

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.11169 OF 2017
IN
NOTICE OF MOTION NO. 1478 OF 2017
IN
SUMMARY SUIT NO. 61 OF 2015**

- 1 M/s Bhagwan Motors Pvt. Ltd.
A private Limited Company registered
under Companies Act, 1956 and having
registered office at Plot No. 101/F,
Sector No.1, Industrial Area, Road II,
Pithampur, Dist. Dhar (M.P.) - 454 774 Petitioner
- 2 Sanket Dilip Mestry, Adult
Director of M/s Bhagwan Motors Pvt. Ltd.
A-1301, Rustomji Royale CHS Ltd.,
Jaywant Sawant Road, Dahisar (West),
Mumbai – 400 068
- 3 Dilip Bhagwan Mestry, Adult
Director of M/s Bhagwan Motors Pvt. Ltd.,
A-8, Jessika Society, Dr. N.R. Karode Marg,
S.V. Road, Borivali (West),
Mumbai – 400 092
And also at

C/o Hypro Tools & Equipments Pvt. Ltd.
25, Kala Silk Mills Compound,
Kashigaon, Kashmirira – 401 904,
Dist. Thane

Vs.

Hemraj Devkarandas Metals &
Minerals Pvt. Ltd.,
a private limited Company incorporated
under Companies Act, 1956 and
carrying on business at 104, Steel Centre,
Ahmedabad Street, Carnac Bunder,
Mumbai – 400 009

.... Respondents

Mr. Harinder Toor i/by Mr. Shivkumar R. Gupta for the Petitioner.
Mr. Anil Agrawal for the Respondents.

Coram : Smt. Sadhana S. Jadhav, J.
Date : 9th October, 2017

P.C.:

1 Rule. Rule is made returnable forthwith. By consent of the parties, the petition is taken up for final hearing. Heard the counsel.

2 The facts in a nutshell are as follows :

The petitioners herein are the original defendants and the respondents are the original plaintiffs in Summary Suit No. 61 of 2015. The suit was filed for recovery of approximately an amount of Rs.1,00,00,000/-. It is the matter on record that prior to institution

of the suit, the defendants had confirmed the outstanding dues on 30th June, 2014 and pursuant to the said admissions had also made part payment of Rs.14,15,360/- and the principal balance was Rs.93,91,822/-. Pursuant to the demand of money claim, 11 cheques were handed over by the petitioners in favour of the respondent i.e. the original plaintiff. On 29th October, 2014, the plaintiff had caused a demand notice. It appears that the said demand notice was neither replied nor complied and therefore the plaintiff was constrained to institute a suit on 26th December, 2014.

3 It is pertinent to note that since the defendants had submitted the claims and had also made part payments to that effect, the plaintiff had requested the Court to draw a Summons for Judgment. Accordingly, the summons were taken on 13th February, 2015.

4 It appears from the record that the advocate engaged by the defendant had not caused her presence till 8th July, 2015 although the defendants had filed the Vakalatnama of Advocate Wadhwani on 9th February, 2015. On 2nd April, 2016 also the

defendants and their advocate chose to remain absent and finally on 2nd April, 2016, the suit was decreed.

5 On 8th September, 2016, the plaintiff had filed an application seeking execution of decree. It is pertinent to note that on 10th October, 2016, the defendants had made part payment of Rs.3,00,000/- thereby accepting the decree passed.

6 It is a matter of record that on 28th October, 2016, the warrants of attachment of property were issued. The plaintiff has caused insolvency notice No. 43 of 2016 on 10th November, 2016 and the warrant of attachment was executed on 15th November, 2016, thereby the property of the defendants was attached.

7 It can therefore be said that the decree passed by the learned Judge was in fact executed.

8 The report of Bailiff would show that on 24th November, 2016, the wife of defendant no.2 had refused to accept the notice of insolvency and therefore, on 6th February, 2017 the insolvency notice was published in the newspapers and was also sent by registered

post to the defendants and same was also pasted on the notice board of the High Court. On 12th February, 2017 also, the wife of defendant no.2 had refused to accept the notice of insolvency and therefore on 4th July, 2017, the said warrant for attachment of property was issued and duly served upon the defendants. It is pertinent to note that the defendants had not filed any appeal challenging the judgment and decree but on 18th April, 2017 had filed the Notice of Motion requesting the Court for setting aside the exparte judgment and decree dated 2nd April, 2016 alongwith an application seeking condonation of delay. Thereafter the advocate engaged by the defendants had filed an affidavit on 25th April, 2017. A reply was filed by the plaintiffs on 28th June, 2017. The High Court had passed an order to effect substituted service of insolvency petition upon the defendants by causing advertisement in the widely circulated newspapers. The said order was complied by the plaintiff. The insolvency petition was advertised on 26th July, 2017 and finally the Notice of Motion seeking setting aside exparte decree was rejected by the order dated 16th August, 2017. Hence, the present petition.

9 Learned counsel appearing for the petitioner averting to the facts of the case or chronology of events has termed the said order as a previous order, since the counsel for the petitioner is of the opinion that the learned Court had not passed the order in accordance with law and the order was passed in violation of the mandatory provisions of the Code of Civil Procedure. According to the learned counsel, it was not the fault of the defendants that their advocate had chosen to remain absent despite the fact that her professional fees were paid and the instructions were given to her. Learned counsel for the petitioner has vehemently submitted that on 30th June, 2017, the defendants had filed a disciplinary case against learned advocate, Ms. Lata C. Wadhwani before the Disciplinary Committee of Bar Council of Maharashtra and Goa. Learned counsel for the petitioner had overlooked the fact that the defendants were fully made aware of the judgment and decree passed on 2nd April, 2016 that the plaintiffs as well as the court had made every effort to see that the insolvency petition was served upon the defendants and the defendants had chosen to deny the acceptance of the said notice.

