

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.65 OF 2014
IN
SUMMARY SUIT NO.233 OF 2002**

M/s. K.L. Wadhi & Company)
a firm having its office at)
(a) 502, Janmabhoomi Chambers,)
Walchand Hirachand Marg, Mumabi)
-400 001 and also at -)
(b) Bhagwandas Mansion, Shivaji Chowk)
Kalyan, Dist. Thane (M.S.),)
PIN-421 301.)...Appellant
(Orig. Defendant
No.2)

V/s

1) IDL Industries Limited)
A Company with Limited Liabilities)
registered under the Companies Act,)
1956 and having its registered office at)
Kukatpally, P.B. No.1, Sanantnagra (IF),)
P.O. Hyderabad- 500 018.)...Respondent No.1
(Orig. Plaintiff)
2) K.L. Wadhi Co. Pvt. Ltd.,)
a Company with limited liabilities)
registered under the Companies Act,)
1956, and having its Office at 502,)
Janmabhoomi Chambers, 5, Walchand)
Hirachand Marg, Mumbai-400 001)...Respondent No.2
(Orig. Defendant
No.1)

Mr. K.H. Halai alongwith P. Ranjan i/b Halai & Co. for the Appellant.
Mr. Vinay Rathi for Respondent No.1.

**CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.**

DATE: 12th January 2016

ORAL JUDGMENT: (Per V.M. Kanade, J.)

1. Heard the learned Counsel for the Appellant and the learned Counsel for Respondent No.1. Appellant is challenging the judgment and decree passed by the learned Single Judge dated 04/07/2005 in favour of Respondent No.1 – Plaintiff on account of non-compliance of the condition imposed by the learned Single Judge while allowing the Summons for Judgment by order dated 16/6/2004.

2. Brief facts which are relevant for the purpose of deciding this appeal are as under:-

3. Respondent No.1 – Plaintiff filed a Summary Suit against the Appellant and in the said Summary Suit, Summons for Judgment was taken out. The learned Single Judge, after hearing the Plaintiff and Defendant Nos. 1 and 2, was pleased to direct the Defendants to deposit an amount of Rs 90 lakhs within a period of eight weeks and conditional leave to defend was granted. The contention of the Defendants that the suit is not maintainable for misjoinder of parties was not accepted. The learned Single

Judge further observed that the Defendants had admitted the claim and the only defence was in respect of three debit notes issued by the Defendants. It was contended that the sales tax liability was to be paid by the Plaintiff. Thereafter, Defendants did not comply with the directions given by the learned Single Judge in the order passed in the Summons for Judgment taken out by Respondent No.1 - Plaintiff. The Summary Suit was placed for hearing before the learned Single Judge, who was pleased to hear the Plaintiff's Counsel. However, none appeared on behalf of Defendants. On account of non-compliance of the condition imposed by the learned Single Judge, the suit was decreed.

4. Appellant did not file any application, seeking review or recall of the order on the ground that the Appellant was absent on the date on which the decree was passed.

5. Appellant had challenged the order passed by the learned Single Judge dated 16/06/2004 in the Summons for Judgment. The said appeal was admitted. However, the appeal was allowed to be withdrawn on 28/4/2008 on the ground that the Appellant was not aware of the final disposal of the Summary Suit No.233 of 2002. Thereafter, present appeal has been filed by the Appellant. Delay caused in filing the Appeal was condoned.

6. We have heard the learned Counsel for the Appellant and the learned Counsel for Respondent No.1.

7. It is sought to be argued by the Appellant that the Appellant – Defendant No.2 was, at the most, a Director of Defendant No.1 and therefore no decree could have been passed against the Director for non-payment of dues by the Company. He invited our attention to the averments in the Plaint and contended that no averment was made as against Defendant No.2, the Appellant herein. He further invited our attention to the affidavit-in-reply filed before the learned Single Judge. He submitted that all these aspects were considered by the learned Single Judge when the suit was decreed in favour of the Respondent No.1 – Plaintiff.

8. We are unable to accept the submissions made by the learned Counsel appearing on behalf of the Appellant. The suit was decreed by an order dated 04/07/2005. The conditional leave to defend was granted on 16/06/2004 and the Defendants were directed to deposit Rs 90 lakhs within eight weeks. This amount has not been deposited. Defendants could have applied for recalling the judgment and decree passed by the learned Single Judge on 04/07/2005 on the ground that Defendant No.2 was not heard. However, no such application was filed. The appeal which was filed against the order granting conditional leave

to defend was withdrawn by the Appellant.

9. Appellant alongwith Defendant No.1 have successfully ensured that the decree which is passed against them is not executed against the Appellant on one pretext or the other. Perusal of the Plaint, more particularly paras 11 and 12 clearly shows the personal involvement of Defendant No.2. Perusal of the title of the Plaint also indicates that names of Defendant No.1 and Defendant No.2 are identical and Defendant No.2 has been referred specifically on various invoices raised by Defendant No.1 and indenter's name and address have been shown as of Defendant No.2. This clear nexus and close link between the two Defendants is specifically averred and the contention of the Defendants in the Summons for Judgment has been specifically negated by the learned Single Judge in his order dated 16/06/2004. Secondly, the learned Single Judge has clearly observed that the entire claim was admitted by Defendant Nos. 1 and 2 except the claim in respect of three invoices with sales tax liability and, therefore, conditional leave to defend was granted with a direction to deposit Rs 90 lakhs. Under these circumstances, it is not now open for Defendant Nos. 1 and 2 to take a different stand and deny the liability. We are informed that even criminal case has been filed against the Appellant and Defendant No.1 and which is pending in the criminal court. The learned Single Judge in the impugned

order has taken into consideration all these facts. Defendant No.2 waited for almost nine years for filing this appeal after the impugned order was passed.

10. Taking into consideration all these facts, we are of the view that there is no reason to interfere with the order passed by the learned Single Judge. Respondent No.1 - Plaintiff has already filed execution proceedings. It appears that only after execution proceedings are filed, Defendant No.2 has raised new defences and has filed this appeal. We are therefore not inclined to set aside the order passed by the learned Single Judge. Appeal is therefore dismissed.

11. The learned Counsel appearing on behalf of the Appellant seeks continuation of the interim order which has been passed. Request of continuation of interim order is declined since the Appellant has successfully evaded execution of the decree which was passed in 2005.

12. Appeal is disposed of in the aforesaid terms.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)