

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.101 OF 2016
WITH
CIVIL APPLICATION NO.125 OF 2016 IN CRA NO.101 OF 2016

Anand Agarwal ... Applicant
Vs.
M and H Enterprises Private Limited and others ... Respondents

Mr. S. U. Kamdar, Senior Advocate a/w. Ms Deepa Pohuja and Ms Pratibha Rupnawa i/b. M/s. J. Law Associates for Applicant.

Mr. Kalpesh Joshi a/w. Ms Koshiki i/b. Kalpesh Joshi Associates for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 24, 2016

P.C. :

Heard Mr. Kamdar, learned Senior Counsel for applicant and Mr. Joshi, learned Counsel for respondent No.1 at length. Mr. Kamdar orally applies leave to convert Civil Revision Application into Writ Petition. He further orally applies for deleting respondents No.2 to 7 on the ground that respondent No.1, being the plaintiff, is the only contesting respondent. On the motion made by Mr. Kamdar, leave to convert C.R.A. into Writ Petition as also to delete respondents No.2 to 7 is granted. Amendment shall be carried out forthwith. Rule. Mr. Joshi waives service for respondent No.1. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. The applicant, hereinafter referred to as defendant No.4, has challenged the judgment and order dated 30.01.2016 passed by the learned Judge presiding over Court Room No.20 of the Bombay City Civil Court at Greater Mumbai in Chamber Summons No.143 of 2016 in Suit No.7860 of 2004 (High Court Suit No.2544 of 2004). By that

order, the learned trial Judge rejected the Chamber Summons taken out by the defendant No.4 for directing the respondent No.1, hereinafter referred to as plaintiff, to implead defendant No.4 as party defendant in the Suit under Rules 3 and 10(2) of Order I of Code of Civil Procedure, 1908 (for short 'C.P.C.');

permitting the defendant No.1 to oppose the Suit and file written statement and in the alternative to prayer (a) to recall the order dated 07.07.2008 passed by the learned Single Judge of this Court in Suit No.2544 of 2004 whereby Suit against defendant No.4 among other defendants was dismissed. The relevant and material facts giving rise to filing Application, briefly stated, are as follows:

3. In the year 1982, W. G. Forge and Allied Industries Limited (the Company) imported various goods (including goods forming subject matter of the present dispute) which were stored in the custom bonded warehouses. It appears that the Industrial Finance Corporation of India (IFCI), Creditor of Company, instituted Miscellaneous Petition No.475 of 1984 for recovery of its dues and the Company was ordered to be wound up by order of this Court. On 09.10.1984, Court Receiver was appointed for making inventory in respect of the assets and liabilities of the Company. By further order dated 30.10.1984, Court Receiver was appointed for movable and immovable properties of the company with power to sell. On 17.01.1991, Court Receiver obtained inventory report of movable and immovable properties lying in various bonded warehouses. It appears that in September, 1994, Custom Authority sold goods lying in certain bonded warehouses by auction. In September, 2001, Court Receiver conducted auction sale of the entire assets of the Company on “as is where is basis”. On 26.09.2002, Court Receiver invited offers in respect of following assets:

Lot No.I – Immovable properties;

Lot No.II – Movable properties;

Lot No.III – Goods lying in warehouses, which is the subject matter of the dispute between the parties. Notice mentioned that the sale was on 'as is where is basis' and price for Lot No.III was fixed at Rs.10 crores.

4. It is the case of the defendant No.4 that on 30.09.2002, 03.10.2002 and 04.10.2002, the properties and goods were offered for inspection. On 07.10.2002, defendant No.4 submitted offer and deposited EMD of Rs. 10 crores with the Court Receiver. The notice mentioned that the sale shall be on 'as is where is basis' and price for Lot No.III was fixed at Rs.10 crores. It is the case of the defendant No.4 that it had nominated itself in the affidavit dated 10.12.2002 in respect of Lot No.III. On 10/11.12.2002, auction was conducted and the defendant No.4 was accepted as the highest bidder for Rs.65.80 crores and the Court confirmed the sale in favour of the defendant No.4.