At this stage, the Court cannot be oblivious of the fact that it was a money claim and even prior to the institution of the suit, the defendants had admitted their claim and that he had not only admitted the claim but had also made part payments to the tune of Rs.14,15,316/-. It is clear that the defendants had accepted the claim and therefore had issued 11 cheques to satisfy the claim of the plaintiffs. It was in these circumstances that the Summons for Judgment was served on 13th February, 2015. It is further pertinent to note that during the period 13th February, 2015 to 2nd April, 2016, the advocate engaged by the defendants had not caused her appearance. It further made clear that the petitioners/original defendants were not in touch with the advocate and were neither diligent about the proceedings.

10 Learned counsel for the petitioners further submits that the observations of the learned court that the defendants also did not remain present would not be a correct position in law as what is contemplated in Order III, Rule 1 of Code of Civil Procedure Code.

ORDER III : RECOGNIZED AGENTS AND PLEADERS
1 Appearances, etc., may be in person, by
recognized agent or by pleader –

Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

According to the learned counsel, the suit was to be defended either by the advocate engaged by the defendants or the petitioner in person. It is further submitted that the court has not taken into consideration the fact that the defendants had filed a complaint against advocate representing them and therefore the defendants could not have been blamed for the same. To substantiate his contention, the learned counsel has placed implicit reliance upon the judgment of the Apex Court in the case of Secretary, Department of Horticulture, Chandigarh and Another Vs. Raghu Raj, reported in (2008) 13 Supreme Court Cases, page 395. The learned counsel has drawn the attention of this court to the observations made by the Hon'ble Apex Court in this case:

“It has repeatedly been emphasised that advocates should appear and argue the case as and

when it is called out for hearing. Once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the court calls upon the counsel to make submissions. It is keeping in view these principles that the court does not proceed to hear the matter in absence of the counsel. The High Court ought not to have decided the appeal in the absence of the appellants' counsel. It would have been appropriate if the High Court had granted an opportunity to the counsel for the appellant to make his submissions by adjourning the matter.

The appeal before the High Court was not an appeal from original decree (first appeal). It was an appeal from appellate decree (second appeal) but Rule 1 of Order 42 which deals with appeals from appellate decrees (second appeals) lays down procedure and expressly states that the rules of Order 41 shall apply so far as may be, to appeals from appellate decrees. Prima facie, therefore, it appears that once an appeal is admitted and is placed for hearing i.e. hearing on merits, it can be dismissed for default but cannot be decided on merits in the absence of the appellant (or his advocate). On the facts in their entirety, the High Court ought not to have proceeded to decide the appeal. The impugned order of the High Court is liable to be set aside. It is however made clear that no final opinion one way or the other has been expressed as regards interpretation of Rule 17 of Order 41 read with Rule 1 of Order 42.”

The facts of the said case are at variance and the ratio may not be

applicable in the present case for the simple reason that the petitioners were fully aware of the judgment and order passed against them not only that the petitioners were also served with the insolvency notice. The wife of defendant no. 2 had refused to accept the notice. The said judgment and order was not challenged before the higher court within the stipulated period. Moreover, in fact, the decree was given effect by not only the attachment of property but by issuing public notice for the same. This court also cannot be oblivious of the fact that on 10th October, 2016, the defendants had paid Rs.3,00,000/- to the plaintiffs. The said payment was made practically after six months of passing of the decree, hence, it could be safely inferred that the defendants had accepted the decree and had allowed execution proceedings to proceed to a stage that the sale of the attached property was published in the newspaper and therefore at this stage, the petitioners cannot be given an opportunity to say that they were not given sufficient time.

11 Learned counsel for the petitioners submits that on 12th February, 2016, the plaintiffs had taken Summons for Judgment.

The said Summons for Judgment was served on 13th February, 2015. According to the learned counsel, the learned Court ought to have granted minimum 10 days time as per the rules for the defendants to cause their appearance and file their say, to defend the suit and the same was not granted and therefore it has resulted in miscarriage of justice. In fact, on 13th February, 2015, advocate, Ms. Lata C. Wadhwani had received the copies of the summons and on the same day, the Court had passed no-reply order. In fact according to the learned counsel, the Court ought to have waited for a period of 10 days and not pass an order of no-reply and therefore, the said decree deserves to be set aside.

12 This Court cannot be oblivious of the fact that the decree has in fact taken effect and Notice of Motion which is filed after 1 year, the said defence would not be open to the petitioners. It is true that the rules would contemplate that the defendants ought to be given 10 days time to defend the suit. However, in any case, the judgment was not passed although the order of no-reply was passed. The suit was decreed only on 2nd Aril, 2016 i.e. practically after 1

year and 2 months after the No-say order was passed. No steps were taken either by the advocate or the petitioners to file an application seeking setting aside of the order of No-say and bringing it to the notice of the court that the Summons for Judgment was served only on 13th February, 2015. At a belated stage, such submission would not be acceptable as the same is being advanced only to protract the execution of the decree, which is passed on 2nd April, 2016.

13 Hence, the petition being sans-merits deserves to be dismissed with no order as to costs. Rule is accordingly discharged.

(Smt. Sadhana S. Jadhav, J.)