

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

COMMERCIAL APPEAL NO. 222 OF 2019

in

SUMMONS FOR JUDGMENT NO. 88 OF 2018

with

NOTICE OF MOTION (St.) NO. 45 OF 2019

in

COMMERCIAL APPEAL NO. 222 OF 2019

Club Acquaria Enterprises

... Appellant/Applicant

V/s.

Sunny Hospitality

... Respondent.

Mr. Mayur Khandeparkar a/w. Uzair Kazi a/w. Rohit Gupta I/b.
Chirag Chanani for the Appellant/Applicant

Mr. Pranav Desai a/w. Joel D'souza I/b. Vishvajeet Mohite for the
Respondent.

***CORAM : PRADEEP NANDRAJOG, C.J. &
N.M. JAMDAR, J.***

DATE : 15 APRIL 2019.

P.C. :-

1. Affidavit tendering apology by Counsel is taken on record.

2. Heard learned Counsel for the parties on the question of maintainability of the Appeal as also the merits thereof.

3. Since the issue of maintainability of the Appeal interlaces the merits, we note the relevant facts.

4. The Appellant filed a Suit under Order XXXVII of the Code of Civil Procedure. The case of the Appellant was that it developed Club Acquaria. That the Defendant expresses a desire to provide catering services and for which a Leave and Licence agreement dated 12 November 2016 was executed. Area permitted to be used was as per the Leave and Licence agreement. Licence fee payable was as agreed. Pleaded that the license fee was not paid in full, pleading state that the cheques issued were returned by the banker on whom the cheques were drawn. Pleading further liability, as per the agreement, to pay VAT, Suit filed was for recovery of the principal sum together with interest till 31 May 2018; stated to be ₹ 1,48,03,338/-. The plaint was filed on 18 June 2018.

5. Objection was raised to the Court fee paid. Ignoring the law that a Plaintiff can always relinquish part of the claim and in the instant case the Plaintiff has relinquished interest from 1 June till the date of filing, the Plaintiff's Counsel proceeded to rectify the objection listed by the Registry. The Counsel made over-writing on said paragraph of the plaint where the Suit amount was mentioned.

The Suit amount was corrected to read as ₹ 1,48,50,922/- in words and in figures the said corrections were carried out in paragraphs 19, 20 and 28 of the plaint as also prayer clause. Interest was calculated till date of filing of the Suit.

6. Corrections were also made in the verification of the plaint with reference to the paragraph numbers. In the original plaint it was verified that paragraphs 1 to 2 of the plaint are true to the knowledge of the Plaintiff and paragraphs 3 to 25 were true on information and the leave. The corrections made were that paragraphs 1 to 19 are true to the knowledge and paragraphs 20 to 30 are true on information and belief. It is apparent that typographical error in the original verification were corrected.

7. The Counsel did not represent the plaint before the Notary for re-verification by the Plaintiff.

8. Vide impugned order dated 12 December 2018 the learned Single Judge has frowned upon what has happened. The learned Single Judge has taken the view that a very serious misdemeanor was committed by the Counsel. As per the learned Single Judge the Suit itself could have been dismissed but proceeding leniently leave to defend has been granted to the Defendant without deciding the merits of the defence. The leave is unconditional.

9. The impugned order shows that the unconditional leave to defend has been granted to the Defendant by way of penalty upon the Plaintiff for the acts of the Counsel in effecting corrections in the plaint to meet the objections listed by the Registry.

10. In the back-drop we deal with the preliminary objection concerning the maintainability of the Appeal. Learned Counsel argues that an unconditional leave to defend a Summary Suit by an order would not render the order appealable for the reason no right of a party is adversely affected.

11. Whilst it may be true that where a leave to defend is granted by considering the defence projected, the said order would not be appealable. But in the instant case, as noted above the impugned order, does not deal with the application seeking leave to defend. It proceeds to impose a penalty to the Plaintiff.

12. The order is without jurisdiction for the reason the wrong committed is not of a kind which would require the impugned order to be passed. At best, eye-brows could be raised on the conduct of the Counsel. We hold the Appeal to be maintainable.

13. On merits, we need not say anything more for the reasons the order proceeds to levy a penalty upon the Plaintiff.

14. Allowing the Appeal and setting aside the impugned order dated 12 December 2018, we direct that pursuant to the Summons for Judgment served upon the Defendant alongwith the plaint as corrected, leave to defend application filed by the Defendant will be decided on merits.

15. Before bringing the curtains down, we note that Practice Directions have been issued by the learned Single Judge in paragraph 13 of the impugned order. The Practice Directions ought not to have been issued by the learned Single Judge for the reasons they would pertain to the domain of the either the Chief Justice of the this Court or the Administrative Committee. Thus, we treat that the directions issued in paragraph 13 be recommendation to the Chief Justice to pass necessary Practice Directions if warranted.

16. The Registry shall place the impugned order on the Administrative Side before the Chief Justice.

17. In view of disposal of the Appeal, the Notice of Motion (L) No. 45 of 2019 does not survive and the same is accordingly disposed of.

18. No costs.

N.M. JAMDAR, J.

CHIEF JUSTICE