IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

APPEAL AGAINST ORDER NO.45 OF 2023

APPELLANT (Orig. Plaintiff on R/A) :- Rajiv S/o Shivji Sharma
Aged about 43 Years, Occupation Business, Proprietor of M/s. Century Steel Traders, having its place of Business at Ghat Road, Nagpur – 440010 and
Resident of Plot No.2, Ghat Road, Nagpur.

..VERSUS..

RESPONDENTS (Orig. defendants) :-

1) M/s. Polaris Steel Castings Private Limited, A company incorporated under the Indian Companies Act, 1956, having Its Registered Office at Mishrra Mansion, 43, Nelco Society, Jaitala Road, Nagpur.

2) Pushpendra Pramodkumar Mishra,
Aged about 42 years, Director of M/s. Polaris Steel Castings Private Limited, having Its Registered Office at Mishra Mansion, 43, Nelco Society, Jaitala Road, Nagpur. Now – 2nd Floor, Gokul Uddhan Apartment, Jaitala Chowk, Subhash Nagar, Nagpur – 22.

3) Smt. Kanchan Rohit Tiwari,
Aged Major, Director of M/s. Polaris Steel Castings Private Limited, R/o Gaddam Layout, Near Jasnagra Hotel, Near Railway Station Akola.

WITH
CROSS OBJECTION ST. NO.17704 OF 2024

CROSS OBJECTORS RESPONDENTS (Orig. defendants) :-

1) M/s. Polaris Steel Castings Private Limited, A company incorporated under the Indian Companies Act, 1956, having Its Registered Office at Mishrra Mansion, 43, Nelco Society, Jaitala Road, Nagpur.

2) Pushpendra Pramodkumar Mishra,
Aged about 42 years, Director of M/s. Polaris Steel Castings Private Limited, having Its Registered Office at Mishra Mansion, 43, Nelco Society, Jaitala Road, Nagpur. Now – 2nd Floor, Gokul Uddhav Apartment, Jaitala Chowk, Subhash Nagar, Nagpur – 22.

3) Smt. Kanchan Rohit Tiwari,
Aged Major, Director of M/s. Polaris Steel Castings Private Limited, R/o Gaddam Layout, Near Jasnagra Hotel, Near Railway Station Akola.

..VERSUS..

RESPONDENT/ APPELLANT (Orig. plaintiff) :-

Rajiv S/o Shivji Sharma
Aged about 43 Years, Occ Business, alleged Proprietor of Century Steel Traders at Ghat Road Nagpur. 440010
R/o Plot No.2, Ghat Road, Nagpur 440010.

Mr. R.M. Sharma, Advocate for Appellant (respondent in XOB).
Mr. M.D. Samel, Advocate for the Respondent Nos.1 and 3/Cross Objectors.

CORAM : ROHIT W. JOSHI, J.

DATE : 04/11/2025

ORAL JUDGMENT :

1. Heard finally with consent of learned counsel for the respective parties.

2. The present appeal is preferred by the original plaintiff who had filed a summary suit for recovery of money as per Order 37 of the Code of Civil Procedure, 1908 (for short "CPC") being Summary Civil Suit No.122 of 2014. The respondents/defendants appeared in the matter on being served with summons issued under Order 37, Rule 3(1) of the CPC. On the date on which the defendants entered appearance in the suit, they filed an application seeking leave to defend. Perusal of the Order 37, Rule 3 of the CPC, will demonstrate that in a suit filed under Order 37 of the CPC, the plaintiff is required to serve the defendant with a copy of the plaint and all accompanying annexures. The defendant must enter appearance before the Court within a period of ten days from the date of service of such summons issued under Order 37, Rule 3(1) of the CPC. Order 37, Rule 3(4) of the CPC, contemplates that in the event the defendant enteres appearance in the matter, the plaintiff shall thereafter serve a summons for judgment on the defendant in Form No.4(A) in Appendix B. The summons is required to be supported by an affidavit verifying the cause of action and the amount claimed. It must also contain a statement that, in

the belief of the plaintiff, the defendant has no defence to offer. It is only after the summons for judgment, as contemplated under Order 37, Rule 3(4) of the CPC, is served on the defendant, that the defendant is required to file an application seeking leave to defend. This application is required to be filed as per Order 37, Rule 3(5) of the CPC.

3. However, in the present case, before a summons for judgment was served on the defendants, they filed an application seeking leave to defend on the first date of appearance itself. This application was filed only on being served with the summons for appearance and not the summons for judgment. The said application was allowed by the learned trial Court vide order dated 03.02.2015, on the condition that the defendants shall deposit entire amount with the learned trial Court within the period specified in the order. The defendants assailed the said order dated 03.02.2015 before this Court by filing a writ petition being Writ Petition No.987 of 2015, which was dismissed vide order dated 31.08.2015. The said order dated 31.08.2015 was unsuccessfully challenged by the defendants before the Hon'ble Supreme Court. Thus, the conditional order granting leave to defend to the defendants attained finality upto the Hon'ble Supreme Court.

