

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 13546 OF 2023

SWEET INDUSTRIES INDIA PVT LTD THROUGH AUTHORIZED SIGNITORY
HIREN SHAMBHU JOTANIYA
VERSUS
COSMO FIRST LTD FORMERLY KNOWN AS COSMO FILMS LTD THROUGH
ITS AUTHORIZED OFFICER

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Advocate for Petitioner : Mr. Kabade Vivek V
Advocate for Respondent : Mr. Ajet D. Kasliwal

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CORAM : SHAILESH P. BRAHME, J.

DATE : 30 OCTOBER 2023

PER COURT :

. Heard both the sides finally at the admission stage.

2. The writ petition is arising out of order below Exhibit-14 passed in Summary Civil Suit No.35/2023. The petitioner before the Court is the defendant, who is facing summary suit for recovery of amount of Rs.56,49,714/-. His application at Exhibit-14 was for leave to defend the summary suit on the ground that the petitioner did not receive a copy of plaint. It was rejected by the learned Judge.

3. The learned Counsel for the petitioner submits that the trial Court adopted hyper technical approach and misread the provision of Order 37 Rule 5. He submits that the petitioner received summons through

RPAD without there being any copy of plaint. It was not possible for him to make out a case on merits seeking leave to defend. He would rely upon Order 5 Rule 2 to make out a case that the summons ought to have been accompanied by the plaint. It is further submitted that he received plaint on the date of appearance for which there is endorsement on Exhibit-1. He seeks reliance upon judgment of the Supreme Court in the matter of National Insurance Company Ltd. Vs. M/s National Building Construction India Ltd. & Ors. and the judgment in the matter of Bimalkumar s/o Awadheshprasad Singh Vs. Housing Development Finance Corporation Ltd.

4. The learned Counsel for the respondent supports impugned order. According to him, the trial Court rightly rejected application (Exhibit-14) because the application is silent and does not make out a case on merits for leave to defend. He submits that application (Exhibit-14) was lacking in material particulars and liable to be dismissed. He further submits that there is no jurisdictional error and the judgment rendered in the matter of Bimalkumar s/o Awadheshprasad Singh (supra) is not applicable. He has placed reliance on judgment in the matter of M/s. V.K. Enterprises & Anr. Vs. M/s. Shiva Steels, reported in 2011(1) ALL MR 929 (SC).

5. I have gone through the rival submissions canvassed by the parties. The petitioner was served by summons on 25.05.2023 through RPAD. The petitioner appeared on 17.06.2023 when he presented application Exhibit-14. On 17.06.2023 it appears that when he

appeared before the Court, he was served with copy of plaint.

6. The learned Judge recorded that the application was not having material particulars neither it was supported by affidavit. No case was made out to grant him any leave to defend. The application of the petitioner was rejected.

7. I have gone through the application (Exhibit-14) which is not only cryptic but refers to only one grievance that the plaint was not accompanying with the summons. Learned Counsel for the petitioner submitted that as the petitioner was not having copy of plaint, it was not possible for him to incorporate material particulars to make out a case for leave to defend on merits. I find substance in the grievance of the petitioner.

8. I have gone through the provision of Order 37 Rule 5. It reveals that Rule 5 contemplates that the defendant may at any time within ten days from service of summons by affidavit or otherwise disclosing such a fact, apply for leave to defend. In the present case, the application (Exhibit-14) is not supported by the affidavit. The material particulars are missing in the application (Exhibit-14). Though the petitioner was not having the plaint, by the earlier correspondence between the parties, some particulars could have been supplied in the application (Exhibit-14). The impugned order cannot be faulted in a technical sense considering the provision of Order 37 Rule 5 as well as law laid down by the Supreme Court in the matter of M/s V.K. Enterprises & Anr.

(supra). The reliance of learned Counsel for the petitioner on the judgment in the matter of Bimalkumar s/o Awadheshprasad Singh (supra) is on the point of issue commencement of the reference of 10 days in Order 37. The provision of Order 37 Rule 5 cannot be treated to be mandatory as per the ratio in the judgment of Bimalkumar s/o Awadheshprasad Singh (supra).

9. However, another flaw in application (Exhibit-14) is that there is no prayer for condonation of delay. The submissions of the learned Counsel for the petitioner that the summons received by the petitioner, were not accompanying plaint, has not been substantiated by him. There is no material on record to infer that only summons was served and not the plaint. In that view of the matter, the order passed below application (Exhibit-14) cannot be faulted.

10. However, considering over all conspectus of the matter, I am of the view that in the present case, it would be too technical to deny the opportunity to the petitioner. The petitioner is facing proceedings for the amount of Rs.56,49,714/-. It would be in the fitness of the things to grant liberty to petitioner to apply afresh by following due procedure of law. The writ petition is disposed of by following order.

ORDER

- (i) The impugned order is quashed.
- (ii) The petitioner is at liberty to file an application for leave to defend afresh within two weeks from today.

- (iii) In case the petitioner fails to comply the same, impugned order below Exhibit-14 stands restored.
- (iv) The petitioner shall pay cost of Rs.20,000/- to the respondent which shall be a condition precedent.

[SHAILESH P BRAHME, J.]

Najeeb.