

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

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FIRST APPEAL (STAMP) NO. 25938 OF 2016
WITH
CIVIL APPLICATION NO. 4212 OF 2016
WITH
CIVIL APPLICATION NO. 4213 OF 2016
IN
FIRST APPEAL (STAMP) NO. 25938 OF 2016

M/s. Shakti Bioscience Ltd.]
a Company registered under the]
Companies Act, 1956, having its]
Factory and Office at Plot No.411/1,]
L.I.C. Sector, Silvassa Road, G.I.D.C.]
Vapi - 396 195, Gujarat.] .. Appellant

Vs.

1. M/s. Mody Chemi Pharma Pvt. Ltd.]
a Company registered under the]
Companies Act, 1956, having its]
Office at Unit No.407/408/409,]
Swastik Disa Corporate Park,]
Near Kotak Mahindra Bank,]
Opp. Shreyas Cinema,]
L.B.S. Marg, Ghatkopar (West),]
Mumbai - 400 020.]
2. Mr. Sadashiv Kanyana Shetty]
Managing Director of Defendant No.1,]
residing at 18/A, Tower 'D',]
Viceroy Park, Opp. Thakur Cinema,]
Thakur Village, Kandivali (East),]
Mumbai - 400 101.].. Respondents

Mr. O. S. Kutty for the Appellant.
Mr. N. S. Charipalli for Respondent No.1.
Mr. Subi S. for Respondent No.2.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 26th SEPTEMBER, 2016.

ORAL JUDGMENT

1. Admit. With consent of learned counsel for both the parties, heard finally at the stage of admission itself as the issue involved in this appeal is very short one.

2. This appeal is preferred against the ex parte Judgment and decree dated 04.11.2015 passed by the City Civil Court, Mumbai under the provisions of Order 37 Rule 2 of the CPC in a summary suit instituted by respondent No.1 against the appellant.

3. As per the appellant, the summons of the said suit was not served on the appellant on its addresses both at Mumbai and also at Vapi, Gujarat. Only when the appellant came to know about the execution proceedings and received the notice thereof from the Court, the appellant made inquiry and came to know about the passing of ex parte decree. The appellant, therefore, filed Notice of Motion No. 2342 of 2016 before the Trial Court for setting aside the ex parte decree. The said Notice of Motion was filed under Order 37 Rule 4 of the CPC. The Trial Court however rejected the said Notice of Motion vide its order dated 11.08.2016. Hence, being aggrieved thereby, this appeal is preferred challenging ex parte Judgment and decree as passed by the Trial Court

and also challenging the order dated 11.08.2016 on the Notice of Motion by submitting that the Trial Court vide the said order rejected the Notice of Motion filed by the appellant for setting aside the ex parte decree as the Trial Court considered the application as if it was for review of the Judgment and decree.

4. It is urged by learned counsel for the appellant that the provisions of Order 37 Rule 4 of the CPC specifically empower the Trial Court to set aside the ex parte decree under special circumstances and gives leave to the defendant to appear and defend the suit, if, it is deemed reasonable to do so and on such terms as the Court may think fit. In the instant case, it is submitted by the learned counsel for the appellant that the Trial Court has totally ignored the relevant provisions of the law laid down in the various authorities relied upon by the learned counsel for the appellant, to point out that the failure to serve the summons is a special circumstance for setting aside the ex parte decree, under Order 37 Rule 4 of the CPC.

5. Learned counsel for the appellant has also drawn attention of this Court to the affidavit filed by the appellant herein stating that the service of summons was not made on the appellant at its Head Office at A-103, Bhakti Apartment, Jambli Gali, Opp. Jain Temple, Near Moksh Plaza Mall, Borivali (West), Mumbai - 400 092 or its registered office and factory

address at Plot No.411/1, L.I.C. Sector, Silvassa Road, G.I.D.C., Vapi, Gujarat. It is urged that, in view of this affidavit and also considering the provisions of Order 37 Rule 4 of the CPC, the Notice of Motion preferred by the appellant before the Trial Court for setting aside the ex parte decree needs to be allowed, so that the appellant will get an opportunity to contest the suit on merits, especially, when the appellant is having strong case of defence. Learned counsel for the appellant submits that the appellant is ready to abide by any conditions imposed by this Court, like the payment of costs to respondent No.1 and also for expeditious hearing of the suit.

6. Learned counsel for respondent No.1 has, however, submitted that the Trial Court has, only after being satisfied on the basis of affidavit of service filed by respondent No.1 herein, passed the order of proceeding with the suit ex parte. The Trial Court has then considered all the evidence produced by respondent No.1 and thereafter only decreed the suit. Now, the said decree is also put to execution. Therefore, according to learned counsel for respondent No.1, no case is made out for setting aside the ex parte decree and the Trial Court has rightly rejected the Notice of Motion.

7. Having heard submissions advanced by the learned counsel for both the parties, certain facts need to be noted. In the first place, admittedly the suit was filed before the Trial Court as a Summary Suit No.

