

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.285 OF 2017

Paras Commercial Centre Pvt. Ltd. and others ... Petitioners
Vs.
VRL Logistics Limited ... Respondent

Mr. Atharva Dandekar i/b. Mr. Oves Ahmed Siddiqui for Petitioners.
Mr. Rajesh Singh for Respondent.

CORAM : R. G. KETKAR, J.
Reserved on : FEBRUARY 10, 2017
Pronounced on: FEBRUARY 22, 2017

P.C. :

Heard Mr. Dandekar, learned Counsel for petitioners and Mr. Singh, learned Counsel for respondent at length. Rule. Mr. Singh waives service for respondent. Having regard to the narrow controversy raised in the Petition as also 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, petitioners have challenged the order dated 17.11.2016 passed by the learned Ad-hoc Judge, City Civil Court, Greater Bombay in Notice of Motion No.4063 of 2016. By that order, the learned trial Judge dismissed the Motion taken out by the petitioners for setting aside the judgment and decree dated 13.03.2014 passed in Summary Suit No.1721 of 2013 as also for granting the petitioners unconditional leave to defend the Summary Suit.

3. Mr. Dandekar invited my attention to paragraph 17 of the impugned order. In paragraph 17, the learned trial Judge observed that

Article 123 of the Limitation Act, 1963 (for short 'Act') is applicable in the present case. Mr. Dandekar relied upon the decision of this Court in ***P. N. Films Limited Vs. Overseas Films Corporation Limited***, AIR 1958 Bombay 10 as also decision of this Court dated 13.08.2008 in Notice of Motion No.3859 of 2007 in Summary Suit No.4979 of 1998, and in particular, paragraphs 10 to 12 thereof. In these decisions, this Court has held that Order XXXVII, Rule 4 is a self-contained order which deals not only with the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, but also with the procedure to be followed if the defendant wishes to have a decree passed in a summary suit set aside. Article 123 does not apply and the period of limitation would be governed by Article 137.

4. Mr. Dandekar further submitted that while considering application under Order XXXVII, Rule 4 for setting aside ex-parte decree, the Court has to consider - (1) whether or not the absence of the defendant was justified and (2) whether or not the defence discloses facts which would entitle the defendant to a leave to defend. He relied upon the decision of this Court in Notice of Motion No.1787 of 2015 in Summary Suit No.4160 of 2000 dated 16.02.2016. Mr. Dandekar also relied upon the decision of the Apex Court in ***Mahesh Kumar Joshi Vs. Madan Singh Negi***, (2015) 12 SCC 254, and in particular paragraph 11. In paragraph 11, the Apex Court observed that the expression “special circumstances” has to be construed having regard to the individual fact situations. The Court has to balance the equities and while safeguarding the interest of the plaintiff, appropriate conditions can be laid down if the defendant makes out a debatable case which may prima facie show injustice if the ex-parte decree was not set aside. He submitted that in paragraph 17 of the impugned order, the learned trial Judge observed

“Therefore at this juncture, whatever for grounds for setting aside decree and stay of execution proceedings are raised by the defendant are not taken into consideration.”

5. On the other hand, Mr. Singh supported the impugned order. He relied upon the decision of this Court in ***Harshad Shah Vs. Bhor Industries Limited***, 1998 (4) Mh.L.J. 334. This was subsequently followed in ***Unilab Chemicals and Pharmaceuticals Vs. Smith Stanistreet Pharmaceuticals Ltd.***, 1999 (2) Mh.L.J. 289. In ***Harashad Shah*** (*supra*), Hon'ble Mr. Justice R. M. Lodha, as the learned C.J.I. then was, observed thus,

“... To spell out special circumstances the defendant has to first satisfy the Court that there was not due service of writ of summons or Summons for judgment or that he was prevented by sufficient cause from getting leave to defend and then secondly to show that he has good, substantial and / or meritorious defence in the suit. In the absence of satisfaction of first condition it may not be necessary to go into second condition at all. ...”

6. Relying upon these decisions, Mr. Singh submitted that to spell out special circumstances, defendant has to first satisfy the Court that there was not due service of writ of summons or summons for judgment or that he was prevented by sufficient cause from getting leave to defend and then secondly to show that he has good substantial and / or meritorious defence in the suit. In the absence of satisfaction of first condition, it may not be necessary to go into second condition at all.

