

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 1766 OF 2011
IN
SUIT NO. 4351 OF 1996**

**Kamal Organic Chemicals } Plaintiff
 versus
Shri. Sunil B. Bhosale } Defendant**

Mr. Y. V. Divekar i/b. M/s. P. S. Legal
for the Applicant/original Defendant.

Mr. A. Bulchandani i/b. Mr. S. M. Kazi
for the Respondent/original Plaintiff.

CORAM :- S.C.DHARMADHIKARI, J.

DATED :- NOVEMBER 20, 2015

P.C. :- (In Chamber)

By this Notice of Motion, the Defendant seeks reconsideration of the condition imposed by this Court in its order dated 13th November, 2009. This Court, in that order, directed the Defendant to deposit a sum of Rs.1,50,00,000/- for setting aside the ex-parte Decree dated 23rd August, 2007. It is submitted by Mr. Divekar appearing in support of this Notice of Motion that the present Suit is filed for recovery of damages. It is not a Suit to recover any outstanding admitted dues. The Plaintiff/Decree Holder was thus obliged to prove the claim for

damages by leading evidence. At the same time, the Defendant has filed Suit No. 4182 of 1997 and which Suit is now pending in the City Civil Court, Mumbai. Rather the trial is going on.

2) Mr. Divekar would submit that in this Court's order imposing the above condition, it has been observed that the conduct of the Defendant does not indicate utter negligence, callousness and lack of bonafides. There could be some omission on the part of the Advocate. However, this Court also found that the Defendant shifted his office and place of business. In these circumstances, this Court's condition is far too onerous and excessive.

3) Mr. Divekar brings to my notice a copy of the order of the Hon'ble Supreme Court of India dated 13th May, 2011. He submits that from the order passed by this Court on 13th November, 2009, an Appeal was preferred before a Division Bench of this Court. Even that Appeal was dismissed on 12th April, 2010. However, the Hon'ble Supreme Court directed the Defendant/Petitioner before it to deposit a sum of Rs.50,00,000/- with the Prothonotary and Senior Master of this Court. The Special Leave Petition was withdrawn, but with liberty to move this Court again for seeking modification of the conditional order. That is how this application is made. Mr. Divekar relies upon the

judgment of the Hon'ble Supreme Court of India in the case of *V. K. Industries and Ors. vs. M. P. Electricity Board, Rampur, Jabalpur* reported in **AIR 2002 SC 1151**. He also relies upon the judgment of a learned Single Judge of the Allahabad High Court in the case of *Raj Kumar Soni vs. M/s. Mohan Meakin Breweries Ltd.* reported in **AIR 1979 Allahabad 370**. Once the some of Rs.50,00,000/- is deposited in this Court and invested, then, according to Mr. Divekar, that is enough and the rest of the amount, therefore, be waived and the condition modified accordingly.

4) On the other hand, Mr. Bulchandani appearing for the Plaintiff/Decree Holder submits that the application is not bonafide. This application is made in the year 2011 but not moved till date. It was only moved after an order was passed on 12th October, 2015 by the learned Single Judge of this Court. No attempt was made to avail of the liberty given by the Hon'ble Supreme Court of India. This is not a case where this Court set aside an ex-parte Decree, which was passed without consideration of any defence or plea of the parties. Rather, the initial Decree passed ex-parte also noted that the Defendant did not come forward to defend the claim. The Defendant was duly served. A sum of Rs.1,50,00,000/- has been awarded together

with interest at 6%. The initial ex-parte Decree passed by this Court is dated 23rd August, 2007. The application to set aside the same was decided on 13th November, 2009. From that date, no amount was deposited and it is when the Hon'ble Supreme Court was approached and a condition was imposed to deposit the sum of Rs.50,00,000/- that some amount has been brought and deposited. The Plaintiff/Decree Holder has lost valuable interest on the sum awarded. In these circumstances, he would submit that the Motion be dismissed.

5) After hearing both sides and perusing the record, I am of the view that the principles are too well settled. The Court cannot impose excessive and onerous condition so as to non-suit a party completely. The Court has to strike a balance so as to grant reasonable opportunity to even the Defendant to defend the claim. The applicability of this principle depends upon the facts and circumstances in each case.

6) In the present case, in the initial order, this Court found that the ex-parte Decree was passed after the Suit Summons was duly served on the Defendant. At that stage, he did not choose to contest the Suit. No Written Statement had been filed. It is pertinent to note and as rightly pointed out by Mr.Bulchandani that the Suit is filed in the year 1996. The initial

ex-parte Decree was passed on 23rd August, 2007. This Court, when it passed the order on 13th November, 2009 and made the observations relied upon by Mr. Divekar, it was dealing with an objection of the Plaintiff on the maintainability of the Notice of Motion. After holding that the Motion was maintainable, this Court recorded that the Writ of Summons came to be served, the Defendant failed to appear and file a Written Statement. That is how the Suit was marked as un-defended and placed by the Registry for ex-parte Decree. When the Court considered the request for passing of an ex-parte Decree, it took on record Plaintiff's affidavit of evidence. It also took on record the documents. On due consideration of the same, this court passed the Decree. Such a Decree either can be set aside in Appeal or an application could be filed to set aside the same before the learned Single Judge. An objection was raised that the Appeal was the only remedy and in dealing with the same, the observations in paras 9 and 10 have been made. However, after the record was perused by this Court and it found that though the Writ of Summons was served in the year 2003, the Defendant was not coming forward to defend the claim by engaging any Advocate or filing a Written Statement. That his defence that he was shifting his business came to be considered. Granting the plea that the Defendant had some difficulties in locating some papers because

of shifting of the business place, the Court balanced the rights and equities and imposed a condition and as against the decretal claim in terms of prayer clause (a) of the Plaint that the Court reduced the interest rate from 10.5% to 6% on the principal amount of Rs.1,50,24,900/-. Thus, the principal amount claimed in the Suit itself was to the tune of Rs.1,50,00,000/-. This was not a case where an ex-parte Decree was not passed initially but this was an order passed on an application to set aside the ex-parte Decree, wherein, the claim was as above. It is in these circumstances that the Court found that interest of justice would be served if a condition of deposit of 1,50,00,000/- was imposed on the Defendant. Against this order, the matter was carried before the Appellate Court and eventually, the Hon'ble Supreme Court of India. It is only after a statement was made before the Hon'ble Supreme Court that the sum of Rs.50,00,000/- is deposited.

7) I am of the view that this would not suffice in the given facts and circumstances. The initial order was passed after duly noting and considering the contentions of the parties. Merely because the matter was carried to the Hon'ble Supreme Court of India and the liberty to approach the Single Judge was granted does not mean that this condition should be modified. Beyond filing the legal proceedings, no material has been brought on

record to seek modification of the condition. That the claim in the Suit is of damages and would be required to be proved is apparent and for that, no liberty has been granted to the Decree Holder to withdraw any sum. The amount would lie in the Court and the Court Registry would duly invest it and that would earn interest. The other Suit is set down for trial would only mean that if the Defendant succeeds in the Suit, he can claim appropriate relief.

8) For all these reasons, I do not find that this is a fit case for modifying the condition. The Notice of Motion is dismissed.

9) At this stage, a request is made to continue the stay on execution and enforcement of the Decree. That request is opposed by Mr. Bulchandani.

10) After hearing both sides on this point, I am of the view that the execution proceeds does not mean that any coercive steps would immediately be taken. Hence, the request as made need not be granted. The request is refused.

(S.C.DHARMADHIKARI, J.)