

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11617 OF 2015**

M/s. Seafood Park (India) Ltd

Petitioner

Vs

M/s. Industrial Refrigeration
through Proprietor, Mr.
Ajaykant Ruia and Anr.

.. Respondents

Mr. Aashish Agarwal a/w Mr. Suraj Ayer i/b M/s Ganesh & Co.,
Advocates for Petitioner.

Mr. Ashish Mehta i/b Mr. Deepak Jamsandekar, Advocate for
Respondents.

CORAM : R.G.KETKAR,J.
DATE : 10/03/2016

PC:

1. Heard Mr. Aashish Agarwal, learned counsel for the petitioner and Mr. Ashish Mehta, learned counsel for the respondents at length.
2. Rule. Mr. Mehta waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 30.9.2015 passed by the learned Judge, presiding over Court Room No.28, of the Bombay City Civil Court at Bombay in Summons for Judgment No.272 of 2011 in Summary Suit No.3675 of 2009 (High Court Summary Suit No. 1389 of 2009). By that order, the learned trial Judge granted conditional leave to defend

to the petitioner, hereinafter referred to as 'defendant', subject to depositing sum of Rs.5,64,995/- in the Court within four weeks from the date of the order. After depositing the said amount by the defendant, written statement was ordered to be filed within four weeks. The learned trial Judge further directed that on depositing the said amount by the defendant within four weeks in the court, Registrar will invest the amount in the nationalized Bank, initially for a period of one year and continue to renew the same for the like period until further orders. On failure of the defendant to deposit the amount within four weeks, the respondents, hereinafter referred to as 'plaintiffs', were granted liberty to apply for further reliefs.

4. The plaintiffs instituted suit on 8.4.2009 under Order 37 of C.P.C. against the defendant for recovery of Rs.13,90,154/- as per particulars of claim at Exhibit 'L' with further interest at the rate of 18% per annum till payment and/or realization. The plaintiffs took out the Summons for Judgment on 9.8.2011 for obtaining judgment in the suit against the defendant for recovery of Rs.13,90,154/- as set out in particulars of claim at Exhibit L with further interest at the rate of 18% per annum till payment and/or realization as also costs of the suit. The plaintiffs also filed Affidavit of Ajaykumar Ruia in support of Summons for Judgment. The defendant filed affidavit of Mr. K. Krishnakumar, Director of the defendant on 14.9.2011. Among other defences, defendant

contended that the plaintiffs took out Summons for Judgment after the period of two years and four months from the date of institution of the suit. The plaintiffs did not take out Summons for Judgment within a period of six months as stipulated in Rule 119 of the Bombay City Civil and Sessions Court Rules, 1948 (for short, 'Rules'). On this ground alone, Summary Suit is liable to be dismissed or in the alternate, defendant is entitled to unconditional leave to defend the suit.

5. By the impugned order, the learned trial Judge granted conditional leave to defend to the defendant subject to depositing Rs.5,64,995/-. It is against this decision, the defendant has instituted the present petition.

6. Mr. Agarwal invited my attention to Rule 119 of the Rules. He submitted that Rule 119(4) lays down that if the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit shall be set down in the daily cause board for dismissal before the Sitting Judge in Chambers, one week before the day fixed for such dismissal. Upon the day fixed for such dismissal, the suit shall be called on before the Sitting Judge in Chambers and shall be dismissed if the plaintiff fails to appear, or appearing fails to satisfy the Judge that he has sufficient cause for not having proceeded with his suit. He submitted that, in the first place, as the plaintiff admittedly did not apply for a decree within six months after filing of the suit. Secondly, the suit was

not set down in the daily cause board before the sitting Judge in Chambers consequently Sitting Judge in Chambers could not go into the question as to whether the suit is liable to be dismissed for not applying for a decree within six months or the plaintiff made out a sufficient cause for not proceeding with the suit. He relied upon the decision of this Court in the case of Bankay Bihari G Agrawal Vs. M/s Bhagwanji Meghji, 2001(1) Mh.L.J. 345 and in particular paragraphs 10,12,13.

7. On the other hand, Mr. Mehta supported the impugned order. During the course of hearing, he however fairly conceded that provisions of Rule 119 were not followed. He, whoever, invited my attention to paragraphs 37 and 43 of Bankay Bihari's decision (supra).

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record.

9. Rule 119 reads thus:

"119. Appearance of defendant. Summons for Judgment - In a suit filed under Order 37 of the Code of Civil Procedure if the defendant enters an appearance, or files a Vakalatnama, the plaintiff shall, on affidavit made by himself or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action, and the amount claimed, and stating that in his belief there is no defence to the action, apply by Summons for Judgment returnable not less than ten clear days from the date of service to the Sitting Judge in Chambers for the amount claimed, together with interest (if any) and costs. The Judge may thereupon, unless the defendant by affidavit or declaration shall satisfy him that he has a good defence to

the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly.

(2) **Interlocutory proceedings.** - On the Summons for Judgment all such directions may be given and orders made for the conduct of the suit as may appear necessary to the Judge hearing the same.

(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.

(4) **When no decree applied for within six months-** If the plaintiff does not apply for a decree within six months after the filing of the plaint, the suit shall be set down in the daily cause board for dismissal before the Sitting Judge in Chambers, one week before the day fixed for such dismissal. Upon the day fixed for such dismissal, the suit shall be called on or before the Sitting Judge in Chambers and shall be dismissed if the plaintiff fails to appear, or appearing fails to satisfy the Judge that he has sufficient cause for not having proceeded with his suit."

