

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13377 OF 2016

Beyond Logistics Private Limited ...Petitioner

Versus

Drive India Enterprises Solutions Ltd.

And Anr.

...Respondents

....

Ms.N.C. Nichani i/b. Ms. Deepa Kamath, Advocate for Petitioner.

Mr.Vikas Khanchandani i/b. Singhania & Co. for Respondent No.1.

Mr.Sandip Babar, AGP, for Respondent No.2-State.

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CORAM : R. G. KETKAR, J.

DATE : 8th DECEMBER, 2016

P.C.

1. Heard Ms. N.C. Nichani, learned Counsel for the petitioner, Mr.Vikas Khanchandani, learned Counsel for respondent No.1 and Mr. Sandip Babar, learned AGP for respondent No.2-State, at length.

2. Rule. Learned Counsel for the respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant',

has challenged the judgment and order dated 20.9.2016 passed by the learned Judge, City Civil Court, Greater Bombay in Notice of Motion No.3769/2015 in Summary Suit No.1458/2014. By that order, the learned trial Judge rejected the Motion taken out by the defendant *inter alia* praying for (a) setting aside the order dated 10.8.2015 for not filing the affidavit in reply in Summons for Judgment or for leave to defend within 10 days from service of Summons for Judgment; (b) condoning the delay of 189 days; (c) allowing the defendant to file affidavit in reply in Summons for Judgment No.76/2015 and proceed for hearing of the Summons for Judgment.

4. Respondent No.1, hereinafter referred to as the 'plaintiff', has instituted Summary Suit for recovery of money under invoices on or about 20.8.2014. The suit summons was duly served on the defendant on 7.10.2014. It is the case of the defendant that on 16.10.2014 Vakalatnama was filed in the Court which was marked Exhibit-3. On 2.12.2014 letter was addressed by the defendant's Advocate to the plaintiff's Advocate requesting them to fix their date and time for inspection of the original documents referred to and relied upon by the plaintiff so as to enable the defendant to file reply in the matter. This

letter was followed by letter dated 8.12.2014. On 7.1.2015, the plaintiff took out Summons for Judgment. On 16.3.2015, Summons for Judgment was directly served on the defendant. On 10.8.2015, the learned trial Judge passed order recording therein that Advocate for the defendant admitted the fact of service of Summons for Judgment in the month of April, 2015. The defendant has neither filed reply nor prayed for leave to defend within ten days from the date of service of summons for judgment. The learned trial Judge, therefore, directed the suit to proceed further under Order XXXVII Rule 3(6)(a) of C.P.C. and adjourned the matter to 5.10.2015.

5. On the same day, the plaintiff filed application for fixing date for exparte decree. The plaintiff contended that the defendant was obliged to file Vakalatnama within 10 days of service of Summons for Judgment. Having not done so, under Rule 119(3) of Bombay City Civil Court Rules, 1948 (for short, 'Rules'), exparte decree must follow. The plaintiff, therefore, prayed that the suit should be set down for passing exparte decree. On 7.10.2015 the defendants took out Notice of Motion for the reliefs already referred hereinabove. In support of this Motion, Mr.Sudhir Gupte, Director of the defendant company

made affidavit. In paragraph-1, it is specifically stated that the defendant's Advocate by letters dated 2.12.2014 and 8.12.2014 informed the Advocate for the plaintiff to give inspection of the original documents which was not given till date. The deponent also admitted that in the month of April, 2015, the Summons for Judgment was served.

6. The plaintiff filed reply dated 23.11.2015 opposing the Motion. In paragraph-6, the plaintiff admitted receiving of letters dated 2.12.2014 and 8.12.2014 written by the defendant's Advocate. It is further stated that the plaintiff's repeated requests for giving intimation or positively writing that Vakalatnama indeed was filed, by giving copy of a Vakalatnama. It was further submitted that the defendant's Advocate name never appeared on the board at the time of hearing. The plaintiff has reasonable doubt. In paragraph-8, reference is made to the letters dated 2.12.2014 and 8.12.2014. It was contended that at the end the letters endorse as "Advocate for the Plaintiffs" which created lot of confusion and the plaintiff therefore, was under the impression that probably the letters are being issued by mistake as even after sending the email dated 20th August 2015 in response to Advocate Deepa Kamath's

email dated 19th August 2015 seeking clarification to the reference of the suit number, no reply or any clarification was issued by the other side.

7. After considering the material on record, the learned trial Judge rejected the motion. It is against this order the defendant has instituted the present petition.

