

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.206 OF 2016

Pandurang Govind Dike

..Applicant

Vs

Kantilal Bastimal Jodhavat and
Anr

.. Respondents

Mr. D. Brijesh, Advocate for Applicant.

**CORAM : R.G.KETKAR,J.
DATE : 06/04/2016**

PC:

1. Heard Mr. D. Brijesh, learned counsel for the applicant at length.
2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short, C.P.C.), the applicant has challenged the judgment and order dated 22.2.2016 passed by the learned Judge, presiding over Court Room No. 28 of the Bombay City Civil Court at Bombay in Notice of Motion No.1407 of 2014 in Summary Suit No. 4232 of 2010. By that order, the learned trial Judge allowed the Motion taken out by the applicant, hereinafter referred to as 'defendant no.2', for setting aside ex parte decree dated 13.3.2013 instituted by respondent no.1, hereinafter referred to as 'plaintiff', subject to defendant no.2 depositing the amount of Rs.,3,30,000/- within four weeks from the date of the

order. Upon depositing the said amount, ex-parte decree stands set aside against defendant no.2 and he is entitled to file written statement within four weeks. The learned trial Judge further directed that the amount shall be invested in the nationalized bank initially for a period of one year and continued to renew for the like period until further orders. On failure to deposit the amount within four weeks, the plaintiff is entitled to execute the decree.

3. The plaintiff instituted Summary Suit No.4232 of 2009 against respondent no.2, hereinafter referred to as 'defendant no.1', and applicant-defendant no.2 for recovery of amount of Rs.3,30,000/- with interest at the rate of 18% per annum from the date of filing of the suit till judgment and further interest on Rs. 3,00,000/- at the rate of 18% per annum from the date of judgment till payment and for costs of the suit. The plaintiff came with the case that defendant no.1 drew Bill of Exchange for Rs. 3 Lacs on 5.1.2009 ordering defendant no.2 to pay to the plaintiff sum of Rs. 3 Lacs on demand and against the said Bill of Exchange, defendant no.1 took loan of Rs. 3 Lacs from the plaintiff. When the said Bill of Exchange was presented to defendant no.2 for acceptance, defendant no.2 accepted the same as per its tenure. The same was presented to defendant no.2 for payment on 18.3.2009. Defendant no.2 dishonoured the

same for non payment. When it was presented to defendant no.1 for payment on 19.3.2009, defendant no.1 also dishonoured the same for non payment. The plaintiff gave notice of demand on 4.7.2009 through advocate informing the defendants about dishonour of the Bill of Exchange and calling upon them to make payment. The defendants neither replied the said notice of demand nor paid the amount. The plaintiff, therefore, instituted the Summary Suit under Order 37 of C.P.C. for recovery of the amount.

4. By order dated 13.3.2013, the learned trial Judge decreed the suit as the defendants failed to enter appearance in the suit. The suit was set down for hearing on Judgment. Documents produced by the plaintiff were taken on record as per list Exh.3 and were marked as Exhibits-4 and 5. The learned trial Judge directed defendants no. 1 and 2 to jointly and severally pay interest on the amount of Rs. 3 Lacs at the rate of 15 % per annum from the date of the suit, i.e. from 31.7.2009 till the date of actual realization of decretal amount.

5. Defendant no.2 took out Notice of Motion No.1407 of 2014 for setting aside ex parte decree. Defendant no.2 filed his affidavit in support of the Motion. The plaintiff filed reply resisting the Motion. By the impugned order, the learned trial Judge has allowed the Motion and set aside the decree subject to depositing

of decretal amount of Rs.3,30,000/-. It is against this order, defendant no.2 has instituted the present Civil Revision Application.

6. In support of this Application Mr. Brijesh raised following contentions:

(i) Plaintiff and defendant no.1 entered into Consent Terms on 21.6.2010 in Notice of Motion No. 1339 of 2010 in Summary Suit No.1751 of 2009. Clause (3) thereof recorded that the plaintiff shall be entitled to withdraw amount of Rs. 45,636/- which was deposited with the office of Sheriff of Mumbai pursuant to attachment order dated 9.11.2009 passed in Execution Application No.608 of 2009, as and by way of full and final settlement towards the entire claim of the plaintiff. Clause (4) thereof provided that the plaintiff undertakes and shall unconditionally withdraw Summary Suit No.2346 of 2009 against defendant no.1 only. Clause (8) provided that the plaintiff shall not claim any amount from defendant no.1 on the basis of any documents executed by defendant no.1. He submitted that by virtue of the Consent Terms in that suit, the entire claim made by the plaintiff in the present suit is satisfied and the Bill of Exchange stood revoked.

