

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

REVIEW PETITION NO. 4 OF 2013
IN
SUMMONS FOR JUDGMENT NO. 377 OF 2011
IN
SUMMARY SUIT NO. 2431 OF 2011

M/s. Farouk Sodagar Darvesh & Co. ... Petitioner.
Versus
May Fair Housing. ... Respondent.

Mr. Rohan Jaisinghania i/b. Mr. Munir Merchant, advocate for
petitioner.

Mr. P.K. Samdhani, Sr. Counsel i/b. Mr. Nivit Srivastava, advocate for
respondent.

CORAM : B.R. GAVAI, J
DATE : MAY 8, 2015

P.C.:

1 The Plaintiffs have approached this Court seeking review of the Order dated 21st June, 2012 vide which, Summons for Judgment taken out by the Plaintiffs was rejected and leave to defend was granted. The review is sought on the ground that the leave to defend could not have been granted in as much as the application seeking leave to defend was filed after a period of 10 days from the service of

summons for judgment. The review is also sought on the ground that the order under review was passed on the erroneous assumption of facts.

2 Shri Jaisinghania, learned Counsel appearing on behalf of the Plaintiff submits that in view of the sub-rule 5 of Rule 3 of Chapter 37, the defendant is required to file application seeking leave to defend, within a period of 10 days from the date of service of such summons for judgment. He submits that though under sub-rule 7, the Court has a power to condone the delay, if a case of sufficient cause is made out by the defendant, unless such a delay is condoned, the application would not be tenable. The learned Counsel submits that since the application for leave to defend, is admittedly filed beyond a period of 10 days from the date of service of the said summons for Judgment and since there is no order condoning the delay, the Court had no jurisdiction to entertain the application for leave to defend. It is therefore, submitted that since the order passed by this Court is

passed in ignorance of aforesaid legal provisions, a good case is made out for reviewing the order passed by this Court.

3 The learned Counsel submits that since the issue of limitation goes to the root of the matter, the Court could not have entertained the application without the delay having been condoned. The learned Counsel in this respect relies on the judgment of the Division Bench of this Court in the case of **Smt. Shakuntalabai Krishna Bhoyar and ors. vs. State of Maharashtra reported in AIR 1986 Bombay 308.**

4 Shri Jaisinghania further submits that the Court on erroneous assumption of facts, that Shri Narayanan was common link between the Plaintiff and defendant, has found that the defendants had a case to defend. It is submitted that the said is factually incorrect. It is therefore, submitted that on this ground also the review needs to be entertained.

5 The learned Counsel in this respect refers to the Judgment of
the Apex Court in the case of **Board of Control for Cricket, India
and anr. vs. Netaji Cricket Club & ors. reported in AIR 2005
Supreme Court 592.**

6 Shri Samdhani, learned Senior Counsel appearing on behalf of
the Defendant/Respondent on the contrary submits that in view of
Section 129 of the Code of Civil Procedure, since the proceedings are
before the original side of the Bombay High Court, the proceedings
would not be governed by the Order XXXVIII of the Code of Civil
Procedure, but would be governed by the Bombay High Court
Original Side Rules. He submits that under Rule 221, no limitation is
provided for making an application for leave to defend. Learned
Counsel therefore submits that in that view of the matter, the
contention regarding limitation is without any substance. The learned
Counsel relies on the Judgment of the Apex Court in the case of
**Iradium India Telecom Ltd. v/s. Motorola Inc. reported in AIR
2005 SC 514.**

7. By now it is settled principle of law that the scope of jurisdiction while exercising the power of review under Section 114 of C.P.C. is very limited. For exercising the jurisdiction case of “mistake or error occurred on the face of the record” is required to be made out. A party seeking review has to show that a mistake or an error is self-evident and does not require process of reasoning. Reference is made in this respect can be made to the judgment of the Apex Court in the case of **Parsion Devi & ors. v/s. Sumitri Devi & ors. reported in (1997) 8 SCC 715.**

8 Seeking guidance from the observations of the Apex Court, I will deal with the case as is sought to be made out by the Applicant/Plaintiff. I will deal with the second ground first. In this regard, it is stated by the learned Counsel for the Applicant/Plaintiff that the Court has passed an order under review, on an erroneous assumptions of facts. In this regard, he has stated that the Court has incorrectly observed that one Shri Narayanan was common link between the plaintiff and defendant and had opened the account in

the name of Western Lumbers in CKP Bank at Thane. In this respect, it will be relevant to refer to various averments made in various paragraphs of the affidavit filed by the respondent/defendant in answer to the summons for judgment taken out by the Applicant/Plaintiff. Perusal of paragraph-2, thereof would reveal that it is averred by the defendant that one Shri K.V. Narayanan had approached the defendant group of companies and requested to give him an assignment of procurement of building construction materials. It is stated that on instructions of said Shri Narayanan, the defendants paid various amounts from time to time in favour of various companies including the plaintiffs and their sister concerns. It is also specifically averred that the defendants had made a payment in favour of M/s. Western Lumbers, which is a sister concern of the Plaintiffs. At more than one places, it is insisted by the defendants that the payments were in fact made by the defendant on the instructions given by said Shri K.V. Narayanan. It is also averred by the defendant that the said Shri Narayanan had open an account in the name of M/s. Western Lumbers, which is a sister concern of the

