

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application (ST) NO. 4636 OF 2016

SKY SHIPPING AND ANR	...Applicants
<i>Versus</i>	
VODAFONE INDIA LIMITED	...Respondent

....
Mr. Mayur Khandeparkar, Advocate a/w. Ranjan i/b. Halai & Co.
for the Applicants.
Mr. Punit B. Anand, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 15th MARCH, 2016

P.C.

1. Heard Mr. Mayur Khandeparkar, learned Counsel for the applicants and Mr. Punit Anand, learned Counsel for the respondent, at length.

2. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicants have challenged the judgment and order dated 19.12.2015 passed by learned Judge, presiding over court room No.24 of the Bombay City Civil Court at Bombay on Summons for Judgment No.542/2014 in Summary Suit No.3213/2013. By that order, learned trial Judge granted leave to defend to the applicants,

hereinafter referred to as the 'defendants' subject to condition of depositing principle sum of Rs.2,46,115.29/- within 2 months in the Court from the date of that order failing which the respondent, hereinafter referred to as the 'plaintiff', shall be at liberty to apply for further orders. In the event of defendants depositing that amount, the defendants would file written statement within 30 days from the date of such deposit. It was also made clear that in case the amount is deposited then the plaintiff will be entitled to withdraw the same, subject to giving an undertaking to the Court to reconstitute the amount with interest at such rate as may be directed by the Court in the event the plaintiff fails in the suit.

3. Rule. Mr. Anand waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the application is taken up for final hearing. The parties hereinafter shall be referred to as per their status in the trial Court.

4. The plaintiff has instituted the suit under Order XXXVII of CPC *inter alia* for decree against the defendants for payment of Rs.2,64,927.93/- as per the particulars of claim

annexed and marked Exhibit "J" with further interest on Rs.2,46,115.29 at the rate 18% p.a. From the date of filing the suit till payment and costs of the Suit. The suit is instituted on or about 29.7.2013.

5. It appears that on 5.11.2014, the plaintiff took out Summons for Judgment No.542/2014. On the same day, learned trial Judge passed the following order :

“05/11/14 Coram: H.H.J. Shri R.B. Deshpande (C.R. No.24)
SU.3213/13 Adv. Puneet Anand for Plaintiff present and filed
service affidavit @ draft S/J @ affidavit – t.o.r.-
leave granted to register – Copy be served on
otherside.
V/P. for the defendants already on record.
Adjd. to 16.01.15.”

6. The defendants took out Notice of Motion No.4545/2014 *inter alia* praying for setting aside Rozanama order dated 5.11.2014; for dismissal of Summary Suit as per the provisions of Rule 119 of the Bombay City Civil and Sessions Court Rules, 1948 (for short, 'Rules'). The defendants also prayed for stay of execution of the order dated 5.11.2014 pending disposal of the suit. In support of that motion, affidavit of Ms.Roshan Irani dated 5.12.2014 was made. By the judgment

and order dated 9.5.2015, learned trial Judge dismissed the Motion. Aggrieved by that decision, the defendants preferred Appeal from Order in this Court. By order dated 19.8.2015, this Court disposed of the Appeal from Order. Said order reads thus :

“ CORAM : MRS. ROSHAN DALVI,J.
DATE : 19th AUGUST, 2015.

P.C.

1. A Summons for Judgment is taken out and which is being heard by the trial Court. One of the defences is that the Summons for Judgment is long delayed. The trial Court would surely consider each of the defences including the defence of delay.
2. The Appeal from Order is disposed of accordingly.
3. The Civil Application is granted.

(ROSHAN DALVI,J.)”

7. The Summons for Judgment was thereafter heard on merits and by the impugned order, learned trial Judge granted leave to defend subject to depositing principal sum of Rs.2,46,115.29/- within two month from the date of the order, amongst other directions. It is against this decision, the defendants have instituted the present Civil Revision Application.

