

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

NOTICE OF MOTION NO.1808 OF 2003
IN
SUMMARY SUIT NO.2058 OF 2001

VISHAL
SUBHASH
PAREKAR

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M/s. Murphy Electronics Private Limited and Ors. ...Applicants

In the matter between

Jawaharlal Lachmandas Agicha ...Plaintiff

vs.

Murphy Electronics Private Limited and Others ...Defendants

Mr. Anshul Anjarlekar, for the Applicants/Ori. Defendants.

Mr. Prakash Nichani i/b. P.V. Nichani & Co., for the Respondent/ Ori.
Plaintiff.

CORAM : N.J. JAMADAR, J.

RESERVED ON : NOVEMBER 10, 2022

PRONOUNCED ON : JANUARY 25, 2023

ORDER:

1. The applicants/defendants have preferred this Notice of Motion to condone the delay in taking out the Notice of Motion and set aside the order passed by this Court in Summons for Judgment No. 1124 of 2021 thereby decreeing the suit with a direction to give credit of a sum of Rs. 10,000/- to the defendants while drawing up the decree.

2. Shorn of superfluities, the background facts, and the circumstances in which this Notice of Motion warrants

determination, at this length of time, can be stated as under:-

2.1 M/s. Murphy Electronics Private Limited, defendant No. 1, is a limited company. Video Vision Centre, the defendant No. 2, is a proprietary concern. Defendant Nos. 3 to 5 are in-charge of and responsible to the affairs of defendant Nos. 1 and 2.

2.2 The defendants approached the plaintiff for financial assistance. During the months of February/August, 1999, the plaintiff had advanced a sum of Rs. 25,50,000/- to the defendants against the bills of exchange drawn by defendant No. 1 and accepted by defendant No. 2. Upon presentment, the bills of exchange were dishonoured by defendant No. 2. After payment a sum of Rs. 2,50,000/- towards interest, the defendants had drawn in all 52 cheques for varying amounts payable on varying dates towards discharge of liability. Few of the cheques were honoured. However as many as 30 cheques were returned un-encashed. The plaintiff thus addressed demand notices under section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881) and called upon the defendants to pay the amount covered by the cheques. In view of the default on the part of the defendants in complying with the demand therein the plaintiff was constrained to lodge the complaints for the offence punishable under section 138 of the Act, 1881.

2.3 Vide legal notice dated 22nd November, 2000 the plaintiff also

called upon the defendants to pay the outstanding amount of Rs. 15,45,000/- along with interest accrued thereon. In a response, dated 19th December, 2000 the defendants gave vague and evasive reply. Hence, the plaintiff was constrained to institute the suit for recovery of the sum of a Rs. 16,84,430/- along with interest thereon on the strength of the bills of exchange.

2.4 The Writ of Summons was served on the defendants in the month of September, 2001. The defendants entered appearance. Thereupon, the Summons for Judgment was served on the advocate for the defendants on 10th October, 2001. However, the defendants did not file affidavit in reply seeking leave to defend.

2.5 On 24th February, 2003 when the Summons for Judgment was listed before the Court, the learned counsel for the defendants made a statement before the Court that, according to his instruction, the defendants had paid the entire amount to the plaintiff. The learned counsel for the plaintiff contested the said claim and submitted that an amount of Rs. 10,000/- only had been paid. Noting the aforesaid submissions and the fact that the defendants had not sought leave to defend, the Court was persuaded to pass a decree with a direction that the defendants be given credit of Rs. 10,000/- as the plaintiff admitted to have received the said amount during the pendency of the suit.