5. Defendant No.4 agreed to sell Lot No.III being the goods lying in the custom bonded warehouses on 'as is where is basis' to the plaintiff. It is the case of the defendant No.4 that the plaintiff after having inspected the warehouses and found a shortfall in the quantity of goods, negotiated the price of Rs.6 crores instead of the proportionate auction price of Rs.11.96 crores paid by the defendant No.4. Plaintiff purchased from the defendant No.4 (and not from the Court Receiver), the goods lying in the warehouse on 'as is where is basis' at a negotiated price of Rs.6 crores only i.e. less by Rs.5.96 crores from the proportionate price at which it was auctioned. On 24.12.2002, defendant No.4 submitted nomination letter to the Court Receiver appointing the plaintiff as a nominee of the defendant No.4 in respect of the goods lying in warehouse on 'as is where is basis'. On 26.12.2002, Court Receiver accepted the entire amount of Rs.65.80 crores from the defendant No.4

and issued receipts in favour of the defendant No.4.

6. It appears that on 19.04.2003 when the representative of the Court Receiver along with the representative of the plaintiff visited the custom bonded warehouses at Wadala, Bombay Port Trust and approached CHF Officer, it was found that goods were only under 6 bonds out of 12 bonds. According to the plaintiff, the goods purchased by him as nominee of defendant No.4 were of 12 bonds and consisted 2211 pieces and 653 bundles as was reflected from various documents. Plaintiff, therefore, took out Notice of Motion No.1390 of 2003 in this Court praying for direction to Bombay Port Trust to immediately handover the goods in 12 bonds lying in the custom bounded warehouses after ascertaining the custom bonded warehousing charges payable by the plaintiff in respect of the said goods. Alternatively, plaintiff prayed that in case the Bombay Port Trust is not in a position to handover the possession of the balance goods lying in 6 bonds, the Court Receiver be directed to refund the sum of Rs.52,72,407/- towards purchase price in respect of the said goods lying in the 6 bonds from and out of total purchase price of Rs.6 crores deposited by the plaintiff.

7. By order dated 19.12.2003 and 08.01.2004, the Division Bench of this Court (Coram: R. M. Lodha, J. the then learned Chief Justice of India as he then was and A. V. Mohta, J.) disposed of the Motion and the reports of the Court Receiver inter alia observing that defendant No.4 by letter dated 24.12.2002 communicated to the Court Receiver nominating the plaintiff as nominee in respect of Lot No.III subject to payment of Rs.6 crores by the plaintiff. The documents available on record unflinchingly indicated that in respect of Lot No.III, plaintiff was a nominee-purchaser (defendant No.4). The said fact was also not disputed either by the defendant No.4 and the Court Receiver. It was

also recorded that the problem arose when representative of the Court Receiver in the report date 19.04.2003 recorded that the goods lying in the bonded warehouses at Wadala were available in six bonds only and not in twelve bonds. It appears that somewhere at that stage, the Court Receiver came to know that goods in six bonds were sold by the Customs Department. In paragraph 5, the Division Bench recorded that the Court Receiver and the concerned officials in the office of the Court Receiver failed to discharge their duty diligently. The goods lying in 6 bonds were sold by the Customs Department in the year 1994 but the Court Receiver was ignorant of this aspect almost for eight years and though the Court Receiver stood appointed in respect of the said goods, and the sale of goods in 6 bonds by Customs Department was in contravention of the Court's order.

8. The Division Bench recorded that prima facie there was lapse on the part of the Court Receiver and the concerned officials in the office of the Court Receiver in not verifying the goods of the company lying in various bonded warehouses before they were put for sale. In paragraph 6, the Division Bench noted that Department of Customs deposited the proceeds of sale of goods in six bonds effected in the year 1994. The sale of goods lying in 6 bonds by the Customs Department was in contravention of the order of this Court and therefore, by order dated 30.09.2003, the Customs Department was directed to deposit the proceeds of sale of goods in six bonds. Plaintiff claimed the sale proceeds of goods in six bonds on the ground that the Court Receiver advertised sale of raw material and goods lying in 12 bonds and as a nominee purchaser in a price of Rs.6 crores, plaintiff had purchased the said goods when they were already sold by the Customs Department in the year 1994. The Division Bench thereafter observed as under:

“In our considered view, in this application in the light of the serious inter-se dispute between the auction purchaser M/s. Anand