8. In support of this petition, Ms. Nichani relied upon the provisions of Order XXXVII of C.P.C. as also Rule 119 of the Rules. She submitted that Order XXXVII Rule 3(1) lays down that the plaintiff shall together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, shall file in Court an address for service of notices on him. Sub-Rule (3) thereof lays down that on the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be. She submitted that after service of summons upon the defendant, it

is mandatory for the defendant to enter appearance either in person or through pleader within 10 days. As far as the requirement of filing in Court an address for service of notice on him as also giving notice of such appearance by to the plaintiff is concerned, they are directory and not mandatory. These are the procedural requirements. In support of these submissions she relied upon the decisions of Delhi High Court in *Arjan Lal Verma and another v. Smt. Rawel Kaur*, AIR 1982 DELHI 148 and *Sri Pal Jain and another v. Mulakh Raj*, AIR 1987 DELHI 21. She submitted that the decision of learned Single Judge of Delhi High Court in *Arjan Lal Verma* (supra) is approved by Division Bench of this Court in *Bankay Bihari B. Agrwal and others v. Bhagwanji Meghji and others*, 2001(2) Bom.C.R. 86. She invited my attention to paragraph-39.

9. Ms. Nichani submitted that before the learned trial Judge the decision of *Sri Pal Jain* (supra) was specifically cited. The learned trial Judge observed that the view expressed in that authority is honored. The learned trial Judge thereafter did not deal with applicability of this authority or not and observed that in the affidavit in support of the Motion, the Director of the Company claimed that he is a layman and was not aware of the

procedure. The learned trial Judge referred to the decision of *Salil Dutta v. T.M. And M.C. Private Ltd., (1993) 2 SCC 185* and observed that being a Director of a private limited company, he cannot take stand of being a layman. Ignorance of law cannot be an excuse and there is no justifiable ground for condoning the delay of 189 days in approaching the Court.

10. Ms. Nichani submitted that the learned trial Judge committed error in relying upon the decision of Apex Court in *Salil Dutta* (supra). She, therefore, submitted that the impugned order deserves to be set aside.

11. On the other hand, Mr. Khanchandani supported the impugned order. He submitted that the defendant had not disputed that the suit summons was duly served on them on 7.10.2014. The suit appeared before the trial Court in September, 2014, 8.12.2014 and 7.1.2015. The defendant's Advocate did not intimate entering appearance. Even the requirement under Order XXXVII Rule 3(1) of filing in Court an address for service of notices on him, was not complied with. He submitted that the plaintiff was not aware of the defendant entering appearance in the suit. Summons for Judgment was served directly on the defendant on 16.3.2015 and within 10 days

from service of Summons for Judgment, no reply was filed. He further submitted that filing of adress for service of notice under Order XXXVII Rule 3(1) is mandatory. In support of this proposition, he relied upon the decision of Delhi High Court in **Rajesh Arora v. Mukesh Jain**, (2002) 98 DLT 29. He further submitted that the learned trial Judge has rightly held that the Director of the defendant company cannot claim to be a lay man and no sufficient cause is made out for condoning the delay of 189 days. He, therefore, submitted that no case is made out for interfering with the impugned order.

12. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. From the material on record, it is evident that the plaintiff has instituted Summary Suit under Order XXXVII on 20.8.2014. Writ of suit summons is served on the defendant on 7.10.2014. There was some dispute as to whether the defendant filed appearance within 10 days or not. In view thereof, R & P was called from the trial Court. After perusing the R & P, it is apparent that the defendant filed appearance on 16.10.2014 i.e. within 10 days from the service of suit summons. It is also evident that the defendant addressed

letters dated 2.12.2014 and 8.12.2014. For appreciating the controversy between the parties, letter dated 8.12.2014 is reproduced.

“

Dated: 8/12/2014

To,
M/s. Singhanian and Company,
Advocate for Plaintiffs,
Suit 102, 103, 10th floor,
Jolly Maker Chamber II,
Nariman Point,
Mumbai 21

RE: City Civil Court, Mumbai

Sum Suit No.1456 of 2014

Drive India Enterprises Solutions Ltd.
V/s.
Beyond Logistics Pvt. Ltd.

Sir,

I am concerned for my clients, the Defendants in the above matter.

You are hereby requested to fix date, place and time for inspection of Original Documents referred to and relied upon by your clients in the above matter so as to enable my clients to file Reply in the above matter.

Please note that matter is kept on 7/1/15 at 11am in Court Room no.26 which please note.

Kindly acknowledge receipt hereof.