2.6 The applicants/defendants took out this Notice of Motion contending that they were unaware of the passing of the said decree. In fact, on 14th February, 2002 the entire suit claim was settled by the parties upon payment of a sum of Rs. 6,10,000/- by defendant No. 1 to the plaintiff. The plaintiff has passed a duly stamped receipt, acknowledging the said payment in full and final settlement of the claim. The plaintiff had assured the defendants that the suit would be withdrawn. The defendants had informed their advocate about the said settlement. However, their advocate had expressed a view that as and when the Summons for Judgment would be listed before the Court, the Court would be apprised about the said settlement and there was no need to move the Court till then. The defendants contend, contrary to the settlement and assurances, when the Summons for Judgment was listed before the Court on 24th February, 2003, the plaintiff falsely claimed that a sum of Rs. 10,000/- only was paid.

2.7 The applicants/defendants further contended that in the Complaint Case No. 739/S/2002 the plaintiff made an endeavour to produce a forged document dishonestly claiming that only a sum of Rs. 10,000/- was paid under the receipt dated 14th February, 2002. The applicants/ defendants further contended that only in the month of March, 2003, when in the complaint for the offence

punishable under section 138 of the Act, 1881, the advocate for the complainant/plaintiff sought to produce a copy of the decree passed in the suit on 24th December, 2003, they became aware of the passing of the said decree.

2.8 On 11th March, 2004, the learned single Judge granted an ad-interim relief in this Notice of Motion subject to deposit of a sum of Rs. 8,95,000/-. In Appeal No. 267 of 2004 in Notice of Motion No. 669 of 2004 by an order dated 19th April, 2004, the appeal Bench directed that the stay to the execution and operation of the decree would operate subject to deposit of a sum of Rs. 3,00,000/- only.

2.9 In Interim Application (L) No. 5117 of 2021 in Appeal No. 267 of 2004, by an order dated 29th July, 2021 the appeal Bench, with the consent of the parties, restored the Notice of Motion and granted four weeks time to respondent/plaintiff to file an affidavit in Notice of Motion and two weeks to the appellant/defendant to file affidavit in rejoinder, with a direction to decide the Notice of Motion within a period of four weeks from the date of completion of pleadings.

2.10 Upon remand, the plaintiff made a statement that he does not wish to file further affidavit in reply. The defendants have, however, filed additional affidavit in support of the Notice of Motion to place on record the copies of the record and proceedings in the complaints

filed under section 138 of the Act, 1881 and the documents tendered therein. This is how the Notice of Motion now comes up for determination.

3. I have heard Mr. Anshul Anjarlekar, learned counsel for the applicants/defendants and Mr. Prakash Nichani, learned counsel for the respondent/ plaintiff. With the assistance of the learned counsel for the parties, I have perused the pleadings and material on record.

4. Mr. Anjarlekar, the learned counsel for the applicants submitted that the peculiar facts of the case justify the exercise of discretion by the Court under Order XXXVII Rule 4 of the Code of Civil Procedure, 1908 (the Code) to set aside the decree and grant an efficacious opportunity to the defendants to defend the suit. Mr. Anjarlekar was at pains to canvass a submission that the decree in question is obtained by plaintiff by resorting to a sharp practice. Post decree, to bolster up the case which was presented before the Court on the date of passing of decree i.e. on 24th February, 2003, the plaintiff resorted to forgery, which is evident from the documents relied upon by the plaintiff in the affidavit in reply filed to the Notice of Motion and tendered before the learned Magistrate.

5. Mr. Anjarlekar would further urge that the then advocate for the defendants, namely, Mr. Niranjan Jagtap has sworn an affidavit to substantiate the claim of the defendants that they had informed him that the suit claim was settled and the plaintiff had assured to withdraw the suit and that he had not apprised the factum of service of the Summons for Judgment on the defendants. In the face of this material, according to Mr. Anjarlekar, the defendants have made out the 'special circumstances' which warrant the exercise of the power under Order XXXVII Rule 4 of the Code.

6. In opposition to this Mr. Nichani would submit that the veracity of the receipt sought to be placed on record by the defendants in support of their claim that they had settled the entire suit claim itself is in contest. According to Mr. Nichani to bolster up a false case of settlement, the defendants had forged the receipt dishonestly claiming that a sum of Rs. 6,00,000/- was paid to the plaintiff in cash.