Agarwal (defendant No.4 herein) and the nominee (applicant herein) (plaintiff herein) about the subject claim, it would not be possible to accede to the request of the applicant in directing the Court Receiver to pay the said amount to the applicant. The controversy in this regard would require investigation into diverse facts which cannot be decided by means of the misc. application on the affidavits. The applicant shall have to establish its right to recover the price of the non-existing goods in the six bonds by filing regular civil suit. Taking overall facts and circumstances of the matter, we feel that the interest of justice shall be subserved if the applicant M/s. M. H. Enterprises is permitted to establish its right for the price of the non-existing goods in the 6 bonds though sold in auction purchase by the Court Receiver. We, accordingly, deem it proper to grant leave to the applicant to file suit against the necessary parties including the Court Receiver for refund of the proceeds realised by the Customs Authorities from the sale of goods in 6 bonds which were also represented to be a part of sale by the Court Receiver vide auction notice pursuant to the order dated 11th September 2002. In what we have observed above, prayer clauses (a) and (d) of the notice of motion taken out by the applicant do not deserve to be granted.”

9. In pursuance of the liberty granted by the Division Bench of this Court, plaintiff instituted Suit No.2544 of 2004 in this Court for the prayers already noted hereinabove. Defendant No.4 filed written statement dated 09.03.2005 opposing the claim made by the plaintiff. It appears that on 07.07.2008, the Advocate for defendant No.4 failed to appear that date. It is the case of the defendant No.4 that Advocate appearing on behalf of the plaintiff made statement that plaintiff give up their claim in damages against defendants No.2, 4, 5, 6 and 7. After recording the statement, the learned Single Judge dismissed the Suit qua these defendants. The learned Single Judge thereafter proceeded to frame the issues and also marked exhibits on the documents. It appears that the Suit was thereafter proceeded against the Court Receiver and the Customs Authority only and was ultimately dismissed on merits on 10.08.2010. Aggrieved by this decision, plaintiff preferred Appeal before the Division Bench of this Court. By order dated 21.07.2011, by consent of the parties, the order passed by the learned Single Judge

dismissing the Suit was set aside and the Suit was remitted to the learned Single Judge for de-novo consideration and decision in accordance with law.

10. It is the case of the plaintiff that as by order dated 07.07.2008, Suit against defendant No.4 was already dismissed, it was not impleaded party respondent in the appeal. It is the case of the defendant No.4 that no notices were served on it. The Suit was thereafter transferred to the City Civil Court. On 14.08.2015, Advocate for the plaintiff issued notice to Advocate A. Ramakrishna as also to defendant No.4 at its address at Navi Mumbai, It is the case of the defendant No.4 that Advocate A. Ramakrishna was not having office at the address given in that notice and for the first time, defendant No.4 became aware of the ongoing proceedings. On 21.01.2016, defendant No.4 took out present Chamber Summons for impleadment under Order I, Rule 10(2) of C.P.C. among other reliefs, which is dismissed by the impugned order.

11. Mr. Kamdar submitted that having regard to the prayers made in the Suit, the learned Single Judge of this Court could not have dismissed the Suit against defendant No.4. The statement of the plaintiff to the effect that he is not pressing claim of damages against defendant No.4 among other defendants was recorded. Plaintiff not only claimed relief of damages against defendant No.4 but also claimed reliefs in terms of prayer clauses (a) and (b). Apart from that, he invited my attention to the written statement filed by defendant No.4 where he has opposed reliefs claimed by the plaintiff including relief claimed in terms of prayer clauses (a) and (b). He submitted that in view of the finding of the Division Bench of this Court in the order dated 19.12.2003 and 08.01.2004 that there is serious controversy between the plaintiff and defendant No.4 about the claim made by the plaintiff as to whether he

has purchased 12 bonds or 6 bonds and granting liberty to the plaintiff to institute Suit, the learned Single Judge was not justified in dismissing Suit against the defendant No.4. He further submitted that no notice was given to the defendant No.4. Advocate for the defendant No.4 did not remain present on 07.07.2008 and on that date, matter was not fixed for hearing but was for framing of issues. In short, he submitted that for the first time, defendant No.4 acquired knowledge of proceedings after receipt of notice dated 04.08.2015. He, therefore, submitted that the learned trial Judge was not justified in dismissing the Chamber Summons on the ground that the delay was not explained as also on the ground that as the learned Single Judge of this Court ordered dismissal of Suit against defendant No.4, the trial Court cannot go beyond this order and that decree will not bind defendant No.4 in his absence.

