

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1239 OF 2016

Rajesh Shah ... Petitioner
Vs.
Coating Specialties (India) Ltd. ... Respondent

Mr. Amrut Joshi a/w. Ms Deeksha Hapawat a/w. Mr. Suraj Iyer i/b. Ganesh & Co. for Petitioner.

Mr. Shyam Kapadia a/w. Ms Shruti Katakey, Ms Vidhi Kothari i/b M/s. Crawford Bayley & Co. for Respondent.

CORAM : R. G. KETKAR, J.

DATE : 20TH APRIL, 2016

P.C. :

Heard Mr. Joshi, learned Counsel for petitioner and Mr. Kapadia, learned Counsel for respondent at length. Rule. Mr. Kapadia waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 10.12.2014 passed by the learned Judge, City Civil Court, Mumbai in Summons for Judgment No.251 of 2014 in Summary Suit No.209 of 2013. By that order, the learned trial Judge granted conditional leave to defend the Suit to the petitioner, hereinafter referred to as defendant, subject to depositing the suit claim amount of Rs.33,44,745/- within 6 weeks from the date of the order. After depositing the said amount within 6 weeks, defendant is directed to file written statement within 2 weeks thereafter. On depositing the said amount by the defendant within six weeks, Registrar (Civil) is directed to invest the said amount in any nationalized bank, initially for a period of one year and continue to renew the same for the like period, until further orders. It was further made clear that on failure on the part of defendant to deposit the amount within six weeks,

Summons for Judgment would be made absolute.

3. Mr. Joshi submitted that though defendant had filed reply to Summons for Judgment, his Advocate was not present at the time of arguments. This is also evident from the order dated 10.12.2014. Defendant, therefore, took out Motion under Order 9, Rule 13 for condoning the delay in taking out the Motion and for setting aside the order dated 10.12.2014. By order dated 14.08.2015, the learned trial Judge dismissed the Motion. He submitted that Summary Suit is instituted in or about 08.01.2013. Summons for Judgment is taken out on or about 06.05.2014. Mr. Joshi further relied upon Rule 119 of the Bombay City Civil and Sessions Court Rules, 1948 and in particular sub-rule (4) thereof to contend that the Summons for Judgment was not taken out within six months as contemplated therein and this aspect is not considered. He relied upon decision of ***Bankay Bihari G. Agrawal Vs. Bhagwanji Meghji*, 2001(1) Mh.L.J. 345.**

4. Mr. Joshi also invited my attention to the communication dated 29.10.2010 addressed by the plaintiff to defendant and in particular clauses 5 and 6 thereof. He also invited my attention to the communication dated 29.06.2012 addressed by the plaintiff to the defendant and in particular paragraphs 1.1, 1.2, 1.3, 1.4, 1.7 and 1.13 to contend that at trivial defence is made out.

5. On the other hand, Mr. Kapadia supported the impugned order. Mr. Kapadia invited my attention to paragraph 9 of the affidavit in reply to contend that defendant did not appear on 10.01.2014, 19.03.2014, 14.08.2014, 15.09.2014, 17.10.2014, 09.12.2014 and also on 10.12.2014 when the impugned order was passed. During the course of hearing, I have suggested to Mr. Kapadia that as the learned trial Judge did not

hear petitioner's Advocate, subject to imposing costs, the matter can be remitted for de novo consideration as also for consideration as to whether plaintiff has made out a case for condoning the delay in taking out the Summons for Judgment. Upon taking instructions, Mr. Kapadia fairly stated that the impugned order may be set aside subject to imposing costs.

6. As the defendant did not appear on various dates as set out in paragraph 9 of the affidavit in reply and more importantly, perusal of the impugned order dated 10.12.2014 also shows that none appeared for the defendant, in my opinion, while setting aside the impugned order by consent, it is necessary to impose costs on the defendant.

7. In view thereof, by consent, impugned order is set aside and the Summons for Judgment is restored to the file of the learned trial Judge subject to depositing costs of Rs.15,000/- within two weeks from today. Respondent-plaintiff is at liberty to withdraw that amount unconditionally. If the costs is not paid within two weeks from today, the impugned order shall stand revived without further reference to the Court. All the contentions of the parties on merits are expressly kept open. Parties agree that they will appear before the trial Court at 2:45 p.m. on 25.04.2016. The learned trial Judge is requested to decide the Summons for Judgment keeping in mind decision of this Court in the case of **Bankay Bihari G. Agrawal** (*supra*), as expeditiously as possible and preferably within 8 weeks from the date of production of the authenticated copy of this order. Rule is made absolute in the aforesaid terms.

(R. G. KETKAR, J.)