

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9264 OF 2015

1. M/s. J. F. K. Products,
a proprietor concern of the
Defendant No.2 carrying on
business at 4, Maitreyi,
Plot No.65-Z, Linking Road,
Santacruz (West), Bombay 400 054.

2. K. P. Diwan
of Bombay, Indian Inhabitant,
carrying on business at 4,
Maitreyi, Plot No.65-Z Linking Road,
Santacruz (West), Mumbai 400 054.

.. Petitioners
(Org. Defts Nos.1 & 2)

Versus

Bank of India,
a body corporate constituted
under the provisions of Banking
Companies (Acquisition & Transfer
of Undertakings) Act V of 1970,
having Head office at Nariman Point,
Express Towers, Bombay 400 021,
and a branch amongst others known
as Bombay (Main) Branch at
70-80 M. G. Road, Fountain,
Mumbai 400 023

.. Respondent
(Org. Plaintiff)

Mr. S. S. Shah, Senior Advocate a/w Ms. Mamta Sadh i/by Mr. Z. H. Zaidy, for the Petitioners.

Mr. O. A. Das, for the Respondent.

CORAM : R.M. SAVANT, J.

DATE : 19th OCTOBER, 2015

ORAL JUDGMENT

1. Rule, having regard to the challenge raised in the above Petition made returnable forthwith and heard.

2. The Writ Jurisdiction of this Court is invoked against the order dated 14.08.2015 passed by the Learned Judge of the City Civil Court, Mumbai, by which order the application being Notice of Motion No.2357 of 2015 filed by the Petitioners/original Defendant Nos.1 and 2 came to be dismissed. The Respondent herein is the original Plaintiff in the suit in question which was originally filed in this Court and bore High Court Suit No.2168 of 1993. On the pecuniary jurisdiction of the City Civil Court being enhanced the said suit came to be transferred to the City Civil Court and now bears the S.C. Suit No.109030 of 1993. The said suit has been filed for recovery of an amount of Rs.6,92,000/- which was the amount due from the Defendants according to the Plaintiff in the year 1993. It is not necessary to dilate further on this aspect. Suffice it would be to state that after the suit was transferred to the City Civil Court, the

suit was listed on a number of occasions and ultimately the evidence of the Plaintiff was closed as the Defendants were unrepresented so as to cross-examine the Plaintiff's witness. It seems that the Plaintiff Bank was also permitted to lead secondary evidence which application was also allowed in the absence of the Defendant Nos.1 and 2 as they were not represented when the said application was considered. The Trial Court thereafter also passed an order of closing the Defendants evidence as the Defendants were continuously unrepresented. It is thereafter that the instant Notice of Motion came to be filed inter-alia for the relief of setting aside the permission to the Plaintiff to lead secondary evidence, for setting aside the closure of Plaintiff's evidence, for permitting the Defendants to lead evidence. The said Notice of Motion was replied to on behalf of the Plaintiff Bank and the reasons or the justification given by the Defendants for their absence in the suit was questioned. The Trial Court considered the said Notice of Motion and has by the impugned order dismissed the same. The Trial Court has rejected the application principally on the ground that after the suit was transferred to the City Civil Court appearance was put up on behalf of the Defendants through Mr. Zaidi proprietor of the Solicitor Firm representing the Defendants and therefore the case of the Defendants that they were not aware of the developments in the suit could not be accepted. The Trial Court was also of the view the

orders closing the Plaintiff's evidence as also the order closing the evidence of the Defendants could not be set aside by it as they could be set aside only by an appellate forum. It is the said order dated 14.08.2015 which is impugned in the present Petition.

3. The Learned Senior Counsel Mr. Shailesh Shah appearing on behalf of the Petitioners/original Defendant Nos.1 and 2 would make submissions in favour of setting aside of the impugned order dated 14.08.2015. It was the submission of the Learned Senior Counsel that an opportunity be given to the Defendant Nos.1 and 2 to cross-examine the Plaintiff's witness as also to lead their own evidence as on account of the fact that after the suit being transferred to the City Civil Court, track could not be kept of the matter.

4. Per contra, Mr. O. A. Das Learned Counsel appearing for the Respondent Bank i.e. Plaintiff would support the impugned order. The Learned Counsel by relying upon certain facts sought to demonstrate that it is the Defendants themselves who are responsible for the situation that they are in at present.

5. Having heard the Learned Counsel for the parties, in my view, the Petition is required to be allowed. The impugned order is required to

be set aside. No doubt, there seems to be some default on the part of the Defendants by not remaining present in the Trial Court on numerous dates when suit had appeared on board. However, in the interest of fair trial and also in the interest of a proper opportunity being given to the Defendants a final indulgence is required to be shown to the Defendants. The same would obviously be on the pains of imposing costs on the Defendants. This course of action is required to be adopted having regard to the well settled principle that it is always better to give an opportunity to a party to prosecute the proceedings on merits rather than being thrown out on technical grounds. The stage at which the suit at present is also not such that the same has become irreversible. However, in so far as the order permitting the Plaintiff to lead secondary evidence is concerned, the said order cannot be interfered with at this stage. It would always be open for the Defendants to challenge the said order by reserving their right under Section 105 of the CPC. Hence, it is only prayer clauses (b), (c) and (d) which this Court is inclined to grant. The above Petition is therefore allowed in terms of prayer clauses (b), (c) and (d). The Learned Counsel for the parties state that the suit is to come up before the Trial Court on 18.11.2015. The Trial Court would fix a schedule for the cross-examination of the Plaintiff's evidence or if the Plaintiff desires to lead further evidence and for the Defendants to lead evidence on the said day.

In the facts and circumstances of the case, the Petitioners i.e. Defendant Nos.1 and 2 to pay costs of Rs.20,000/- to the Plaintiff. The same to be deposited in the Trial Court within four weeks from date, and on such deposit, the Plaintiff would be entitled to withdraw the same.

6. It seems that the Defendant Nos.3 and 4 have expired during the pendency of the suit. The Learned Senior Counsel appearing on behalf of the Petitioners on instructions of Mr. Zaidi who is personally present in Court makes a statement that the names of the heirs of the Defendant Nos.3 and 4 would be provided to the Learned Advocate for the Plaintiff within two weeks from date. Statement accepted. The Plaintiff would be entitled to file an application for bringing the heirs of the said Defendants on record in the suit in place of the original Defendant Nos.3 and 4 by filing an appropriate application for the same, which application would be heard on its own merits and in accordance with law. The Learned Counsel for the Plaintiff Bank i.e. Respondent herein to furnish a copy of the affidavit of examination-in-chief of the witness of the Plaintiff to the Defendant Nos.1 and 2 within two weeks from date.

[R.M. SAVANT, J]