

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Biswaroop Chowdhury

APO/210/2019
With
CS/364/2014
IA NO: GA/5/2024

Harrow Hall
Vs.
Sukhlal Chandanmull (P) Ltd.

For the appellants :- Mr. Ahin Choudhury, Sr. Adv
Mr. Dhruba Ghosh, Sr. Adv.
Mr. Rohit Banerjee,
Mr. Altamash Alim,
Mr. Raja Mantosh,

For the respondents :- Mr. Sabyasachi Chaudhury, Adv.
Mr. Biswanath Chatterjee,
Mr. Shaunak Mukhopadhyay,
Mr. Neelesh Choudhury,
Ms. Anuradha Podder,

Judgment on :- 09.08.2024.

I. P. MUKERJI, J.:-

On 3rd November, 2014 the respondent/plaintiff instituted this suit (CS 364 of 2014) against the appellant/defendant for eviction and for recovery of possession of the suit premises which are the second and third floors each measuring 5487.530 sq. ft. in premises No.27B, Park Street, Kolkata-16. This was together with a claim for arrear rent for June, 2014 and mesne profits for Rs.20 lakhs for the period 12th July, 2014 till 11th September, 2014 and at a higher rate from 12th September, 2014 till recovery of physical possession. On 18th November, 2014 the writ of summons was served upon the appellant/defendant.

On 26th November, 2014 they served a notice upon the respondent/plaintiff of their having entered appearance. On 9th December, 2014 the appellant/defendant filed their written statement and served it on the respondent/plaintiff. The respondent/plaintiff filed an application under Chapter-XIIIA of the Original Side Rules on the same day and served it on the appellant/defendant on 10th December,

2014. The appellant/defendant contended that since they had filed their written statement, by operation of the proviso, the Chapter-XIIIA application ought to have been filed within ten days of notification of their entering of appearance on 26th November, 2014, that is to say, by 6th December, 2014. Hence, the Chapter-XIIIA application was beyond ten days. It was attacked at the threshold by the appellant/defendant by an application. They contended that the Chapter-XIIIA application was not maintainable and should be dismissed.

The learned judge by the impugned judgment and order dated 29th January, 2019 dismissed the application and has proceeded to entertain the application. Hence this appeal.

Chapter-XIIIA of the Original Side Rules provides for summary judgment to be obtained by the plaintiff in cases specified in that Chapter. Chapter-XIIIA rule 3 is as follows:-

“1. Nature of cases in which applicable.-The provisions of this Chapter shall not be applicable save to suits.

...

3. When application to be made.- Where the defendant in any suit which is within the terms of Rule 1 has entered appearance the plaintiff may, as regards any claim which is within the terms of Rule 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim, apply to the Judge for final judgment for the amount claimed together with interest, if any, or for the recovery of the land (with or without rent or mesne profits) as the case may be and costs:

Provided that as against any defendant who has filed a written statement such application shall not be permissible unless the summons is taken out as in Rule 4 mentioned within ten days after receipt of notice of the entering of appearance under Chapter VIII, rule 18.”

For deciding the appeal, the impact of the proviso needs assessment.

There is no question that the appellant/defendant has filed the written statement in the suit and that the Chapter-XIIIA application was taken out more than ten days after receipt of the notice by the plaintiff's advocate on record of the entering of appearance by the appellant/defendant, under Chapter-VIII Rule 18. Based on this proviso it is contended by this party that the Chapter-XIIIA application is not maintainable. It should be dismissed. Let us analyse this proviso and the effect of it.

Chapter-VIII Rule 4 of the said rules provides that the summons in every suit except a summary suit shall require the defendant to enter an appearance and file a written statement within a specified time. Under Order VIII Rule 18 the defendant or his advocate is to give notice to the plaintiff's advocate-on-record of having entered his appearance.