Yours faithfully,
Sd/-

Advocate for the Plaintiffs. ”

13. Perusal of this letter shows that reference is made to the Summary Suit No.1456/2014. Admittedly the Suit is numbered as Summary Suit No.1458/2014. Perusal of the letter further shows that Advocate Deepa R. Kamath has addressed the letter setting out therein that she is concerned for the defendant in the matter and requested to fix date, place and time for inspection of the original documents referred to and relied upon by the plaintiff so as to enable the defendant to file reply in time. It was also informed that the matter is kept on 7.1.2015. The letter is thereafter signed as "Advocate for the plaintiffs". Thus apparently there are two mistakes in the letter dated 8.12.2014 i.e. (1) in the number of the suit and (2) the letter is ended by saying "Advocate for the Plaintiffs". As noted earlier, the plaintiff has admitted receiving of letters dated 2.12.2014 and 8.12.2014 as is evident from paragraphs-6 & 8. The plaintiff has not brought on record any correspondence addressed by them in response to letters dated 2.12.2014 and 8.12.2014. It is also not brought on record as to whether the request made in these letters, namely, of giving inspection of the original documents was complied. However, in paragraph-8 it was stated thus :

“8. I say that letters dated 8/12/2014 and 2/12/2014 the case number referred to is 1456 of 2014 and also in the beginning the Learned Advocate Ms. Kamath wrote “*I am concerned for my clients, the defendants in the above matter*” and then at the end of the letter endorses as “*Advocate for the Plaintiffs*” which creates a lot of confusion and the Plaintiff therefore, was under the impression that probably the letters are being issued by mistake as even after sending the email dated 20th August, 2015 in response to Advocate Deepa Kamath's email dated 19th August, 2015 seeking clarification to the reference of the suit number, no reply or any clarification was issued by the other side.”

14. On one hand, the plaintiff did not respond to the letters dated 2.12.2014 and 8.12.2014 as also apparently did not give inspection of the original documents and on the other filed application dated 5.10.2015 for passing exparte decree. Rule 119(3) of the Rules reads thus :

“119. Appearance of defendant.

XXXXX

XXXXX

(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.”

15. Perusal of sub-rule (3), extracted hereinabove, permits the plaintiff to apply for putting down the suit for hearing forthwith 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. In such an application, the plaintiff has to 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.

16. In the present case, perusal of the application dated 5.10.2015 does not indicate that the plaintiff positively made statement of defendant not entering an appearance. The plaintiff also did not state the date when the defendant was served. However, the plaintiff prayed for passing ex parte decree. The said application made under Rule 119(3) is bereft of particulars.

17. In the case of *Arjan Lal Verma* (supra), the learned Single Judge of Delhi High Court has observed that filing of appearance within a period of 10 days from service of writ of

summons is a mandatory provision. Insofar as entering appearance and filing address of service are the procedural requirements. The decision of *Arjan Lal Verma* (supra) was quoted with approval by Division Bench of this Court in *Bankay Bihari B. Agrawal* (supra) and in particular paragraph-39. Said decision was referred to contend that mere failure of the defendant to serve the notice of his entering appearance on the plaintiff or his Counsel could not result in a summary judgment and decree against the defendant merely on the ground of failure to serving notice of entering appearance. Division Bench observed that the proposition laid down by the learned Single Judge, with respect, is correct.

18. The decision of *Arjan Lal Verma* (supra) was also considered in *Sri Pal Jain* (supra) in paragraph-8. In paragraph-12 it was held that filing of address for service is not mandatory part of Order XXXVII Rule 3 of C.P.C. and Hon'ble Mr.Justice Chawala held that the trial Court could not have passed the decree by assuming that the facts stated in the plaint are admitted.

19. Mr. Khanchandani relied upon the decision of Delhi

High Court in *Rajesh Arora (supra)*. Perusal of this decision does not indicate that attention of the learned Single Judge was invited to the decisions of *Arjan Lal Verma (supra)* and *Sri Pal Jain (supra)*. That apart, Division Bench of this Court has quoted with approval the decision of *Arjan Lal Verma (supra)*. In view thereof, reliance placed by Mr. Khanchandani on the decision of *Rajesh Arora (supra)* does not advance the case of the plaintiff.

20. By the Notice of Motion, the defendant has prayed for recalling order dated 10.8.2015 by which the learned trial Judge directed the suit to proceed exparte under Order XXXVII Rule (3) (6)(a) of C.P.C., for filing affidavit in reply in Summons for Judgment or for granting leave to defend. The defendant also prayed for condoning the delay of 189 days and further prayed for permission to file affidavit-in-reply in Summons for Judgment.

21. In my opinion, the learned trial Judge did not find out whether the defendant had filed appearance within 10 days from service of suit summons or not. That apart, the learned trial Judge also did not consider the letters dated 2.12.2014 and 8.12.2014 and also the fact that no material is produced on

record to indicate that the plaintiff gave inspection of the original documents. In such state of affairs, the learned trial Judge was not justified in dismissing the Motion. Perusal of the impugned order shows that the learned trial Judge though referred to the decision in *Sri Pal Jain* (supra), did not follow that decision but merely observed that said authority was not honored.

22. In the light of the aforesaid discussion, the impugned order cannot be sustained and as such is liable to be set aside and thereby allowing the Notice of Motion in terms of prayer clauses (a), (b) and (c). Rule is made absolute in aforesaid terms with no order as to costs. R & P be transmitted to trial Court forthwith.

(R. G. KETKAR, J.)

Deshmane (PS)