7. Mr. Nichani laid emphasis on the probabilities of the case. It was urged that on 4th October, 2021 when the defendants claimed to have settled the entire dispute by paying a sum of Rs. 6,10,000/-, the complaints were subjudice before the Magistrate. In such a

situation, it is inconceivable that the defendants would have made payment of a huge sum of Rs. 6,00,000/- in cash, without insisting for the settlement and/or withdrawal and/or composition of the pending proceedings between the parties.

8. It was further submitted that the endeavour of the plaintiff to send the receipt tendered by the defendants (accused) before the learned Magistrate for the opinion of the handwriting expert was stonewalled by the defendants and eventually the said application came to be rejected. Yet, the plaintiff has obtained the opinion of the handwriting expert which vouches for the genuineness of the receipt tendered by the plaintiff and establishes the forgery by interpolation in the receipts relied upon by the defendants.

9. Mr. Nichani would further urge that since the defendants were present when the decree was passed by this Court, the decree, can not be said to have been passed ex-parte. In any event, having failed to seek the leave to defend the suit, at this juncture, the defendants can not seek setting aside of the decree.

10. To begin with, uncontroverted facts. The service of the Writ of Summons on the defendants is incontestable. The defendants

admittedly entered appearance upon service of Writ of Summons. It is also indubitable that the Summons for Judgment was served on the advocate for the defendants. The defendants do not claim to have sought leave to defend the suit. Mr. Jagtap, the then advocate for the defendants has put oath behind the statement that he had not apprised the factum of service of Summons for Judgment to the defendants and, upon being informed by the defendants that the suit claim was settled, he was of the opinion that it was not necessary to file an affidavit seeking leave to defend and it would be suffice to apprise the Court as and when the Summons for Judgment was listed before the Court.

11. In this context, it would be appropriate to extract the relevant part of the order passed by this Court on 24th February, 2003 in the Summons for Judgment. It reads as under:-

“The learned counsel for the plaintiff informs that the defendants have been served with the summons for judgement on 10-10-2001. He undertakes to file affidavit of service within one week from today.

The learned counsel for the defendants states that according to instructions of the defendants the entire amount has been paid.

This statement is disputed by the learned counsel for the plaintiff. He states that only an amount of Rs. 10,000/- has been paid.

In any case, even if the statement of the learned counsel for the defendant is correct that

the entire amount has been paid. The defendants can produce the receipt at the time of execution of the decree.

Defendants have not filed any application for leave to defend the suit nor they filed any affidavit disclosing the grounds on which leave to defend can be granted to the defendants. Therefore, in terms of the provisions of Order 37 Rule 3 of CPC the plaintiff is entitled to the judgment.

Perused the record. Summons for Judgment is granted accordingly. Suit is decreed in terms of clauses of the suit.

While drawing the decree, credit of Rs. 10,000/- be given to the defendants which according to the plaintiff the defendants have paid during the pendency of the suit.”

12. In the light of the aforesaid order, a submission was sought to be canvassed on behalf of the plaintiff that the decree can not be said to have been passed ex-parte and, therefore, a Notice of Motion to set aside the decree is untenable. I am afraid to accede to this submission for the reason that it does not appreciate the scope and ambit of the provision contained in Order XXXVII Rule 4 of the Code. The submission seeks to constrict the scope of the provision contained in Order XXXVII Rule 4 of the Code to that of Order IX Rule 13 of the Code.

13. Rule 4 of the Order XXXVII reads 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.”

14. A careful reading of the afore-extracted rule would indicate that rule is not confined to setting aside ex-parte decree. The Court which has passed a decree in a summary suit is vested with the discretionary jurisdiction to set aside the decree which is not passed ex-parte under special circumstances. The Court is further empowered to either stay or set aside the execution and also grant leave to the defendant to appear to the Summons for Judgment and defend the suit.