3624 of 2013. It was clearly a money suit for the recovery of sum of Rs.41,43,235/- with further interest, towards the sale of goods. Therefore, the suit was filed under the provisions of Order 37 of the CPC. Para 5 of the impugned Judgment of the Trial Court Court reveals that the Writ of Summons was transmitted through RPAD and was duly served on the present appellant while another Writ of Summons forwarded to respondent No.2 returned unclaimed. The Trial Court considered it to be a good service and as none of the defendants therein i.e. the appellant and respondent No.2 appeared, the suit was proceeded ex parte.

8. Immediately, when the appellant came to know about the ex parte decree passed in the suit, when the appellant received the notice of execution proceeding, the appellant filed Notice of Motion No. 2342 of 2016 before the Trial Court with a specific averment made therein that this Notice of Motion was under Order 37 Rule 4 of the CPC for setting aside the ex parte decree. The provisions of Order 37 Rule 4 of the CPC read as follows:

"4. Power to set aside decree.- After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit."

9. These provisions abundantly make it clear that whenever a decree is passed in a summary suit, the Court has the special power to set

aside the said decree under special circumstances and to grant leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court to do so and on such terms as the Court thinks fit. These powers conferred under Order 37 Rule 4 of the CPC aim at dispensing substantial cause of justice to the parties so as to decide the matter on merits. This provision thus specifically provide for setting aside the ex parte decree and giving leave to the defendant to defend the suit in special circumstances. What can be the special circumstances, is also laid down in various authorities like; **(1) P.N. Films Ltd. and Anr. Vs. Overseas Films Corporation Ltd. AIR 1958 Bom 10**, **(2) Fountainhead Promotions of Events Pvt. Ltd. Vs. Gitanjali Lifestyl Ltd.**, Notice of Motion No. 1902 of 2012 in Summary Suit No. 874 of 2012 decided on 15.07.2013 and **(3) Rajnikumar Vs. Suresh Kumar Malhotra**, Appeal (Civil) No. 2538 of 2003, decided on 28.03.2003, which are relied upon by the learned counsel for the appellant before the Trial Court and which the Trial Court has considered in para 3 of its impugned order passed below the Notice of Motion. It is stated that in all the authorities which are mentioned in para 3 of the order, that failure to serve the summons is a special circumstance for setting aside the ex parte decree as per Order 37 Rule 4 of the CPC.

10. In the instant case, the very ground on which the appellant is seeking setting aside of the ex parte decree, is the non receipt of Writ of

Summons. The appellant has filed the affidavit to that effect in the Notice of Motion. In para 3 of the said affidavit, the appellant has made a categorical statement that the appellant has not received the Writ of Summons of the suit either on his address at Head Office in Borivali or at registered office at factory at Vapi, Gujarat. In such situation, it goes without saying that the Trial Court should have allowed the Notice of Motion filed by the appellant herein for setting aside the ex parte decree.

11. The impugned order passed by the Trial Court, especially, the observations made in para 8 of the said order however reveals that the Trial Court has proceeded on the presumption that as the notice sent by RPAD has returned with acknowledgment, it has to be presumed that the notice was duly served on the appellant. When admittedly this presumption is controverted by the appellant by filing affidavit on oath, the Trial Court should have held the presumption to stand as rebutted and set aside the ex parte decree. However, the observations made by the Trial Court in para 11 of the impugned order reveal that the Trial Court has considered that it cannot reverse its own order unless it comes within the purview of Order 47 of the CPC. The Trial Court further observed that as the Notice of Motion filed by the appellant was not an application for review of the Judgment and decree, the Trial Court cannot take into consideration the defence raised by the appellant herein and accordingly, the Trial Court dismissed the said Notice of Motion. Needless to state that

the Trial Court has thus totally misguided itself while rejecting the said Notice of Motion on consideration that the Notice of Motion is as good as a review application. It, therefore, follows that the impugned order passed by the Trial Court of rejecting the Notice of Motion cannot be upheld.

12. Once it is held that under Order 37 Rule 4 of the CPC non service of summons is considered to be the special circumstance for setting aside the ex parte decree, the Notice of Motion preferred by the appellant on the very same ground needs to be allowed thereby giving an opportunity to the appellant to defend the suit on such terms, as this Court may think fit.

13. Considering that the decree is for the amount of Rs.41,43,235/- along with future interest thereon, however the principal amount was only of Rs.26,13,380/-, the decree can be set aside subject to costs of Rs.50,000/- to be paid by the appellant to respondent No.1 and also subject to condition that appellant deposits in the Trial Court the principal amount of Rs.26,13,380/- and both the parties co-operate to the Trial Court for expeditious disposal of the suit.

14. Accordingly, the appeal is allowed.

15. The impugned order passed by the Trial Court in Notice of

Motion No.2342 of 2016 is set aside. The said Notice of Motion is allowed.

16. As a result the ex parte Judgment and decree passed by the Trial Court dated 04.11.2015 is set aside.

17. The appellant is granted leave to appear in the suit and to defend the suit subject to payment of costs of Rs.50,000/- to respondent No.1 and subject to deposit the principal sum of Rs.26,13,380/- within four weeks from today in the Trial Court.

18. Both the parties are accordingly directed to appear before the Trial Court on 30.11.2016.

19. Needless to state that both the parties will co-operate with the Trial Court for expeditious hearing of the suit.

20. All the civil applications in this appeal, having become infructuous, are also disposed of finally.

[DR. SHALINI PHANSALKAR-JOSHI, J.]