

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.8493 OF 2016

M/s. The Indure Private Limited & Anr. Petitioners

Versus

Piramal Sons Pvt. Ltd.
(Through Manager Vilas Patil)Respondents

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Mr. Sanskar Marathe for the Petitioners.
Mr. Kedar Dighe for the Respondents.

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CORAM : N. M. Jamdar, J.

Friday 26 AUGUST, 2016

ORAL ORDER

. By this petition, the Petitioners challenge the orders passed by the learned Judge of City Civil Court dated 25 August, 2015 and 29 June, 2016 wherein the learned Judge has directed that suit to proceed since the Petitioners had not filed reply to the summons for judgment nor had not applied for leave to defend, and application for condonation of delay has been rejected.

2. The Respondents filed a summary suit invoking the provisions of order XXXVII of Code of Civil Procedure, in City Civil Court at Mumbai, on 8 May 2015. In the plaint, the Respondents contended that the Petitioners were interested in hiring a crane from the Respondents / Plaintiffs for it's project at Bhavanagar. Negotiations were held and contract was entered into. The case of

the Respondents / Plaintiffs is that the crane was to be given to the Petitioners on rental basis for minimum period of 12 months. Letter of intent was issued on 5 December, 2013 and the crane was mobilised on 21 February 2014. According to the Respondents / Plaintiffs the contract was terminated within six months though was for minimum of 12 months. The Respondents / Plaintiffs treated this termination as the cause of action for filing the suit and filed the suit for recovery of amount of Rs.59,92,254/-. On 25 August, 2015, the suit appeared before the learned Judge of City Civil Court, wherein the Petitioners appeared through an advocate. The learned Judge of City Civil Court noted that there was no reply to summons for judgment nor any leave within ten days of service of summons, was sought and therefore the suit will have to proceed. Thereafter, the Petitioners took out Notice of Motion No.4233 of 2015 for condonation of delay and Notice of Motion no.1094 of 2016 for recall of order dated 25 August, 2015. The learned Judge of City Civil Court came to the conclusion that he had no power to recall the order in view of the decision of this court and also that the reason given for delay was not satisfactory. Accordingly, Notices of Motion were dismissed.

3. Heard the learned counsel for the parties

4. The learned counsel for the Petitioners submitted that even assuming that the learned Judge of City Civil Court did not have jurisdiction to recall the order but the application for condonation of delay in seeking leave and for filing reply could

have been considered and in any case this court can consider the application for condonation of delay and permit the Petitioners to file their reply. He submitted that the suit itself was filed two years after letter of intent and therefore the Respondents / Plaintiffs themselves approached the court with delay. He submitted that this is a fit case, the equities can be balanced by imposing some costs and the lenient view be taken so that the Petitioners can put forth their case on merits before the court.

5. The learned counsel for the Respondents opposed the prayer and submitted that the Petitioners have deliberately delayed the matter so as to avoid payment due and he submitted that the cause of action when the contract was terminated and immediately suit has been filed. He submitted that the learned Judge of the City Civil Court had no jurisdiction to recall its own order and nothing stopped the Petitioners from challenging the order dated 25 August, 2015 immediately in this court, instead of that the Petitioners have deliberately dragged the proceedings. He relied on the decision of the learned Single Judge of Delhi High Court in ILR (2009) VI DELHI 541, I.A. in the matter of Swarovski India Pvt. Ltd. Vs. M/s. SPA Agencies & Another.

6. After hearing both the sides an order was passed on 25 August, 2016 as under

"P.C.

. *The petitioners challenge the orders passed by the City Civil Court dated 29 June, 2016 and 25 August, 2015 wherein the learned City Civil Court*

Judge has directed to proceed with the suit under Order 37 Rule 3(6) (a) of the Code of Civil Procedure.