(ii) Signature of defendant no.1 is forged and, therefore, the plaintiff settled Suit No. 1751 of 2009 as the forgery was brought

to the notice of the Court.

(iii) Signatures of defendant no.2 are also forged.

7. Mr. Brijesh invited my attention to paragraphs 5 to 8, 14 and 15 of the affidavit in reply of defendant no.2 to contend that as triable issues are raised, the learned trial Judge was not justified in imposing conditions of depositing decretal amount while setting aside ex parte decree. He relied upon decision of the Apex Court in the case of Mechalec Engineers and Manufacturers Vs. Basic Equipment corporation, AIR 1977 Supreme Court 577.

8. I have considered the submissions advanced by Mr. Brijesh. I have also perused the material on record. It is not in dispute that despite service, the defendants did not enter appearance in the suit. Perusal of the Consent Terms entered into between the plaintiff and defendant no.1 in Summary Suit No.1751 of 2009 does not indicate that the claim of the plaintiff in the present suit was fully satisfied or that the Bill of Exchange was revoked.

Clauses 3,4,5,6 and 8 of the Consent Decree read thus:

“(3) The plaintiff shall be entitled to withdraw the amount of Rs.45636 which has been so far deposited with the office of Sheriff of Mumbai pursuant to attachment order dated 9.11.2009 passed in execution Application no.608 of 2009, as and by way of full and final settlement towards the entire claim of the plaintiff.

(4) The plaintiff undertakes and shall unconditionally withdraw Summary Suit No.2346 of 2009 filed in the Hon'ble High Court of Judicature at Bombay against Vijay P Sodaye the defendant no.1 therein only.

(5) The plaintiff admits and agrees that the cheque nos 273865, 273867 to 273871 drawn on Bank of Baroda, issued by the defendant no.1 at the time of the suit transaction have been destroyed by him and that he further indemnifies the defendant no.1 against any claim over the said cheques.

(6) The defendant no.1 claims that the plaintiff had obtained signatures on some blank papers. Both the parties herein agree that if there is any such document/s, the said signatures and the documents stand revoked and the same shall not be used by the plaintiff in any manner.

(8) The plaintiff shall not claim any amount from the defendant no.1 herein on the basis of any documents executed by defendant no.1 herein."

9. Perusal of the above clauses shows that the plaintiff undertook to unconditionally withdraw the present suit against defendant no.1 only. In other words, the plaintiff did not undertake to withdraw the suit against the applicant who is defendant no.2. The Consent Terms also do not provide revocation of Bill of Exchange. As far as the allegations made by defendant no.2 that his signatures are forged, is a matter of evidence and cannot be decided at this stage.

10. Mr. Brijesh relied upon the decision of the Apex Court in the case of Mechalec Engineers and Manufacturers (supra). In that case, the Apex Court has laid down the principles to be applied while considering application for grant of leave to defend the suit. Order 37, Rule 4 empowers the Court to set aside decree under special circumstances and also granting leave to the

defendants to defend the suit if it seems reasonable to the Court so to do and on such terms as the Court thinks fit. In the present case, the learned trial Judge has considered special circumstances, namely, allegations of fraud and genuineness of documents are raised by defendant no.2. It is, therefore, necessary to set aside the exparte decree. The learned trial Judge noted that interest of the plaintiff has to be safe-guarded and at the same time opportunity of defending the suit is required to be given to defendant no.2.

11. After considering the material on record, prima facie, I do not find that the Consent Terms relied by defendant no.2 provide for settlement of claim of the plaintiff against defendant no.2 as also the Bill of Exchange stood revoked. That apart, the learned trial Judge had directed investment of the amount of Rs.3,30,000/- to be deposited by defendant no.2. In view thereof, I do not find that any case is made out for interfering with the impugned order. Hence, Application fails and the same is dismissed.

12. At this stage, Mr. Brijesh orally applies for extension of eight weeks time for depositing the amount as also filing of written statement as ordered by the trial Court. He further assures that defendant no.2 will not apply for extension of time.

13. In view thereof, notwithstanding dismissal of the Civil

Revision Application, the time stipulated in the impugned order for depositing Rs. 3,30,000/- and for filing written statement is extended for a period of eight weeks from today, with further understanding that defendant no.2 shall not apply for extension of time. Order accordingly.

(R.G.KETKAR, J.)