10. In the case of Bankay Bihari (supra), the Division Bench of this Court considered Rules 227 and 265 of the Bombay High Court (Original Side) Rules 1980. In paragraphs 10 and 37 it was observed thus:-

"10. Every Plaintiff has the choice of bringing any suit, and is governed by normal rules prescribed by the Code of Civil Procedure in the conduct of such suit. Order 37 is a special summary procedure which is applicable to a limited class of suits. If a Plaintiff wants to adopt this, Rule 227 enjoins him to act with alacrity by taking out Summons for Judgment for decree within 6 months after filing of the plaint. If he fails to do so, then the Rule enjoins upon the Prothonotary & Senior

Master to place the suit on board for dismissal before the Chamber Judge. In our view, merely because a suit is placed upon the board for dismissal for failure to take out a Summons for Judgment within 6 months, it need not be dismissed. Rule 265 of the 1980 Rules clothes the Chamber Judge with the discretion to enlarge or abridge the time appointed by the Rules, or fixed by any order, for doing any act or taking any proceedings, upon such terms as the justice of the case may require. Thus, there is scope for exercise of judicial discretion depending on the facts and circumstances of the case. Consequently, upon failure to take out the Summons for Judgment within a period of 6 months, as provided by Rule 227, all that would happen is that the suit would appear on the board for dismissal, and the Plaintiff is required to satisfy the Chamber Judge as to reasons, if any, which prevented him from taking out the Summons for Judgment within a period of 6 months. If the Judge is not satisfied, then, the suit shall, of course, be dismissed. However, if the Chamber Judge accepts the reason given by the Plaintiff for the delay, then, under Rule 265, he has discretion to excuse the delay in the taking out of the Summons for Judgment "upon such terms as the justice of the case may require". No one has disputed this proposition that delay in taking out Summons for Judgment is always excusable for good reasons and on such terms as the Chamber Judge may decide.

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of the Summons for Judgment "upon such terms as the justice of the case may require". No one has disputed this proposition that delay in taking out Summons for Judgment is always excusable for good reasons and on such terms as the Chamber Judge may decide.

37. The underlying public policy behind Order 37 is expeditious disposal of suits of commercial nature. This public policy would be sub served if the plaintiff, after adopting the summary remedy, takes inordinately long time to take out a Summons for Judgment: nor would it be sub served if merely on the ground that the Plaintiff has taken more time than prescribed by Rule 227, unconditional leave is to be granted to the defendant as a matter of course. It is in this area that judicial discretion has to be exercised. The Court, in our judgment, is empowered to consider, even in a case of delay on the part of the plaintiff, the merits of the defence and then take an overall view as to whether leave should be granted to defend the suit conditionally or unconditionally or whether such leave should be refused. Otherwise, it would mean that even in a case where the defence is totally illusory or chimerical, the defendant could claim unconditional right to defend the suit as a matter of right merely on the ground of plaintiffs delay. The better view to take would be that the Court would have to balance the lack of promptitude on the part of the plaintiff against the nature of the defence raised in the affidavit by the defendant and decide whether to grant unconditional or conditional leave or to decline leave to defend the suit."

11. In paragraph 43, Division Bench further considered the contention that if there is delay in taking out a Summons for Judgment, condonation thereof is itself a triable issue, and, therefore, unconditional leave to defend the suit ought to be granted to the Defendant. The said contention was repealed by observing that it is a fallacious contention. It was thereafter observed that the stage for considering the application for leave to defend commences only after the exercise of power of condonation of delay under Rule 227. Delay in taking out

Summons for Judgment may result in the suit being placed on the board of the Chamber Judge for dismissal. At that stage, the defendant is not even in the picture. What transpires is purely between the Court and the Plaintiff. The plaintiff has to satisfy the judicial conscience that there were circumstances under which dismissal of the suit would render injustice. Upon this being done, the suit would not be dismissed. The Division Bench also repealed the contention of the defendant in such a case the discretion having already been exercised in favour of the Plaintiff by not dismissing the suit, imposing a condition for granting leave to defend the suit would amount to exercise of discretion twice over in favour of the Plaintiff. The Division Bench observed thus:

“43. ... The two exercises are distinct, though not necessarily unconnected. First, is at the stage of Rule 227 to decide whether the suit deserves to be dismissed on the ground of delay in taking out the Summons for Judgment. Second, is to decide whether leave should be granted for defending the suit. In addition to the merits of the defence, the Court is required, in our view, to keep the conduct of the plaintiff also in mind. If the delay in taking out the Summons for Judgment is unconscionable, it could well affect the discretion of the Court in granting unconditional leave or in imposing conditions on the leave to defend the suit. To postulate that in every case, irrespective of the nature of the defence, the factor of delay in taking out the Summons for Judgment alone would result in unconditional leave to defend the suit, should make the judicial discretion hamstrung and defeat the public policy underlying the procedure for summary suits.”

12. Rule 119 is pari materia with Rules 227 and 265 of High

Court (Original Side) Rules, 1980. As noted earlier, there is non compliance of Rule 119, extracted herein above. In the light of the decision of the Division Bench of this Court in Bankay Bihari (supra), impugned order is liable to be set aside, thereby, directing Registry of City Civil Court to place the matter before the Chamber Judge in terms of Rule 119 of the Rules. Hence, the following order.

- (i) Impugned order is set aside and the matter shall be listed before the Chamber Judge in terms of Rule 119 of the Rules.
- (ii) Let that exercise be done within two weeks from receipt of the authenticated copy of this order. Learned Chamber Judge is requested to take appropriate decision in accordance with law within four weeks thereafter.
- (iii) Rule is made absolute in the above terms with no order as to costs. Order accordingly.

(R.G.Ketkar, J.)