12. On the other hand, Mr. Joshi supported the impugned order. He submitted that defendant No.4 was represented by Advocate in the Suit instituted by the plaintiff. Name of the Advocate of the defendant No.4 appeared on the board as and when the Suit was listed for hearing on various dates. On 07.07.2008, Advocate for defendant No.4 did not remain present and on making statement by plaintiff that it is not pressing damages against defendants No.2 and 4 to 7, the Suit was dismissed against the defendants. He further submitted that plaintiff had deposited Rs.6 crores in this Court and the dispute is only between the plaintiff on one hand, and Court Receiver and the Customs Authority on the other for which dispute presence of defendant No.4 is not necessary. He, therefore, submitted that no case is made out for interfering with the impugned order.

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

record. As noted earlier, in pursuance of the liberty granted by the Division Bench of this Court on 19.12.2003 and 08.01.2004, plaintiff has instituted the Suit. Perusal of the plaint and in particular paragraphs 87 to 90, 95, 108 and 109 shows that on the basis of assertions made in these paragraphs, plaintiff has claimed amount from defendant No.4 as regards 6 missing bonds. In particular, in paragraph 108, plaintiff has also given the particulars of claim and enclosed exhibits – 'EEE' and 'FFF'. On that basis, the plaintiff has claimed relief against defendants No.1 to 4, 6 and 7 in terms of prayer clauses (a) and (b). In paragraph 109, plaintiff has also claimed damages against defendants No.1 to 4, 6 and 7 and enclosed particulars of claim at exhibit 'GGG'. Prayer clauses (a) to (c) read thus,

“a) for order and decree directing Defendants Nos.1 to 4, 6 and 7, or any one or more of them jointly and/or severally to pay to the Plaintiff the amount of Rs.50,63,117/- with interest thereon at the rate of 18% per annum from 19.4.2003 till payment and/or realization as per Particulars of Claim annexed at Exhibit “EEE” to the plaint;

b) in the alternative to prayer (a) above, for order and decree directing defendant Nos.1 to 4, 6 and 7 or any one or more of them, jointly and/or severally to pay to the plaintiff an amount of Rs.47,68,437/- with interest thereon at the rate of 18% per annum from 19th December, 2002 till payment and/or realisation as per particulars of claim annexed and marked Exhibit “FFF” respectively to the plaint;

c) for order and decree directing Defendants Nos.1 to 4, 6 and 7 or any one or more of them jointly and severally to pay to the Plaintiff an amount of Rs.2,03,08,029/- as per particulars of claim annexed hereto and marked Exhibit “GGG” along with interest thereon at the rate of 18% per annum from the date of filing of the suit till payment and/or realization;”

14. Perusal of prayer clause (c) shows that plaintiff has claimed amount of damages to the tune of Rs.2,03,08,029/- as per particulars of claim set out in exhibit-GGG along with interest. Perusal of prayer clause (a) shows that plaintiff has prayed for reliefs against defendants

No.1 to 4, 6 and 7 for payment of Rs.50,63,117/- together with interest thereon @ 18% p.a. from 19.04.2003 till payment and / or realization as per particulars of claim as per exhibit-EEE to the plaint. Perusal of prayer clause (b) shows that in the alternative to prayer (a), plaintiff has sought decree directing defendants No.1 to 4, 6 and 7 or any one or more of them, jointly and /or severally to pay amount of Rs.47,68,437/- with interest thereon @ 18% p.a. from 19.12.2002 till payment and / or realization as per the particulars of claim annexed and marked exhibit-FFF to the plaint. Thus, apart from claiming relief of damages, plaintiff has specifically claimed reliefs in terms of prayer clauses (a) and (b) against defendant No.4 among other defendants. Perusal of the written statement filed by defendant No.4 and in particular, paragraphs 10, 28, 29, 32, 34 and 35 shows that defendant No.4 has disputed the assertions made by plaintiff and also resisted the reliefs claimed by plaintiff against defendant No.4.