8. The only contention advanced by Mr. Khandeparkar is

based on Rule 119 of the Rules. He submitted that Rule 119(4) lays down that if the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit has to be set down in the daily cause board for dismissal before the Sitting Judge in Chambers, one week before the day fixed for such dismissal. Upon the day fixed for such dismissal, the suit shall be called on before the Sitting Judge in Chambers and shall be dismissed if the plaintiff fails to appear, or appearing fails to satisfy the Judge that he has sufficient cause for not having proceeded with his suit. He submitted that the order dated 5.11.201 simply recorded that leave to register the Summons for Judgment was granted. He has taken me through the affidavit in support of the Notice of Motion No.4545/2014 as also the order dated 9.5.2015 passed by learned trial Judge dismissing the Motion and the order dated 19.8.2015 passed by this Court. He relied upon the decision of this Court in the case of **Bankay Bihari G Agrawal vs. M/s. Bhagwanji Meghji, 2001(1) Mh.L.J. 345** and in particular paragraphs-54 and 55. He submitted that the Division Bench answered two questions and they were answered thus :

“54. For the aforesaid reasons, we decide the questions referred to us as under :-

Question : (1) What is the legal consequence of a Summons for Judgment not being taken out by a Plaintiff within the period of 6 months of the plaint being filed ?

Answer : The suit is liable to be placed on the board of the Chamber Judge for dismissal. It is open to the Plaintiff to contend before the Chamber Judge that for good reasons the suit ought not to be dismissed. It is left to the judicial discretion of the Chamber Judge to dismiss the suit or direct it to proceed on such terms as he deems fit.

Question : (2) Upon such failure of the Plaintiff, is the Defendant, as a matter of course, entitled to unconditional leave to defend the suit, irrespective of the merits of the defence?

Answer : A delay in taking out Summons for Judgment beyond the period of 6 months prescribed by Rule 227 does not automatically entitle the Defendant to unconditional leave to defend the suit: but it is a relevant factor to be considered in conjunction with the nature of the defence while granting conditional or unconditional leave to defend the suit or refusing the application for leave to defend.”

9. He submitted that perusal of answer given to question (1) shows that when the suit is placed before the Chamber Judge it is open to the plaintiff to contend before the Chamber Judge that for good reasons the suit ought not to be dismissed and it is left with judicial discretion of the Chamber Judge to

dismiss the suit or direct it to proceed on such terms as he deems fit. He submitted that if the Chamber Judge dismisses the suit, then there is no question of the Chamber Judge exercising discretion in directing the plaintiff to proceed with the suit on such terms as he deems fit. If however the learned trial Judge directs the Suit to proceed he has to give reasons for condoning the delay and recording satisfaction for condoning the delay. It is only thereafter question No.(2) will arise for consideration. Even after the learned trial Judge directs the suit to proceed, it is still open for the defendants to contend that they are entitled to unconditional leave to defend. He, therefore, submitted that as in the present case mandate of Rule 119 of the Rules is not followed, the impugned order is required to be set aside.

10. On the other hand, Mr. Anand supported the impugned order. In any case he submitted that the defendants took out Notice of Motion No.4545/2014 for setting aside order dated 5.11.2014. That Motion was dismissed by the trial Court and this Court did not interfere in that order while disposing of the Appeal from Order. He submitted that while disposing of the

Appeal from Order, this Court directed the trial Court to consider each of the defences including the defence of delay. He, therefore, submitted that the impugned order may be set aside and the Summons for Judgment may be directed to be heard *de novo*. He further submitted that the order dated 19.8.2015 passed in Appeal from Order is worked out in the sense that thereafter the Summons for Judgment was heard and now the defendants cannot go behind the order dated 19.8.2015.

11. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

12. Rule 119 of the Rules reads thus :

"119. Appearance of defendant. Summons for Judgment - In a suit filed under Order 37 of the Code of Civil Procedure if the defendant enters an appearance, or files a Vakalatnama, the plaintiff shall, on affidavit made by himself or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action, and the amount claimed, and stating that in his belief there is no defence to the action, apply by Summons for Judgment returnable not less than ten clear days from the date of service to the Sitting Judge in Chambers for the amount claimed, together with interest (if any) and costs. The Judge may thereupon,

unless the defendant by affidavit or declaration shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly.

(2) **Interlocutory proceedings.** - On the Summons for Judgment all such directions may be given and orders made for the conduct of the suit as may appear necessary to the Judge hearing the same.

(3) **Default in filing appearance.** - If the defendant does not enter an appearance or file a Vakalatnama within ten days of the service upon him of the Writ of Summons and the plaint and exhibits thereto, the plaintiff shall be at liberty to apply to put the suit down for hearing forthwith thereafter before the Sitting Judge in Chambers. In such application the plaintiff shall state the date when the defendant was served and also state the fact of the affidavit of service of the writ of summons having been filed.

(4) **When no decree applied for within six months-** If the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit shall be set down in the daily cause board for dismissal before the Sitting Judge in Chambers, one week before the day fixed for such dismissal. Upon the day fixed for such dismissal, the suit shall be called on or before the Sitting Judge in Chambers and shall be dismissed if the plaintiff fails to appear, or appearing fails to satisfy the Judge that he has sufficient cause for not having proceeded with his suit.”

13. In the case of Bankay Bihari (supra), the Division

Bench of this Court considered Rules 227 and 265 of the Bombay High Court (Original Side) Rules 1980. In paragraphs 10 and 37 it was observed thus:-

“10. Every Plaintiff has the choice of bringing any suit, and is governed by normal rules prescribed by the Code of Civil Procedure in the conduct of such suit. Order 37 is a special summary procedure which is applicable to a limited class of suits. If a Plaintiff wants to adopt this, Rule 227 enjoins him to act with alacrity by taking out Summons for Judgment for decree within 6 months after filing of the plaint. If he fails to do so, then the Rule enjoins upon the Prothonotary & Senior Master to place the suit on board for dismissal before the Chamber Judge. In our view, merely because a suit is placed upon the board for dismissal for failure to take out a Summons for Judgment within 6 months, it need not be dismissed. Rule 265 of the 1980 Rules clothes the Chamber Judge with the discretion to enlarge or abridge the time appointed by the Rules, or fixed by any order, for doing any act or taking any proceedings, upon such terms as the justice of the case may require. Thus, there is scope for exercise of judicial discretion depending on the facts and circumstances of the case. Consequently, upon failure to take out the Summons for Judgment within a period of 6 months, as provided by Rule 227, all that would happen is that the suit would appear on the board for dismissal, and the Plaintiff is required to satisfy the Chamber Judge as to reasons, if any, which prevented him from taking out the Summons for Judgment within a period of 6 months. If the Judge is not satisfied, then, the suit shall, of course, be dismissed. However, if the Chamber Judge accepts the reason given by the Plaintiff for the delay, then,

under Rule 265, he has discretion to excuse the delay in the taking out of the Summons for Judgment "upon such terms as the justice of the case may require". No one has disputed this proposition that delay in taking out Summons for Judgment is always excusable for good reasons and on such terms as the Chamber Judge may decide. Prothonotary & Senior Master to place the suit on board for dismissal before the Chamber Judge. In our view, merely because a suit is placed upon the board for dismissal for failure to take out a Summons for Judgment within 6 months, it need not be dismissed. Rule 265 of the 1980 Rules clothes the Chamber Judge with the discretion to enlarge or abridge the time appointed by the Rules, or fixed by any order, for doing any act or taking any proceedings, upon such terms as the justice of the case may require. Thus, there is scope for exercise of judicial discretion depending on the facts and circumstances of the case. Consequently, upon failure to take out the Summons for Judgment within a period of 6 months, as provided by Rule 227, all that would happen is that the suit would appear on the board for dismissal, and the Plaintiff is required to satisfy the Chamber Judge as to reasons, if any, which prevented him from taking out the Summons for Judgment within a period of 6 months. If the Judge is not satisfied, then, the suit shall, of course, be dismissed. However, if the Chamber Judge accepts the reason given by the Plaintiff for the delay, then, under Rule 265, he has discretion to excuse the delay in the taking out of the Summons for Judgment "upon such terms as the justice of the case may require". No one has disputed this proposition that delay in taking out Summons for Judgment is always excusable for good reasons and on such terms as the Chamber Judge may decide.