2. *Heard the learned Counsel for the parties at length.*

3. *When the suit appeared on board on 25 August 2015, the Petitioners were represented however they had not applied for leave within 10 days. Therefore, the learned Judge had no option but to continue with the suit. Thereafter, an application was taken out for condonation of delay and recall of the order which has been rejected. The delay is of seven months and six days. The order was passed on 25 August 2015 and the application was moved in March 2016.*

4. *From the perusal of the record there is hardly any explanation as to why the application for restoration was moved after seven months, when the Petitioners were represented on 25 August 2015. The Respondent has invoked provisions of Order 37 of Code of Civil Procedure and has filed a Summary Suit. The Summary procedure is provided with legislative intent to expedite disposal of the dispute based on commercial instruments. Therefore, the conduct of a party seeking to delay the proceedings in such matters will have to be viewed differently.*

5. *In this context, it was put to the learned Counsel for the Petitioners as to whether the Petitioners are ready to secure part of the claim either by depositing the amount or by furnishing a bank guarantee or such other methods of securing the claim so that the equities in the matter can be balanced. The learned Counsel for the Petitioners seeks time to take instructions. Stand over to 26 August, 2016 for 'directions.'*

7. When the Petition was called out today, the learned counsel for the Petitioners, on instructions, submitted that the documents would show that the plaintiffs are liable to pay only Rs.25 lacs and as against 25 lacs, the Petitioners are ready to secure an amount of Rs.2 lacs. This statement is not in consonance with the intention expressed in order dated 25 August 2016. Therefore, on deposit of Rs.2 lacs when the claim of the Petitioner is to the tune of Rs.61 lacs, equities can not be balanced in proceedings of such nature. Therefore, I proceed to examine the rival contentions on their own merits.

8. Admittedly on 25 August, 2015 when the suit appeared on board the Petitioners were represented through their advocate. In the order, there was no reference of any request for filing an reply. Admittedly on that date, no leave to defend was sought within 10 days of the summons. The order does not reflects that there was any grievance that 10 days have not lapsed since service of summons. The order reflects that absolutely nothing was done and matter was simpliciter adjourned in view of the default of the Petitioners.

9. The learned Single Judge of this Court (R.P. SondurBaldota, J.) in Writ Petition No.9999 of 2013 has taken a view that the City Civil Court, in view of the specific provisions of order XXXVII of Rule 3 and 4 of the Code of Civil Procedure, does not have power to recall its own order and remedy is to approach the higher court. Therefore the consequences of not filing reply within a time or

seeking leave to defend were fully clear to the Petitioners. The Petitioners are a business house, with substantial turnover on their own showing and it is not a case that they are not aware of the legal provisions. It is not that on the next date an application is moved or the present petition is filed. The Notice of Motion No.4233 of 2015 was filed for condonation of delay and to take reply on record in October 2015. On 29 March, 2016, the Notice of Motion No.1094 of 2016 was filed for recall of the order dated 25 August, 2015. After rejection of these Notices of Motion, the writ petition has been filed on 13 July, 2016. Since, the Petitioners on their own showing is an established business house, it cannot be presumed that they are not aware of legal position or short of any legal advice. In essence by this petition moved in July 2016, the Petitioners are seeking to set aside of order passed in August 2015.

10. Even if the case is to be considered for condonation of delay in this petition, there is hardly any reason given in the affidavit in support of Notice of Motion. What has been stated by the Petitioners is that it took some time in the communication between advocate and their Delhi Office and the suit pertains to LOI dated 5 December, 2013 and it took some time to recognise the persons who were working on the project. Then some general averments are made that the concerned persons have left the job and it took some time to collect information. There are no particulars at all and the applicant is bereft of any particulars. Such general statement can be made by anybody.

11. By creating a remedy of a summary suit the legislature has provided for a summary procedure with clear intent of resolving the commercial dispute at the earliest. The manner in which the Petitioners have proceeded indicates that it is not mere negligence but a deliberate intent to delay the proceedings. Firstly no leave is sought, when every other diligent litigant seeks leave immediately. Then after months delay application for condonation and recall of order are moved and thereafter the present petition. Even when the query put that indulgence can be shown if part of the amount is secured, the Petitioners were ready only to deposit an amount of Rs.2 lacs as against the claim of Rs.61 lacs.

12. I am convinced from the attitude of the Petitioners, that there is a clear attempt to delay the proceedings so as to avoid and postpone the final outcome of the suit. If any indulgence is shown in these circumstances it will send a wrong signal and will encourage to the recalcitrant litigants to defeat the legislature intent in establishing a summary procedure at their will.

13. In the power of superintendence of this court, the order passed by the learned City Civil Judge cannot be set aside as it suffers from no infirmity. The Writ Petition is accordingly rejected.

(N. M. Jamdar, J.)