrong in refusing to grant adjournment, merely on the technical ground that one the plaintiffs was physically present in the Court and was not ready to proceed with the suit.

23. The Code of Civil Procedure has been designed to facilitate fair trial of the suits. It is not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of provisions that leaves no room for reasonable elasticity of interpretation should therefore be guarded against: (provided always that

justice is done to 'both' sides) least the very means designed for the furtherance of justice be used to frustrate it.”

14. In paragraph 24, it was further observed that the view expressed by this Court in **Prashant Vagaskar's** case was later followed by atleast three learned Single Judges of this Court in the cases of **Shri Subhash Mataji Pulate vs. Smt. Laxmibai Somaji Khillare** (Per B.P. Dharmadhikari, J.), **M/s. Devidayal Sales Pvt. Ltd. vs. The State Trading Corporation of India & Anr.** (Per A.A. Sayed, J.) and **Bhalchandra Ganesh Naik & Anr. vs. Sona Hotel** (Per C.L. Pangarkar, J.).

15. In **Devidayal Sales Pvt.Ltd's** case the learned Single Judge has observed in paragraph 15 as under :

15. Thus, the presence of a Counsel has to be an effective presence, not mere physical presence. The Counsel should be ready with the matter and be able to assist the Court. The appearance of a Counsel who has instructions only to apply for an adjournment or to have the matter kept back cannot be considered as an appearance at all in the context of Order 17 Rule 2 or Order 9 Rule 8 of Code of Civil Procedure. If one peruses the Vakalatnama, it ordinarily mentions the words “act appear and plead” for and on behalf of the party. The appearance of a Counsel who is not able to or unwilling to plead the cause of his client can hardly be termed as an appearance. It may be mentioned that it has become a matter of routine and everyday practice in this Court to let juniors appear and seek adjournments or have the matter kept back and many a times they are not even aware about the subject matter. Their presence cannot be termed as their “appearance” for the purposes of Order 17, Rule 2.”

16. In paragraph 28, the learned Single Judge ultimately recorded conclusion that in the event a party, though appearing

through an Advocate, is unable to proceed with the hearing of the suit due to inability to lead evidence on the date of adjourned hearing (after time was granted by a Court to produce evidence) and the Court dismisses such a suit for non-prosecution, the Court effectively proceeds as though the party was absent and therefore invokes the provisions of Rule 3(b) of Order XVII of the C.P.C. The Court in such a case exercises its option to proceed under Rule 2 of Order XVII and passes an order in one of the modes provided in that behalf by Order IX. The relevant modes in this behalf are the modes of dismissal of a suit either under Rule 3 of Order IX where neither party appears or under Rule 8 where only defendant appears. In either of the two cases, the plaintiff, who suffers dismissal of a suit as a result, has an option to apply for restoration of the suit under Rule 4 of Order IX or Rule 9 of Order IX, as the case may be.

17. In the case of **Prakash Manchanda** (*supra*), the Apex Court has observed thus :

It is clear that in cases where a party is absent the only course as mentioned in Order 17 Rule 3(b) is to proceed under Rule 2. It is therefore clear that in absence of the defendant, the court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as it now stands also clearly lays down that if any one of the parties fails to appear, the court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives a discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date

fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9 of the Code of Civil Procedure. It is therefore clear that after this amendment in Order 17 Rules 2 and 3 of the Code of Civil Procedure there remains no doubt and therefore there is no possibility of any controversy.”

18. Applying tests laid down in the aforesaid decisions, in my opinion, it can't be construed that appearance of the plaintiff was effective on 21/09/2013, when the learned trial Judge dismissed the Suit. I am, therefore, of the opinion, that the Suit was dismissed in default and the Motion taken out under Order 9 Rule 13 of C.P.C. is maintainable.

19. The next question is whether the plaintiff has made out a sufficient cause for restoration of the Suit. Perusal of paragraphs 2 to 5 of the affidavit in support coupled with findings recorded by the learned trial Judge in the impugned order clearly made out a case of sufficient cause. The learned trial Judge held in paragraph 5 that advocate for the plaintiff was present on 21/09/2013 when the Suit was dismissed. His presence was not taken into consideration only because his vakalatnama was not on record. The learned trial Judge accordingly set aside order of the dismissal subject to heavy costs and allowed the Motion subject to payment of costs of Rs.10,000/-.

20. Dr.Chandrachud submitted that the in the case of

Hasrukh B.Gohel (*supra*), the learned Single Judge held that the decisions rendered by the learned Single Judges of this Court in **State Bank of India** (*supra*) and **ICICI Bank Ltd** (*supra*) were per incuriam. He submitted that the learned Single Judge should have referred the matter to a Larger Bench in the light of the decision of the Apex Court in the case of **State of Bihar** (*supra*). In the case of **State Bank of India** (*supra*), the Suit appeared on daily board on 29/11/2001 for framing issues. The advocate for the plaintiff appeared before the Court. He, however, stated that he was not ready to go on with the matter. The learned trial Judge did not find any valid reason for his saying so and dismissed the Suit for non-prosecution. In paragraph 6, it was noted that plaintiff appeared through his advocate. The advocate was, however, not ready to go on with the matter. The learned Single Judge held that Suit was not dismissed in default and therefore, Order 9 Rule 9 had no application. In paragraph 9, it was observed that on a plain construction of scheme of Order 9 Rules 8 & 9, the said provisions apply only where the defendant appears and the plaintiff does not appear. The phrase “does not appear” must be given its plain and natural meaning and cannot include a case where advocate appeared but cannot or refuse to go on with the matter.

21. In my opinion, the said decision is not applicable to the present case. I have already indicated that by order dated

21/09/2013, Suit was not dismissed on merits. The learned trial Judge did not take cognizance of appearance of the plaintiff's advocate on the ground that he did not file vakalatnama. It has, therefore, to be held that in the absence of plaintiff's advocate, Suit was dismissed and the dismissal was essentially under Order 9 Rule 8 of C.P.C. The Motion taken out under Order 9 Rule 9 of C.P.C. was, therefore, perfectly maintainable.

22. Dr.Chandrachud submitted that costs of Rs.10,000/- is not realistic and is illusory. However, the defendant was not in a position to show that any prejudice was caused to them. As noted earlier, the plaintiff's suit is for recovery of amount of Rs. 31,39,405/- along with interest @ 24%. per annum. It is, therefore, obvious that plaintiff is not interested in delaying the Suit and rather is interested in prosecuting the Suit. The delay in prosecuting the Suit will not enure to the benefit of the plaintiff. Understood thus, I do not find that the learned trial Judge committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. Order accordingly. Before parting, I must place on record the able assistance rendered by Dr.Chandrachud on behalf of the petitioner.

(R. G. KETKAR, J.)