37. The underlying public policy behind Order 37 is expeditious disposal of suits of commercial nature. This public policy would be sub served if the plaintiff, after adopting the summary remedy, takes inordinately long time to take out a Summons for Judgment: nor would it be sub served if merely on the ground that the Plaintiff has taken more time than prescribed by Rule 227, unconditional leave is to be granted to the defendant as a matter of course. It is in this area that judicial discretion has to be exercised. The Court, in our judgment, is empowered to consider, even in a case of delay on the part of the plaintiff, the merits of the defence and then take an overall view as to whether leave should be granted to defend the suit conditionally or unconditionally or whether such leave should be refused. Otherwise, it would mean that even in a case where the defence is totally illusory or chimerical, the defendant could claim unconditional right to defend the suit as a matter of right merely on the ground of plaintiffs delay. I The better view to lake would be that the Court would have to balance the lack of promptitude on the part of the plaintiff against the nature of the defence raised in the affidavit by the defendant and decide whether to grant unconditional or conditional leave or to decline leave to defend the suit.”

14. In paragraph 43, Division Bench further considered the contention that if there is delay in taking out a Summons for Judgment, condonation thereof is itself a triable issue, and, therefore, unconditional leave to defend the suit ought to be granted to the Defendant. The said contention was repelled by

observing that it is a fallacious contention. It was thereafter observed that the stage for considering the application for leave to defend commences only after the exercise of power of condonation of delay under Rule 227. Delay in taking out Summons for Judgment may result in the suit being placed on the board of the Chamber Judge for dismissal. At that stage, the defendant is not even in the picture. What transpires is purely between the Court and the Plaintiff. The plaintiff has to satisfy the judicial conscience that there were circumstances under which dismissal of the suit would render injustice. Upon this being done, the suit would not be dismissed. The Division Bench also repelled the contention of the defendant in such a case the discretion having already been exercised in favour of the Plaintiff by not dismissing the suit, imposing a condition for granting leave to defend the suit would amount to exercise of discretion twice over in favour of the Plaintiff. The Division Bench observed thus:

“43. ... The two exercises are distinct, though not necessarily unconnected. First, is at the stage of Rule 227 to decide whether the suit deserves to be dismissed on the ground of delay in taking out the Summons for Judgment. Second, is to decide whether leave should be

granted for defending the suit. In addition to the merits of the defence, the Court is required, in our view, to keep the conduct of the plaintiff also in mind. If the delay in taking out the Summons for Judgment is unconscionable, it could well affect the discretion of the Court in granting unconditional leave or in imposing conditions on the leave to defend the suit. To postulate that in every case, irrespective of the nature of the defence, the factor of delay in taking out the Summons for Judgment alone would result in unconditional leave to defend the suit, should make the judicial discretion hamstrung and defeat the public policy underlying the procedure for summary suits.”

15. Rule 119 is *pari materia* with Rules 227 and 265 of High Court (Original Side) Rules, 1980. As noted earlier, there is non compliance of Rule 119, extracted herein above. In the light of the decision of the Division Bench of this Court in Bankay Bihari (supra), impugned order is liable to be set aside, thereby, directing Registry of City Civil Court to place the matter before the Chamber Judge in terms of Rule 119 of the Rules.

