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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.12812 OF 2017

Sudarshan Vishwanath Malpani & Anr. ... Petitioners

V/s.

Vinod Kumar Saboo ... Respondent

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Mr. Kishore D. Shah for the petitioners.

Mr. Yashpal Jain with Ms. Jessica Dharmadhikari for
the respondent.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 23, 2023

PC.:

1. The challenge in this writ petition in exercise of powers under Article 227 of the Constitution of India is to the order dated 9 October 2017 dismissing Notice of Motion No.1756 of 2017 to refer parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 and for dismissal of the suit.

2. Facts giving rise to the filing of the present writ petition are as under.

The petitioners filed Summary Suit No.6977 of 2003 seeking enforcement of settlement allegedly arrived at between the parties, wherein the respondent promised to pay Rs.42,50,000/- to the petitioners, and on such payment the petitioners would retire from the suit firm. On 4 August 2003 the petitioners filed Summons for

Judgment. On 16 August 2005 this Court granted conditional leave to the respondent on deposit of Rs.40 lakh. The respondent challenged the order of grant of conditional leave by way of Appeal No.972 of 2005. Due to enhancement of pecuniary jurisdiction, suit was transferred to the City Civil Court. During pendency of appeal, City Civil Court on 28 October 2014 passed *ex parte* decree against the respondent. On 3 April 2017, the Appellate Court allowed the appeal granting unconditional leave to the respondent. The operative part of the Appellate Court reads thus:

- “a) Appeal is allowed.
- b) Impugned order dated 16 August 2005, is quashed and set aside to the extent of direction to deposit an amount of Rs.40 lakhs within a period of four weeks.
- c) Appellant is entitled for unconditional leave to defend the Suit.
- d) The Appellant-Original Defendant, if required, to file written statement within thirty days from the receipt of copy of this order. Affidavit, list of documents to be filed within four weeks, thereafter. Inspection be made within four weeks, thereafter.
- e) The Suit, if pending, be placed on the board of learned Judge, who is taking the commercial causes suits, as the same is transferred to the list of commercial causes.
- f) In view of disposal of the Appeal itself nothing survives in the Notice of Motion and the same is also disposed of.”

3. The respondent, therefore, filed Notice of Motion under Section 8 of the Arbitration and Conciliation Act, 1996. The City

Civil Court, while refusing to accept request to refer the parties to arbitration under Section 8, passed an order of setting aside *ex parte* decree dated 28 October 2014 and restored the suit. The Trial Court directed the defendant to file written statement before next date. Said order of the Trial Court has been challenged by the petitioners in this writ petition.

4. According to the learned advocate for the petitioners, in the absence of specific application either under Order 37 Rule 4 or under Order 9 Rule 13 of the Code of Civil Procedure, 1908, *ex parte* decree dated 28 October 2014 could not have been set aside.

5. Per contra, learned advocate for the respondent invited my attention to the operative part of the order passed by the Appellate Court to submit that the final relief as contemplated under Order 37 Rule 4 of the Code of Civil Procedure, 1908 granting leave to defendant to appear to summons and to defend the suit has already been granted by the Appellate Court. Therefore, applying under Order 37 Rule 4 was not necessary. He submitted that the foundation of passing of decree having been extinguished, consequential order of passing of decree has no force. In support of his submissions, he relied on the following judgments:

- a) **Siri Krishan Bharadwaj v. Manohar Lal Gupta & Anr.** reported in ILR (1977) II Delhi 438;
- b) **Vareed Jacob v. Sosamma Geevarghese & Ors.** Reported in (2004) 6 SCC 378;
- c) **Emkay Exports, Mumbai & Anr. v. Madhusudan Shrikrishna** reported in 2008 (4) Mh.L.J. 843; and

d) **Lucky Electrical Stores v. Ramesh Steel House** reported in 1988-I-L-W-574.

6. Having heard learned advocates for the parties and after perusing the material on record, to decide the controversy between the parties, it is necessary to refer to Order 37 Rule 4 of the Code of Civil Procedure, 1908 as under:

“4. Power to set aside decree.— After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.”

7. On consideration of documents on record, it appears that the Appellate Court has granted unconditional leave to defend to the defendant. The Appellate Court further granted permission to the defendant to file written statement, affidavit and list of documents. On reading of Order 37 Rule 4, the Court while exercising power under Order 37 Rule 4 CPC after setting aside decree is conferred with the power to grant leave to the defendant to appear to summons and to defend the suit. Such exercise which the Court while exercising power under Order 37 Rule 4 was required to exercise has already been done by the Appellate Court in an appeal arising out order granting conditional leave to the defendant. Therefore, in my opinion, the fact of granting unconditional leave to defend and permission to file written statement is deemed to be an exercise of power under Order 37 Rule 4 of the Code of Civil Procedure, 1908.

8. Moreover, as rightly pointed out by the learned advocate for the defendant relying on the judgment of the High Court of Madras in **Lucky Electrical Stores** (supra) as under:

“8. In *Sri Krishna Bharadwaj’s case* (AIR 1977 Delhi 226), a Division Bench of the Delhi High Court has held that the effect of refusal of leave to appear and defend is that statutorily, the allegation in the plaint have to be treated as admitted and a decree has to follow. In such a case, the decree is consequential on the earlier order refusing to grant leave and if the earlier order is set aside the latter order must also fail. In paragraph 15 of the judgment, Prakash Narain, J. (as he then was) with whom Pritam Singh Safeer, J. agreed, has observed as follows—

“When leave is refused to the defendant to appear and defend the suit under O.37, C.P.C. the effect of the refusal of leave to appear and defend is that the allegations in the plaint by a deeming provision stand admitted. The allegations in the plaint being admitted, a decree has to follow. This means that the decree followed as a consequence of the earlier order of refusal to grant leave to appear and defend. In my opinion, when a subsequent order, even if it be a decree, is a consequential order to an earlier order and the earlier order is set aside the latter order also falls and directions to that effect have to be given.”

9. It is well settled that when the foundation of an order is taken away, consequential order would have no legal force.

10. Moreover, the order passed by the Trial Court sub-serves interest of justice. By passing the impugned order, the Trial Court has done substantial justice. Therefore, no interference under Article 227 of the Constitution of India is called for.

11. The writ petition accordingly stands dismissed. No costs.

(AMIT BORKAR, J.)