7. He submitted that in the present case, defendants were duly served. He invited my attention to the Bailiff's report which shows that suit summons with affidavit was duly served by the plaintiff upon Smt. Prema, Manager for and on behalf of defendants No.1 to 4. He, therefore, submitted that no case is made out for invocation of powers

under Article 227 of the Constitution of India.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In the present case, decree was passed on 13.03.2014. Defendants-judgment debtors applied for certified copies of the judgment and decree on 07.09.2016. They received certified copies on 20.10.2016. Draft Notice of Motion was filed on 15.10.2016 for setting aside the decree. The learned trial Judge observed in paragraph 17 that although defendants got knowledge of the decree on 13.03.2014, still, till one year and 9 months, they did not apply for certified copies. As per Article 123 of the Limitation Act, period of limitation is 30 days for setting aside the ex-parte decree. In my opinion, the learned trial Judge was not justified in holding that period of limitation prescribed for setting aside ex-parte decree is regulated by Article 123. In the case of **P. N. Films Limited** (*supra*), Division Bench of this Court has observed in paragraph 2 that looking to the provisions of Order IX, Rule 6, it seems to us clear that those provisions do not apply to a decree passed in a summary suit and that an application to set aside a decree in a summary suit is not regulated by Order IX, Rule 13 but by Order XXXVII, Rule 4. In other words, Order XXXVII, Rule 4 is a self-contained order which deals not only with the the right of the defendant to appear in a summary suit in which a decree has to be passed if leave to defend is not given to him, but also with the procedure to be followed if the defendant wishes to have a decree passed in a summary suit set aside. In paragraph 3, it was observed thus,

“3. It is then urged by Mr. Gupte that even assuming the present application of the appellant does not fall under Order 9, Rule 13 and even assuming that no ex-parte decree was passed as contemplated by Order 9, Rule 6, Article 164 does not in terms limit the application covered by that article to an application made under Order 9, Rule 13, and Mr. Gupte says that although the decree that we have before us may not be an ex-parte decree

within the meaning of Order 9, Rule 6 it is still an ex-parte decree as generally understood and there is no reason why the connotation of an ex-parte decree in Article 164 be restricted and limited to an ex-parte decree as understood by Order 9, Rule 6. Now that seems to be a little more difficult contention to decide. It is true that in one sense the decree was passed against the defendant in his absence, but that absence was an enforced absence and it was enforced by law. In our opinion, even giving to the expression 'ex-parte' its plain natural meaning, the expression 'ex-parte' does carry with it the connotation that a Court or a Judge or a Tribunal has proceeded in the absence of other party when it could have had the other party before it or when it was not prevented by law from having the other party before it. But perhaps it is better to decide this point on the other aspect of the matter. Both the Law of Limitation and the Civil Procedure Code are procedural laws and we must try and give the same meaning to expressions used in these two laws. If the Civil Procedure Code has understood an ex-parte decree in the particular definite sense, there is no reason why we should take the view that the Limitation Act has understood it in a different sense. Apart from that, the Limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a valuable right and unless the provision in the Limitation Act was clear and beyond doubt, a benevolent construction, a construction favourable to the party whose valuable right is being taken away, must always be given and therefore in our opinion Article 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. In our opinion, such an application falls under Order 37, Rule 4 and the Limitation Act has not dealt with any such application. Therefore, the article that would apply would be the residuary Article 181."

9. Thus the Division Bench has categorically held that Article that would apply would be the residuary Article 181 and now in the Limitation Act, 1963, it would be 137. As noted earlier, decree was passed on 13.03.2014 and motion is taken out on 15.10.2016, which is within 3 years as per Article 137. It, therefore, cannot be said that the Notice of Motion was liable to be dismissed on the ground that it was beyond prescribed period of limitation and consequently was not tenable.

10. As I am setting aside the order on the short ground, I am not inclined to deal with the submissions advanced by Mr. Singh based on the decision of this Court in **Harshad Shah's case** (*supra*), lest the trial Court will be influenced by observations made in this order. Hence, the following order:

- a. Impugned order dated 17.11.2016 is set aside;
- b. Notice of Motion No.4063 of 2016 is restored to the file of the trial Court;
- c. All contentions of the parties on merits are expressly kept open;
- d. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)

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