15. A jurisdictional condition for exercise of the discretion under Rule 4 is the satisfaction of the Court about the existence of “special circumstances” which warrant setting aside of the decree. The term “special circumstances” is not susceptible to precise definition. In the very nature of the things, the existence or otherwise of special circumstances would largely depend on the facts of a given case.

16. A useful reference in this context can be made to a judgment of the Supreme Court in the case of **Rajni Kumar vs. Suresh Kumar Malhotra and Another**¹ wherein the Supreme Court had an occasion

¹ (2003) 5 Supreme Court Cases 315.

to consider the scope and import of Rule 4 of Order XXXVII and the distinction between the provisions contained in Order XXXVII Rule 4 and Order IX Rule 13, in the matter of the power of the Court to set aside the decree. The observations of the Court in paragraphs 8, 9 and 11 are instructive and hence extracted below:-

8] A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit :

- (i) to stay or set aside execution and
- (ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit.

9] The expression 'special circumstances' is not defined in the Civil Procedure Code nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

... ..

11] It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

17. The Supreme Court has thus enunciated that when the defendant seeks setting aside of a decree passed in a summary suit by invoking the provision contained in Order XXXVII Rule 4, two conditions are required to be satisfied. First, it is incumbent upon

the defendant to demonstrate, “special circumstances” which merit setting aside of the decree. Second, there is further obligation on the defendant to satisfy the Court that the facts of the case are such that he is entitled to leave to defend the suit. This additional requirement stems from the legislative policy of not permitting a defendant in a suit under Order XXXVII to defend the suit as a matter of right.

18. On the aforesaid touchstone, reverting to the facts of the case, it has to be seen whether there exist “special circumstances” and the defendants are otherwise entitled to leave to defend the suit. First and foremost, the nature of the order passed by this Court, in my view, assumes critical significance. While passing the order on the Summons for Judgment, the Court notes that a statement was made on behalf of the defendants that the entire amount had been paid. In controversion, the plaintiff asserted that only a sum of Rs. 10,000/- was paid. Secondly, the Court proceeds to record that even if it was assumed that the defendants had paid the entire amount, it was open for the defendants to produce the receipt at the time of execution of the decree. Thirdly, on account of the default on the part of the defendants to seek leave to defend, the Court took recourse to Rule 3 of Order XXXVII to pass the decree. Fourthly,

taking note of the admission of receipt of a sum of Rs. 10,000/-, the Court directs that the credit of Rs. 10,000/- be given to the defendants while drawing the decree.

19. The aforesaid order makes it clear that the stand of the defendants that there was a settlement between the parties was made known to the Court. The parties were at issue over the quantum of the amount paid in pursuance of the purported settlement. It also becomes abundantly clear that the defendants claimed that they had receipts which acknowledge the payment and thus the Court observed that, if that was the case, the defendants could produce the receipt at the stage of execution of the decree. This part of the direction, in my view, gives a considerable heft to the submission on behalf of the defendants that the course suggested by the Court was fraught with infirmity as the executing Court could not have gone behind the decree.

20. The aforesaid order, in the least, would indicate that on the day the said order came to be passed settlement there were negotiation for and the controversy principally revolved around the quantum of the amount, actually paid by the defendants to the plaintiff towards the same.

21. The affidavit filed by Mr. Jagtap, the then advocate for the defendants, if seen through the aforesaid prism, assumes significance. Had the plaintiff taken a stand that there was no offer of/ effort at settlement and no payment was made in pursuance thereof, different considerations would have come into play. The submission on behalf of the plaintiff that only a sum of Rs. 10,000/- was paid thus, prima facie, lent credence to the submission on behalf of the defendants that their efforts to settle the matter out of Court.