The defendant may or may not have filed a written statement. If the Chapter-XIIIA application is taken out within ten days of notice of the defendant's entering appearance, it is good in the eye of the rule whether or not the defendant files his written statement. Now suppose the defendant files his written statement. If at the time of filing of the Chapter XIIIA application, a period of 10 days from the date of intimation of appearance is over, then, according to the proviso, the Chapter-XIIIA application would not be maintainable.

Again suppose, the defendant does not file a written statement within the stipulated time and even beyond it. In terms of the proviso it would be open to the plaintiff to file the Chapter-XIIIA application. Now take the situation where, thereafter, taking extension of time from the court the defendant is able to file his written statement.

Does the Chapter-XIIIA application immediately become invalid and not maintainable?

The courts have made their own interpretation of this proviso.

In **Manik Lal Sharma vs. Usha Beltron Limited** reported in (2004) 3

CAL LT 271 (HC) , a Division Bench of our court presided over by Mr.

Justice Dilip Kumar Seth, ruled as follows:

“4.4. After having gone through the provisions contained in Rule 3 of Chapter XIII-A, It appears to us that the principal Rule does not provide for any time limit for applying for final judgment. It permits making of such application when the defendant has entered appearance. The principal Rule has been qualified by the proviso. The proviso has used present perfect, future and present tense while laying down the condition under which such an application cannot be permissible viz., (i) against a defendant who has filed a written statement, (ii) the application shall not be permissible, (111) unless the summons is taken out within the time limit prescribed. In the manner in which the expression has been engrafted using present perfect tense for the purpose of filing written statement and making an application impermissible preceded by a future tense followed by present tense for taking out the summons presupposes that the impermissibility is applicable when it follows the filing of the written statement. If such application is made after the written statement is filed, in that event, the 10 days limitation for taking out the Master's Summons would be applicable. But, if the Master's Summon is taken out before the written statement is filed, in that event, by virtue of filing of written statement the purpose of taking out the Master's Summons cannot be frustrated simply by filing a written statement. Our view is supported by the use of the verb "is" for taking out of the summons. The use of the present tense is for the taking out of summons is significant. If the legislature intended the effect, as Mr. Pal contends, then it would have used past tense "was" instead of present tense "is" for taking out summons. The question is to be gone into on merits and not on technicalities.”

In **Kankani Estate Private Limited vs. Oriental Bank of Commerce**

reported in **(2012) 3 CHN 311**, I tried to simplify the rule by stating as

follows:-

“12. However, with the deepest respect to the judgment of the Division Bench I would like to add that the purpose of this rule in Chapter XIII-A, as I see it, is that an application under this Chapter should be filed as expeditiously as possible. If a defendant has filed a written statement and the suit progressed by discovery of documents, inspection and so on then it is better to have a regular trial. I think it is inequitable to allow a plaintiff to proceed with a suit by compelling the defendant to file a defence, discover documents and so on, evaluate the evidence brought forward by the defendant, and then ask for a summary judgment. The principle is that in an application for summary

judgment, the Court either declines leave to defend or grants it. So a XIII-A application is to be brought without delay, upon notice of entering of appearance by the defendant, within ten days thereof as Rule 3 prescribes or according to the above decision of the division bench, before expiry of the time to file the written statement. The wording of the proviso is undoubtedly ambiguous.”

Mr. Justice Soumen Sen in **M/s Arjun Shyam & Co. (P) Ltd. vs. M/s Sagar Trading Co. & Ors.** decided on 11th August, 2015 and till date unreported expressed the view that the stipulation that as against the defendant who had filed his written statement a Chapter-XIIIA application had to be filed within ten days of receipt of the summons was “absurd” for the reasons that if the defendant filed his written statement much later than ten days time would long have elapsed.