4. The defendants did not deposit the amount as directed by the learned trial Court. As a consequence of this, the learned trial Court proceeded with the suit and has decreed the suit vide judgment and decree dated 06.03.2017. The defendants thereafter preferred an appeal being Regular Civil Appeal No.347 of 2017, challenging the said judgment and decree. The learned District Judge-17, Nagpur, has partly allowed the appeal vide judgment and order dated 06.05.2023. The learned First Appellate Court found that the defendants were served with summons for appearance under Order 37, Rule 1 of the CPC and had immediately filed an application seeking leave to defend. It is found that that the summons for judgment, as contemplated under Order 37, Rule 3(4) of the CPC, was never served on the defendants. In view of this procedural non-compliance, the learned First Appellate Court considered it proper to quash and set aside the decree passed by the learned trial Court and to remand the suit afresh from the stage mentioned in the Order 37, Rule 3(4) of the CPC i.e. from the stage of issuance of judgment summons.

5. The consequence of the aforesaid order of remand is that the defendants will get a fresh opportunity to file an application seeking leave to defend, as contemplated under Order 37, Rule 3(5)

of the CPC. Mr. Sharma, learned Advocate for the appellant contends that the only purpose of issuing summons for judgment under Order 37, Rule 3(4) of the CPC, is that on being served with such summons, the defendants can file an application seeking leave to defend. Mr. Sharma, learned Advocate contends that in the case at hand, the defendant had filed an application seeking leave to defend immediately upon being served with summons for appearance. He therefore, contends that the defendants have fulfilled the requirement of being served with summons for judgment. He has placed reliance on the judgment of the Hon'ble Supreme Court in the matter of *State Bank of Patiala and others ..vs.. S.K. Sharma*, reported in **(1996) 3 SCC 364**, particularly in paragraph Nos. 29, 33(3) and 33(4b).

6. Mr. Sharma, learned Advocate contends that the procedural provisions can always be waived by the persons for whose benefit such provisions are incorporated. He further contends that the laws of procedure are meant only for ensuring a fair trial and unless prejudice is demonstrated, orders and decrees passed by the competent courts should not be interfered with only in view of non-compliance with certain procedural provisions. He further contends that, where procedural provisions are intended for the

benefit of a litigant, such provisions can always be waived by that litigant. Mr. Sharma, learned Advocate also contends that the learned First Appellate Court has not dealt with the merits of the matter and has remanded the suit for fresh adjudication from the stage of Order 37, Rule 3(4) of the CPC, merely on a technical ground. He further contends that the effect of the judgment and order passed by the learned First Appellate Court would be that an order of conditional leave passed by the learned trial Court, which has been confirmed upto the Hon'ble Supreme Court, would be set at naught. He therefore contends that the judgment and order of remand passed by the learned First Appellate Court deserves to be quashed and set aside.

7. *Per contra*, Mr. Samel, learned Advocate for the respondents argues that the order on application for seeking leave to defend is obtained by the plaintiff by practicing fraud. He contends that the plaintiff has filed the suit claiming to be the sole proprietor of a business undertaking named Century Steel Trader. Mr. Samel, argues that the suit is based on a cheque which is also the subject matter of criminal proceedings under Section 138 of the Negotiable Instrument Act, 1881 (hereinafter referred to as "NI Act"). Mr. Samel, learned Advocate for the respondents contends that the

defendants were acquitted in those proceedings initiated under Section 138 of the NI Act and the said order of acquittal was confirmed by this Court vide judgment dated 31.07.2018, dismissing the criminal appeal preferred by the plaintiff. Referring to the said judgment, Mr. Samel, contends that it is clearly admitted by the plaintiff that he is not proprietor of Century Steel Trader, in whose favour the cheque in question is issued and as such, he had no authority to file the civil suit. Apart from this, Mr. Samel, learned Advocate also draws attention to the findings that the cheque in question is a forged document. Mr. Samel, therefore justified the order of remand. As regards the order passed by the learned trial Court granting conditional leave to defend which is confirmed right upto the Hon'ble Supreme Court, the contention is that orders obtained by fraud are nullity and never operate as *res judicata*. Mr. Samel, further contends that the only of conditional leave was interim order which was passed without recording any evidence.