22. Though the learned counsel for the parties made an endeavour to persuade the Court to delve deep into the aspect as to which of the two receipts, namely, the one evidencing the receipt of a sum of Rs. 6,10,000/- banked upon by the defendants, and another evidencing the receipt of a sum of Rs. 10,000/- only pressed into service by the plaintiff, is forged yet. I do not deem it appropriate to record a definitive finding on the said core controversy, at this stage. In the context of the scope of inquiry in the instant application to set aside the decree, in my view, the question as to whether the defendants have made out a justifiable ground to do so, can be determined with reference to the two receipts purportedly produced by the plaintiff.

23. In the affidavit in reply to the Notice of Motion, the plaintiff affirmed that when the defendants had paid a sum of Rs. 10,000/- only to him and asked him to execute a receipt, he had obtained a photocopy thereof and the copy annexed to the affidavit in reply (Exhibit 1) is the said photostate copy. In C.C. No.963/SS/2005, the plaintiff professed to produce on the record of the Metropolitan Magistrate Court original receipt dated 14th February, 2002.

24. It is pertinent to note that there is material variance in both these documents. The receipt tendered before the learned Magistrate was professedly original typed receipt. In contrast, a photostate copy of the receipt, which was allegedly obtained by the plaintiff, was sought to be annexed to the affidavit in reply. Secondly, the receipt annexed to the affidavit in reply appeared to be duly stamped, with a part of the signature appearing on the stamp. Whereas, the receipt tendered before the learned Magistrate was not duly stamped. Thirdly, the original typed receipt tendered before the learned Magistrate contains stamp and endorsement of the defendant No. 1. Copy of the receipt annexed to the affidavit in reply, does not contain such stamp and endorsement. On a bare perusal and comparison of the two sets of the documents, relied upon by the plaintiff himself, the discrepancies are clear and

explicit. This factor singularly persuades the Court to hold that the veracity of the competing claims about the genuineness of the receipts, banked upon by the parties, warrants adjudication.

25. The conspectus of the aforesaid consideration is that the defendants have succeeded in demonstrating that there were “special circumstances” which prevented them filing the affidavit seeking leave to defend. Mr. Jagtap, the then advocate for the defendants, has categorically affirmed about the circumstances in which the order came to be passed on 24th February, 2003. The claim of Mr. Jagtap has not been controverted. The situation to which Mr. Jagtap adverted is not inconceivable. If that is the case, it is trite, a party can not be made to suffer for an error of judgment on the part of an advocate.

26. In any event, in the totality of the circumstances, the question as to whether there was a settlement out of the Court between the parties and the plaintiff accepted a sum of Rs. 6,10,000/- in full and final satisfaction of the suit claim, is a matter which warrants adjudication. As noted above, the parties differ on the quantum of the amount paid. Mr. Nichani may be justified in canvassing a submission that, in the circumstances of the case, it was highly

improbable for the plaintiff to accept a sum of Rs. 6,10,000/- only against the entire suit claim. However, that is a matter for trial. Since which of the receipts is genuine is in the realm of controversy and the defendants have placed on record two receipts banked upon by the plaintiff, which are at variance with each other, I am impelled to hold that the defendants deserve leave to defend the suit.

27. Lastly, since the defendants have deposited a sum of Rs. 3 lakhs pursuant to the order of the appeal Bench, in my view, no further condition of deposit is required to be imposed. However, having regard to the time which has elapsed since the institution of the suit, it may be expedient to stipulate conditions as to time for completion of trial.

Hence, the following order:

ORDER

- 1] The Notice of Motion stands allowed in terms of prayer clauses (a) and (b).
- 2] The order dated 24th February, 2003 in Summons

for Judgment No. 1124 of 2001 and the decree stand set aside.

3] The defendants are granted leave to defend the suit subject to the condition of continuing the deposit of the sum of Rs. 3 lakhs till the final disposal of the suit.

4] Hearing of the suit stands expedited.

5] The defendants shall file their written statement within a period of 30 days from the date of this order.

6] The pre-trial formalities be completed within a further period of two months.

7] The suit be listed for directions on 26th April, 2023.

(N. J. JAMADAR, J.)