15. It is in that context, relevant to consider the order dated 07.07.2008 passed by this Court. In paragraph 3 of the order, the statement made on behalf of the plaintiffs that they are giving up their claim in damages against defendants No.2, 4, 5, 6 and 7 was recorded. The Suit was, therefore, dismissed against these defendants. The Court further recorded that now the Suit remains only against the Court Receiver, defendant No.1 and the Customs Authority, defendant No.3. In my opinion, the learned Single Judge, with respect, was not justified in dismissing the Suit against defendants No.2 and 4 to 7 as perusal of the prayers extracted hereinabove clearly shows that in addition to the relief of damages, plaintiff has claimed amounts in terms of prayer clauses (a) and (b) from defendant No.4 as well. In other words, the Suit was not only claiming relief of damages against these defendants. In view thereof and on this ground alone, the order dated 07.07.2008 deserves to

be recalled.

16. The learned trial Judge dismissed the Chamber Summons on the ground that the delay is not properly explained. As noted earlier, after the Suit was dismissed against defendant No.4, the Suit was dismissed on merits on 10.08.2010. Aggrieved by that decision, plaintiff preferred appeal before the Division Bench where defendant No.4 was not impleaded as party respondent. The appeal was allowed on 21.07.2011 and the order of dismissal of Suit was set aside and the Suit was remitted before the learned Single Judge for de-novo consideration. After restoration of the Suit, on 04.08.2015, the Advocate for plaintiffs issued notice to the defendant No.4 and thereafter defendant No.4 has taken out Chamber Summons for impleadment on 21.01.2016 as also for recalling order dated 07.07.2008. In my opinion, defendant No.4 has made out a case for condoning the delay. Apart from that, it is settled principle of law that no party should suffer because of the mistake committed by the Court. In my opinion, while dismissing the Suit against defendant No.4 on 07.07.2008, this Court committed mistake as set out earlier and because of the mistake committed by the Court, no party should suffer. On this principle also, the learned trial Judge should have allowed the Chamber Summons. While dismissing the Chamber Summons, the learned trial Judge was also of the view that as the High Court passed order on 07.07.2008, he cannot recall that order. In my opinion, this ground is also wholly unsustainable. It is not in dispute that the Suit was transferred to the City Civil Court in view of the Bombay City Civil Court (Amendment) Act, 2012. Rule 3 of the Bombay City Civil Court (Transfer of Suits) Rules, 2012 lays down that the City Civil Court will have all the powers and jurisdiction in respect of the Suits and / or proceedings, which are transferred to the City Civil Court under sub-section (1) of Section 4-A of the Bombay City Civil Court Act, 1948 as

if it had been originally instituted in that Court. Rule 3 reads thus,

“3. All suits and / or proceedings, which are liable to be transferred to the City Civil Court, under sub-section (1) of Section 4A of the Bombay City Civil Court Act, 1948, shall stand transferred to the Principal Seat of the Bombay City Civil Court, Old Secretariat, Bombay, with effect from the date on which Section 4 of the Amending Act, shall come into force. **The City Civil Court shall have all the powers and jurisdiction in respect thereof as if it had been originally instituted in that Court.**”

(Emphasis supplied)

17. In view of Rule 3 as extracted hereinabove, all suits and / or proceedings, which are transferred to the City Civil Court under sub-section (1) of Section 4A of the Bombay City Civil Court Act, 1948, City Civil Court will have all the powers and jurisdiction in respect thereof as if it had been originally instituted in that Court. Though factually, plaintiff had instituted Suit on the Original Side of this Court in August 2004, by legal fiction, it is deemed to have been originally instituted in the City Civil Court. The learned trial Judge was, therefore, competent to consider the prayer made for recalling order dated 07.07.2008 passed by this Court. On this ground also, impugned order cannot be sustained. Hence, Petition is allowed. Impugned order dated 30.01.2016 is set aside. Rule is made absolute in the aforesaid terms with no order as to cost.

18. In view of the disposal of the C.R.A., nothing survives in Civil Application No.125 of 2016 and the same is disposed of accordingly.

(R. G. KETKAR, J.)