

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 921 OF 2014

M/s. Vasudha Chemicals Pvt Ltd	Applicants
Vs	
M/s Bhalla Chemical Works Pvt. Ltd.	.. Respondents

Mr. O.S.Kutty, Advocate for Applicants.

Mr. M.S.Bhandari i/b Nalin M. Shah, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 27/07/2015

PC:

1. Heard Mr.O.S.Kutty, learned counsel for the applicants and Mr. M.S.Bhandari, learned counsel for the respondent s at length.
2. By this Petition under Section 115 of C.P.C., original plaintiffs have challenged the Judgment and order dated 25.7.2014 passed by the learned Judge, City Civil Court, Greater Bombay in Notice of Motion No.1336 of 2013 in Summary Suit No.7317 of 2002 (High Court Summary Suit No.810 of 2002). By that order, the learned trial Judge allowed the Motion taken out by the respondents, hereinafter referred to as 'defendants', subject to payment of costs of Rs.1000/- to the applicants, hereinafter referred to as 'plaintiffs' as condition precedent and set aside exparte decree passed on 7.3.2013 and restored suit to its original number.
3. In support of this Application, Mr. Kutty submitted that the

plaintiffs instituted summary suit on original side of this Court on 26.2.2002 for recovery of sum of Rs. 11,13,422/- against value of goods sold and delivered. On 25.3.2002, writ of summons was duly served upon the defendants. The defendants filed appearance within 10 days from the receipt of writ of summons. On 20.9.2003, Summons for Judgment taken out by the plaintiffs was disposed of by granting unconditional leave to defend the suit. On 13.10.2003, the defendants filed Written Statement in the suit. In October, 2012, by virtue of a Government Notification, suits having claim below one crore were transferred to the City Civil Court at Bombay. The suit instituted by the plaintiffs was also transferred to the City Civil Court, Bombay. On 16.10.2012, suit came up for trial Court before Court Room No.28 of City Civil Court. The plaintiffs were directed to take further steps in the matter. The defendants and their Advocate failed to appear and at no point of time they were present. On 31.1.2013, the trial Court framed the issues and directed the plaintiffs to file affidavit of evidence and list of documents. On 12.2.2013, the plaintiffs' evidence was recorded and the matter was kept for hearing on 21.2.2013. On 7.3.2013, the learned trial Judge passed a decree. The defendants were directed to pay interest at the rate of 15 percent per annum from the date, i.e. 26.2.2002 on the principal sum of Rs.7,01,872/- till realization of decretal amount.

4. On 2.4.2013 the defendants took out Notice of Motion for

setting aside exparte decree dated 7.3.2013. By the impugned order, the learned trial Judge has allowed the Motion. It is against that order, the plaintiffs have instituted Revision Application.

5. In support of this Application, Mr. Kutty submitted that in terms of Order 37, Rule 4 of C.P.C., the defendant did not make out any special circumstances for setting aside exparte decree. He further submitted that in any case no sufficient cause is shown by the defendant for setting aside exparte decree. In other words, he submitted that under Order 9, Rule 13, exparte decree can be set aside if the defendant satisfies the Court that the suit summons was not duly served, or that he was prevented by sufficient cause from appearing when the suit was called out for hearing. Admittedly, in the present case, suit summons was duly served on the defendants and, therefore, the defendants have to satisfy the court that they were prevented by sufficient cause. In the present case, no sufficient cause is shown. He further submitted that in affidavit in support of Notice of Motion, the defendants contended that in October, 2012 in pursuance of a Government Notification suits having claim below Rs. one crore were transferred to the City Civil Court, Bombay. In paragraph 8, it is asserted that 200 suits in which the defendant's Advocate was appearing were transferred to the City Civil Court. The defendants were given to understand that their Advocate was expecting intimation of transfer of the suit from the City Civil

Court. Neither his Advocate nor the defendant received any intimation about transfer of the suit from City Civil Court or from this Court. He submitted that is not the practice followed by either this Court or City Civil Court to give individual intimation on account of transfer of suits to either Advocates or litigants. He, therefore submitted that no sufficient cause is made out.

6. Mr. Kutty submitted that applicants are not disputing that the decree passed on 7.3.2013 is an exparte decree. The applicants are also not disputing that the application made by the defendants under Order 9, Rule 13 is maintainable. In any case, he submitted that if at all the Court was inclined to set aside exparte decree, having regard to fact that suit is instituted in the year 2002 for recovery of sum of Rs. 11, 13,422/-, learned trial Judge ought to have put defendants to terms, namely, of depositing substantial amount claimed in the suit.

7. On the other hand, Mr. Bhandari supported the impugned order. He submitted that some of the Judges of City Civil Court have directed office to issue notices after transfer of suits from this court to City Civil Court . In some case, Court had directed Advocates to intimate other sides about transfer of suits. In any case, he submitted that exparte decree was passed on 7.3.2013 and Notice of Motion was filed on 2.4.2013, that is to say, within 30 days. He further submitted that the defendants are ready and willing to pay costs of Rs. 10,000/- to the plaintiffs.

8. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As indicated earlier, by order dated 20.9.2003, this Court granted unconditional leave to defend the suit. In other words, the suit now cannot be tried as a summary suit and it will have to be tried as regular suit. Mr Kutty relied upon decision of this Court in *Indian Express Newspapers Vs. Shiv Kapooria*, 2003 (5) Bom.C.R 5 and *Forward Financial Services Ltd Vs. Premus Chemicals Ltd* (Notice of Motion No.2734 of 2008 in Suit No.100 of 1999 decided on 15.10.2008 Coram: Smt. Roshan Dalvi,J.) and submitted that no special circumstances have been made out by the defendants.

9. I do not find any merit in the submission of Mr. Kutty for more than one reason. In the first place, Order 37, Rule 4 will not apply as unconditional leave to defend the suit was granted to the defendants. Secondly, in the case of *Indian Express Newspapers Ltd (supra)*, in paragraph 3 it was observed that Court hearing the summons for judgment decreed the suit under Order 37, Rule 3 of C.P.C. on the ground that there was no reply filed by the defendants nor was there any affidavit disclosing the ground on which the leave can be granted. In other words, no case for granting leave to defend conditionally or unconditionally was made out and accordingly decree came to be passed under Order 37, Rule 3 of C.P.C. In view thereof, decision in the case of

Indian Express Newspapers (supra) does not advance the case of the plaintiffs. In the case of *Farward Financial Services Ltd*, (supra) unconditional leave to defend was granted to the defendants in Summons for Judgment taken out in the suit on 28.8.2000. The defendants were directed to file Written Statement by 27.12.2000. The defendants failed to file Written Statement. In paragraph 12, contention that Written Statement was ready and filed on 27.6.2005 and then remained under objection was recorded. This Court observed that Written Statement remained under objection because permission of Court was not obtained. It is in that context this Court observed that no special circumstances were shown. No reason for condonation of delay in filing Written Statement was shown to have been made out. As noted earlier, in the present case after obtaining unconditional leave to defend the suit, the defendants filed Written Statement. In view thereof, the decision in the case of *Forward Financial Services Ltd (supra)* does not advance the case of the plaintiff.

10. In paragraph 8 of the affidavit in support, the defendants have given explanation to the effect that after transfer of suits from High Court to City Civil Court, he was under impression that necessary intimation of transfer will be given by the City Civil Court. The learned trial Judge found that the explanation given by the defendants constitutes sufficient cause. The defendants

have already filed written statement on record and obviously they will attend the court proceedings after they receive intimation from Advocate. In other words, prima facie, there is lapse on the part of advocate appearing on behalf of the defendants in not attending the matter and also in not intimating the fact of transfer to the defendants. The question is whether because of lapse on the part of Advocate, the defendants should suffer. In my opinion, the defendant is an innocent party and should not suffer because of lapse on the part of Advocate.

11. In the case of Rafiq Vs. Munshilal, (1981) 2 SCC 788, the appellant Rafiq had preferred a Second Appeal in the Allahabad High Court through an Advocate. His Advocate was not present when Second Appeal was taken up for hearing with the result it was dismissed for default. The Appellant then moved an application to set aside the order of dismissal for default which was dismissed by the High Court. In paragraph 3, the Apex Court observed thus :

“The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done

everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job."

It was then argued by the counsel for the respondent in that appeal that a practice has grown up in the High Court of Allahabad among the lawyers to remain absent when they did not like a particular bench and that the absence of the appellant's advocate in the High Court was in accordance with the said practice, which should not be encouraged. It was observed that "the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented," and then made the following further observations:

12.".. ... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

Applying the principles laid down therein, I am of the opinion that because of the mistake of an Advocate, applicant should not suffer.

12. In view thereof, I do not find that the learned trial Judge has committed any error in setting aside exparte decree. The question is whether the learned trial Judge was justified in

imposing costs of Rs.1000/- only. As noted earlier, the suit is instituted in the year 2002 and exparte decree came to be passed on 7.3.2013. Suit is for recovery of money. In view thereof, in my opinion, the learned trial Judge should have imposed costs of Rs.10000/- on the defendants instead of Rs. 1000/-. Subject to this modification, no case is made out for invocation of posers under section 115 of C.P.C. Application fails and the same is dismissed.

13. The costs shall be paid to the plaintiffs or deposited in the trial Court within two weeks from today and costs is a condition precedent. Deposit of costs in the trial Court should be under due intimation in writing to the plaintiffs' Advocate. The plaintiffs are at liberty to withdraw the amount unconditionally. Liberty is reserved to the parties to apply for expeditious disposal of the case.

(R.G.KETKAR, J.)