Plaintiff, in CKP Bank at Thane. In that view of the matter, it cannot be said that the reasoning given by this Court to the effect that “the defendants have raised a specific defence that the said Shri Narayanan who was the common link between the plaintiff and defendant had opened an account in the name of Western Lumbers in CKP Bank at Thane” can be said to be on erroneous assumption of facts. It is a different matter as to whether that factual position has been correctly considered or not by the Court. However, the same would not fall within the ambit of review jurisdiction.

9 In so far as the second ground is concerned, no doubt that the learned Counsel is right on relying on the provisions of Order XXXVIII which requires an application for leave to defend to be filed within 10 days from the receipt of the summons for judgment. However, it is to be noted that Their Lordships of the Apex Court, in the case **Iradium India Telecom Ltd. (supra)** while considering the issue as to whether rules framed by the High Court under Section 129 of the Code of

Civil Procedure are required to be consistent with the provisions of CPC or not has observed thus :

“37. Taking into account the extrinsic evidence, i.e. the historical circumstances in which the precursor of Section 129 was introduced into the 1882 Code by a specific amendment made in 1895, we are of the view that the non obstante clause used in Section 129 is not merely declaratory, but indicative of Parliament's intention to prevent the application of the CPC in respect of civil proceedings on the Original Side of the High Courts.

37. The High Court noticed that the interpretation put on Section 129 had been uniformly followed in the several judgments of High Courts, including the judgments of two Full Benches of Delhi and Calcutta High Courts. (See in this connection: AIR 1979 Delhi 217 (FB), (1913) ILR 37 Bom. 572, AIR 1925 Mad. 1132, AIR 1930 Cal. 685, AIR 1930 Cal. 324, AIR 1961 Cal. 483 (FB) and AIR 1961 All 595)

40. In our judgment, the principle of stare decisis squarely applies to the case on hand. In the first place, we are not satisfied that all the aforesaid judgments of the High Courts have been wrongly decided. Secondly, even assuming that it is possible to take a different view, as long as the principle has been consistently followed by the majority of the High Courts in

this country, as observed in *Mishri Lal* (supra), even if the High Courts consistently have taken an erroneous view, (though we do not see that the view is erroneous), it would be worthwhile to let the matter rest, since a large number of parties have modulated and continue to modulate their legal relationships based on the settled law. On this principle also the view taken by the Division Bench of the High Court of Judicature at Bombay commends itself to us.”

In the said case, question that fell for consideration was as to whether the limitation as provided under amended provisions of Order VIII Rule 1 would apply to the proceedings in a suit on the original side of the High Court or not. The learned Single Judge of this Court and Division Bench of this Court had taken a view that it would not apply. The Apex Court upholding the said view dismissed the appeal.

10 In so far as the procedure regarding summons for judgment in summary suit is governed by Rule 221 of the said Rules, which reads thus :

“R. 221. Summons for Judgment : (i) *In a suit filed under Order XXXVII of the Code of Civil Procedure, if the defendant enters an appearance in person or a vakalatnama the plaintiff shall apply by Summons for Judgment to the Judge in Chambers for a decree for the amount claimed, together with interest, if any, and costs. The summons shall be supported by affidavit, confirming the facts alleged in the plaint and stating that in the deponent's belief there is no defence to the suit. The summons shall be in Form No.11 and shall be made returnable not less than ten clear days from the date of the service.*

(ii) *The defendant may apply on such summons for leave to defend the suit by filing an affidavit or affidavits, showing that he has a good defence to the suit on the merits or disclosing such facts as may be deemed sufficient to entitle him to defend.*

(iii) *Leave to defend the suit may be granted to the defendant unconditionally or upon such terms as to the Judge may seem just. If leave to defend is granted, the Judge may give such directions as he may deem fit.*

(iv) *If the defendant does not apply for leave to defend or if such application is made and is refused, the Judge may pass a decree forthwith for the plaintiff.”*

Perusal of the aforesaid rule clearly shows that no limitation is provided in the said rule as is provided under sub-rule 5 of Order XXXVIII. In view of the judgment of the Apex Court in the case of **Iradium India Telecom Ltd.(supra)** in the suits which are filed on the original side, procedure as prescribed under the said rule would prevail. Since no limitation is provided under the said rules as is provided under Order XXXVIII the contention in that regard as raised by the Plaintiff will have to be rejected. In that view of the matter, I am of the considered view that review on the said ground is also not tenable. In the result, the application is without merit and as such rejected.

(B.R.GAVAI,J)