16. I have already extracted the order dated 5.11.2014 passed by learned trial Judge. Perusal of that order shows that learned trial Judge without recording any reasons as also without recording satisfaction granted leave to register the

Summons for Judgment. In view of Rule 119(4) of the Rules, it has to be held that learned trial Judge did not comply the provisions of that Rules. I have perused the affidavit in support of Notice of Motion No.4545/2014 and in particular para-7. In para-7 it is asserted that the Suit appeared before the Court on 5.11.2014 under the caption of 'dismissal'. The Suit was called out along with regular matters at 11:00 O'clock where the Advocate for the plaintiff was once again absent and the matter was kept back to 2:45 p.m.. At 2:45 p.m., Advocate for the defendants was present but the matter was not called out as the Court was busy with the recording of evidence in another matter. Again at 4:30 p.m. the defendants enquired about the next date if any given by the Court in the said matter whereupon Advocate for the defendants was informed that till that time no date was given and collect the date later on. It is further asserted that at 5:05 p.m. Advocate for the defendants came back and enquired about the status in the said matter and to their utter shock they were informed that at the very last moment just before the rising of the Court mentioned the said matter and filed the Summons of Judgment and the Court took the said Summons for Judgment and gave leave to register the

same. The matter was mentioned by the plaintiff without any notice to the defendants. In para-12 it was further asserted that the order dated 5.11.2014 does not record any sufficient cause shown by the plaintiff to explain the delay in applying for Summons for judgment.

17. By order dated 9.5.2015, learned trial Judge dismissed the Motion. While dismissing the Motion, in para-9, learned trial Judge recorded that neither the suit was set down for dismissal as per Sub Rule (4) of Rule 119 nor delay in taking out Summons for Judgment could be the sole ground on the basis of which the suit can be dismissed. Against that decision, the defendants preferred Appeal from Order. Appeal from Order was disposed of on 19.8.2015 with direction to the trial Court to consider each of the defences including the defence of delay while deciding the Summons for Judgment. I have already referred to para-43 of the **Bankay Bihari's** case (supra), wherein it is observed that the stage for considering the application for leave to defend commences only after the exercise of powers of condonation of delay under Rule 227. Delay in taking out Summons for Judgment may result in the suit being

placed on the board of the Chamber Judge for dismissal. At that stage, the defendant is not even in the picture. What transpires is purely between the Court and the plaintiff. **The plaintiff has to satisfy the judicial conscience that there were circumstances under which dismissal of the suit would render injustice. Upon this being done, the Suit would not be dismissed.** The Division Bench also repelled the contention of the defendant in such a case the discretion having been already exercised in favour of the plaintiff by not dismissing the suit, imposing condition for granting leave to defend the suit would amount to exercise of discretion twice over in favour of the plaintiff. In my opinion, reliance placed by Mr.Anand on the order dated 19.8.2015 does not advance the case of the plaintiff in view of Rule 119 and the decision of Division Bench of this Court in ***Bankay Bihari's*** case (supra).

(Emphasis supplied)

18. As against this, the Division Bench of this Court after considering Rules 227 and 265 of the Bombay High Court (Original Side) Rules, 1980 have dealt with suit to be proceeded in the event of plaintiff not taking of the order. In my opinion, Rule 119(4) has to be complied with and, therefore, the plaintiff

has to satisfy the Court the reasons that prevented him from taking out the Summons for Judgment within six months from filing of the suit and the Court has to exercise the judicial discretion thereby meaning that the Court has to record its satisfaction for condoning the delay in taking out Summons for Judgment beyond six months of filing of the Suit. This cannot be treated as an empty formality. In view thereof, the impugned order cannot be sustained and it will necessary to direct the Registry of the City Civil Court to place the matter before the concerned Court in terms of Rule 119 of Rules. Hence, the following order.

- (i) The impugned order is set aside and the matter shall be listed before the concerned Court in terms of Rule 119 of the Rules. Let that exercise be done within two weeks from receipt of the authenticated copy of this order. The concerned Court is requested to take appropriate decision in accordance with law within four weeks thereafter.
- (ii) Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)