In the impugned judgment and order the learned judge while very painstakingly attempting to interpret the proviso to Rule 3 of Chapter-XIIIA application remarked as follows:-

“15. As a post-script, the proviso to Rule 3 of Chapter XIII needs to be revisited. There is little clarity in the proviso as to what should be the appropriate outcome where a defendant affirms a written statement but does not take any steps to file or serve such written statement until after a plaintiff has taken out the summons under Chapter-XIIIA. The language in the proviso is uncertain and amenable to various constructions which give rise to unnecessary proceedings and are contrary to the very object of Chapter-XIIIA of the Original Side Rules of this court.”

A judge would attempt an interpretation of a statute or a rule if on making a construction of it from the express words used or their implication or from a purposive interpretation of the contents, some rational meaning of the words of the enactment or intention of the legislature or rule maker can be derived. When after applying the rules and canons governing interpretation, a logical meaning of an enactment cannot be ascertained, there is no other alternative but to suggest its repeal and substitution of a new provision.

In this case, this provision is clearly most ambiguous.

If a Chapter-XIIIA application is filed within ten days of receipt of the notice of appearance of the defendant the plaintiff is safe. Otherwise look at the way the rule works. A Chapter-XIIIA application can be filed at any time, if the defendant has not filed a written statement. The words “has filed the written statement” does not indicate that the written statement must have been filed at the time of entering of appearance or notification thereof by the defendant. It more likely tends to suggest filing of the written statement at any point of time. Then in that case the moment the Chapter-XIIIA application is sought to be filed, an enquiry is to be made whether the defendant has filed his written statement. If the written statement has not been filed the Chapter-XIIIA application is maintainable. If it is found that it has been filed and ten days from the date of service of notice of appearance has elapsed, then the Chapter-XIIIA application cannot be entertained. It would also have a more extreme consequence, when, while the Chapter-XIIIA application is being prosecuted the defendant obtains leave of the court to file the written statement. If that Chapter-XIIIA application has been filed more than ten days after receipt of the notice of appearance it will automatically become barred under the proviso and cannot be proceeded further.

Therefore, this proviso is so vague and ambiguous that no effect should be given to it. Sitting singly, I have pointed out in **Kankani Estate Private Limited vs. Oriental Bank of Commerce** reported in **2012 (3) CHN 311** that a Chapter-XIIIA application is to be brought out before the defendant is asked to undergo the procedure for contesting the suit. The language of Chapter-XIIIA application supports this view because on consideration of the Chapter-XIIIA application the court decides under Rule 9 of that Chapter whether to grant leave to the defendant to defend or give him such leave subject to terms and conditions to be set by the court. Therefore, it follows that a Chapter-XIIIA application should be filed before expiry of the time granted to the defendant to file his written statement. If in the Chapter-XIIIA application the court finds that he has got a defence and must be allowed to defend the suit, then only he should be asked to file a written statement disclosing such defence.

Nevertheless, the right to file the Chapter-XIIIA application should not be closed at any point of time because even if the defendant has filed his written statement, the court might order on consideration of the Chapter-XIIIA application that he has no right to defend the suit or it can only defend a part of the claim or defend the claim wholly. In that event, the suit might go to trial or go to trial on limited issues.

More importantly, even if one retains Chapter-XIIIA Rule 3 as it is, there is nothing in the rule which provides a special period of limitation under Section 29 of the Limitation Act for a Chapter-XIIIA application, so as to exclude the operation of Section 5. Even if there is delay in filing the Chapter-XIIIA application, the same may be condoned.

Even if I am unable to ignore the proviso to the said rule at this point of time and even applying the words of that rule strictly, still I would condone the marginal delay in filing the Chapter-XIIIA application, under Section 5 of the Limitation Act. This is in addition to my view that the proviso should be disapplied as it is most ambiguous and most irrational.

For all those reasons, I would dismiss the appeal and affirm the impugned judgment and order.

The court might proceed to hear out the Chapter-XIIIA application as expeditiously as possible.

I agree.

(Biswaroop Chowdhury, J.)

(I. P. Mukerji, J.)