

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.433 OF 2023
WITH
INTERIM APPLICATION NO.7884 OF 2023**

Shravan Kailashchandra Suthar ...Appellant

vs.

Kokil Mohanlal Jain ...Respondent

Mr. Virendra Dubey, for the Appellant.
None for the Respondent.

CORAM : N. J. JAMADAR, J.

DATE : JUNE 14, 2023

P.C.:

1. Heard the learned counsel for the parties.
2. This appeal is directed against an order passed by the learned Judge, City Civil Court in Draft Notice of Motion in Summons in Summary Suit No.834 of 2017 whereby the learned Judge granted leave to register the Notice of Motion taken out by the appellant to set aside the exparte decree dated 6th December, 2018 passed by the City Civil Court in Summary Suit No. 834 of 2017 subject to deposit of an amount of Rs. 13,50,000/-.
3. The respondent had instituted a Summary Suit No. 834 of 2017 for recovery of the amount of the goods sold and delivered under various invoices. As defendant including the appellant/

defendant No. 3 did not appear before the Court despite service of Writ of Summons, the learned Judge passed a decree directing the defendant Nos. 1 to 4 to jointly and severally pay a sum of Rs. 41,88,444/- along with interest @ 18% p.a. on the principal amount of Rs. 27,19,769/- from the date of institution of the suit till realization.

4. The appellant claimed that he was unaware of the proceedings and when the execution of the said decree was laid in a Court at Ahmadabad, the appellant became aware of the *ex parte* decree and thus sought to move a Notice of Motion to set aside the decree.

5. By the impugned order, the learned Judge considered it appropriate to direct the appellant to deposit 50% of the principal amount as a condition for registering the Notice of Motion.

6. The learned counsel for the appellant submitted that the City Civil Court could not have put a condition for registering the Notice of Motion.

7. After passing a decree, Rule 4 of Order XXXVII confers discretion in the Court to set aside the decree, and if necessary stay

or set aside the execution and grant leave to the defendant to appear to the summons and to defend the suit, under special circumstances and if it seems reasonable to the Court. The Court is empowered to put the defendant to such terms as the Court considers fit. The provisions contained in Order XXXVII Rule 4 of the Code are distinct from the general power to set aside ex parte decree under Order IX Rule 13. The defendant is required to satisfy the Court that there are special circumstances which warrant the setting aside of the decree passed in the summary suit.

8. The Court can impose conditions including deposit of the decretal amount or part thereof in the event the Court considers it appropriate to set aside the decree or execution and grant leave to the defendant to appear to defend the suit. However, such power to impose conditions cannot be exercised at the stage of registering the Notice of Motion.

9. In the case at hand, one of the prayers in Notice of Motion is to stay the execution of the decree. After entertaining the Notice of Motion if the Court, by way of ad-interim/ interim relief, considers it appropriate to stay the execution of the decree, a condition to deposit a portion of the decretal amount would be in order.

However, the defendant could not have been ordered to deposit the amount as if it is a pre-condition for entertaining the Notice of Motion.

10. In the aforesaid view of the matter, the impugned order, which was passed at pre admission stage of the Notice of Motion, deserves to be quashed and set aside.

Hence, the following order.

ORDER

- 1] The appeal stands allowed.
- 2] The impugned order stands quashed and set aside.
- 3] The Notice of Motion be registered, if otherwise in order, without insisting for the deposit of the amount of Rs. 13,50,000/-.
- 4] It is hereby made clear that this Court has not entered into the merits of the matter and the learned Judge shall decide the Notice of Motion on its own merits and in accordance with law.
- 5] In view of the above, Interim Application also stands disposed.

(N. J. JAMADAR, J.)