

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.204 OF 2020**

BALAJI TRADING COM.,
THR. ITS AUT. REP., P.
NHAVEEN KUMAR,
THR. ITS AUT. REP.,
NAGESHWAR R. DORAPALL

.... PETITIONER

VERSUS

PENTAIR WATER INDIA
PVT. LTD., THR. ITS AUT.
REP., RAY SARVAN SINGH

.... RESPONDENT

Shri Ravi Gawas, Advocate for the Petitioner.
Shri S. Redkar, Advocate for the Respondent No.1.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 7 APRIL 2021

ORAL ORDER:

The respondent instituted Commercial Suit No.29 of 2020 against the petitioner Company before the Commercial Court, Margao. To sue, the respondent invoked Order 37 of CPC. In other words, the respondent filed a summary suit.

2. Though CPC provides for a distinct procedure for summary suits, the Commercial Court issued summons to the petitioner under Rules 1 and 2 of Order 5, CPC. It was on 02.07/2019. The petitioner had to appear before the Court on 30.07.2019. That day he did appear through his counsel. Then the matter was adjourned to 15.10.2019. On the next adjournment, the counsel did not appear. Eventually on 15.10.2019, the Commercial Court set the petitioner/defendant *ex parte*.

3. When Commercial Court wanted to proceed with the matter *ex parte*, on 21.12.2019 the petitioner invoked Order 9 Rule 7 of CPC and

applied to the trial Court for having the *ex parte* order set aside. On 09.01.2020 the trial Court allowed the petitioner's application and recalled the *ex parte* order by imposing costs of ₹10,000/- on the petitioner.

4. Within the time frame, the petitioner did not pay the costs. Instead, the counsel appeared on 04.02.2020 and, it seems, expressed his willingness to pay the costs on that day. For him to do so, he wanted the trial Court to extend the originally granted time by one week or so. Unimpressed by the reasons provided by the petitioner, the trial Court, though its order dated 04.02.2020, rejected the petitioner's plea to extend the time to enable him to pay the costs. Aggrieved, the petitioner has filed this Writ Petition under Article 227 of the Constitution of India.

5. The petitioner's conduct is not commendable. That said, two things weighed with this Court: (i) the procedure the Commercial Court adopted for trying the summary suits under Order 37 of CPC; (ii) the matters, as far as possible, ought to be decided on merits rather than on technicalities unless the defaulting party abuses the judicial process.

6. Here, the Commercial Court, by oversight, has treated the summary suit as if it were a regular suit. Therefore, it issued summons under Order 5 Rules 1 & 5 of CPC. Let us examine the distinct procedure under Order 37 of CPC. Rule 2 (2) of this Order requires the trial Court send the summons in Form No. 4 in Appendix B to CPC. Further, as per Rule 2 (3), the defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance. If he fails to enter his appearance, the allegations in the plaint shall be deemed admitted and the plaintiff may have a decree for any sum, not exceeding the sum mentioned in the summons, with interest at the rate specified, if any, up to the date of the decree and such sum for costs. And such decree may be executed forthwith.

7. Now, we will examine the procedure for the defendant to appear before the trial Court in a summary suit. Rule 3 of Order 37 lays down

the procedure. Under sub-rule (1) of that Rule, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures. Then, at any time within ten days of such service, the defendant may enter an appearance either in person or by pleader. In either case, he shall file in Court his address for service of notices on him.

8. As sub-rule (3) of Rule 3 mandates, when the defendant appears before the court, he should notify the plaintiff or his counsel about his appearance. After that, the plaintiff will serve on the defendant a summons for judgment in Form No. 4A in Appendix B. This summons must be returnable not less than ten days from the date of service. Besides, the summons must also be supported by the plaintiff's affidavit verifying the cause of action and the amount claimed. The plaintiff, among others, must assert that in his belief the defendant has no defence to the suit.

9. Once the defendant receives summons in Form No.4A, in ten days he may, by affidavit or otherwise, disclose to the trial Court such facts as deemed sufficient to entitle him to defend. And thus, he should apply for leave to defend the suit. Then, under sub-rule (5) of Rule 3, the trial Court may grant him leave to defend unconditionally or conditionally.

10. The proviso to sub-rule (5) of Rule 3 does not allow the trial Court to refuse leave to defend unless it is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous vexatious. The second proviso to the same sub-rule speaks partial admission of the plaintiff's claim. In his application for leave to defend, if the defendant admits a part of the plaintiff's claim, the trial Court can grant the leave to defend only if the defendant deposits in the court that admitted amount.

11. Indeed, as sub-rule (6) of Rule 3 clarifies, if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff is entitled to judgment forthwith. In the alternative, if the defendant is permitted to defend as to the whole or any part of the claim, the Court may direct him to give security within a timeframe as it fixes. If the defendant fails to the security within the time specified, the plaintiff shall be entitled to judgment forthwith.

12. Finally, we will refer to the defendant's delayed appearance. As sub-rule (7) permits, if the defendant shows sufficient reasons for his non-appearance earlier, the court may excuse the delay and allow the defendant to take the remaining steps under Rule 3 of Order 37, CPC.

13. But evidently the Commercial Court has not followed the procedure prescribed under Rule 3 of Order 37, CPC. At any rate, now, the petitioner as the defendant entered his appearance. That appearance must be taken as if it had been in answer to the summons under Form No.4 of appendix B. With that appearance, the petitioner should seek the Commercial Court's leave to defend itself. Once that application is filed, the Commercial Court will follow the rest of the procedure. Of course, the recourse to Order 37 CPC must be only if the plaintiff has filed the suit conforming to the procedure thus far. Before concluding, I may also note that Amendments made the Code of Civil Procedure by the Commercial Courts Act, 2015, does not seem to have altered the procedure prescribed under Order 37, CPC.

14. Therefore, in the interest of justice, I set aside the impugned order, dated 04.02.2020. That said, the petitioner's conduct does not inspire confidence to hold that it has been diligent enough in prosecuting the matter. So, this Court desires to impose further costs of ₹10,000/- on the petitioner. If the petitioner pays to the respondent-plaintiff ₹20,000/-

in two weeks from the date this order is uploaded and files proof before the trial Court, it will proceed with the matter.

Writ Petition stands disposed of in the above terms.

DAMA SESHADRI NAIDU, J.

NH

NITI K
HALDANKAR

Digitally signed by
NITI K HALDANKAR
Date: 2021.04.19
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