8. Vide order dated 10.09.2024, the following substantial question of law was framed in the present appeal :-

> *"Whether by filing an application for leave to defend under Order 37, Rule 5 of the Civil Procedure Code, 1908 (CPC) would amount to waiver of issuance of summons for judgment, as contemplated under Order 37, Rule 4 of the CPC. ?"*

Parties were also put to notice by the said order that the appeal would be heard finally at the stage of admission. Accordingly, the learned Advocates have advanced submissions on merits of the appeal for final hearing.

9. It will be appropriate to deal with the contention of the defendants with respect to fraud. It is not in dispute that the plaintiff has initiated criminal prosecution against the defendants under Section 138 of the NI Act and that the defendants were acquitted in the said criminal case. It is also an admitted fact that the appeal preferred by the plaintiff is dismissed by this Court. While dismissing the appeal, this Court has recorded findings that the plaintiff had clearly admitted during the course of his cross-examination that he was not proprietor of the business undertaking, 'Century Steel Trader', in whose favour the cheque in question was issued. Perusal of paragraph Nos.23 and 24 of the judgment will demonstrate that this Court has referred to the findings recorded by the learned Magistrate that the signatures on the disputed cheque appeared to be forged and that there was no reliable evidence to show that any transaction existed between the parties or that the cheque in question was issued to discharge any legal debt or liability. This Court has further observed that, in

criminal cases, when two views are possible, the view that favours the accused must be accepted.

10. As regards the findings recorded by this Court in criminal case, it must be stated that such findings do not operate as *res judicata* in a civil suit. Mr. Sharma, points out that the learned trial Court has held that the judgment delivered by the learned Magistrate acquitting the defendants in the criminal case will not be conclusive while passing the decree in favour of the plaintiff. He points out that, according to the learned trial Court, the admission regarding the plaintiff not being proprietor of the said business undertaking is not a clear admission.

11. The issue of fraud, which is sought to be canvassed by Mr. Samel, learned Advocate for the respondents, has been considered by the learned trial Court. Merits of the findings recorded by the learned Trial Court are not the subject matter of the present appeal. The subject matter of the present appeal is correctness or otherwise the order of remand passed by the learned First Appellate Court. As regards the order passed by the learned First Appellate Court, perusal of the judgment will indicate that the matter is remanded only on the ground that summons for judgment as contemplated under Order 37, Rule 3(4) of the CPC, was not

issued. It is not in dispute that the defendants had filed an application seeking leave to defend immediately only upon being served with the summons for appearance. The said application is decided by the learned trial Court on merits and the said order granting conditional leave is confirmed upto the Hon'ble Supreme Court.

12. I agree with submission of Mr. Sharma, learned Advocate that by directing the learned trial Court to observe all the formalities from such Order 37, Rule 3(4) of the CPC, the learned First Appellate Court has in fact satisfied the order passed by this Court and the Hon'ble Supreme Court confirming the order passed by the learned trial Court granting conditional leave to defend to the defendants.

13. It will be pertinent to state that the defendants had themselves moved an application at premature stage seeking leave to defend. The defendants cannot allow to take advantage of a procedural irregularity which is committed by them or by their learned Advocate. In this backdrop, it will be appropriate to refer to Section 99 of the CPC, which provides that no decree shall be reversed or varied nor shall any case be remanded in appeal, on account of any error, defect or irregularity in the proceedings of the

suit that does not affect the merits of the case or jurisdiction of the Court. The learned First Appellate Court does not record that any prejudice is caused to the defendants on account of the fact that summons for judgment will not serve on the defendants. In any case, the defendants have failed to make out any case of prejudice on account of said procedural irregularity.

14. In view of the reasons, in the considered opinion of this Court, the judgment and order of remand passed by the learned First Appellate Court is unsustainable and is liable to be quashed and set aside. The appeal is partly allowed in the following terms :-

i) The appeal is **partly allowed**.

ii) The judgment and order dated 06.05.2023, passed by the learned District Judge-17, Nagpur, in Regular Civil Appeal No.347 of 2017, is quashed and set aside.

iii) Regular Civil Appeal No.347 of 2017 is remanded to the learned First Appellate Court for deciding the same on merits in accordance with the law.

iv) Parties shall appear before the learned First Appellate Court on **01.12.2025**. Parties to note that, separate notice

for appearance will not be issued. It is clarified that, all contentions with respect to merits of the matter including the case of fraud are kept open to be decided by the learned First Appellate Court.

v) The Court shall decide the appeal without being influenced by the observations made in the present judgment, since they are restricted to the point of remand and do not deal with the controversy or the rival cases of the parties on merits.

vi) Parties to bear their own costs. No order as to costs.

Correction carried out as per Court order dated 14.11.2025.

vii) Cross Objection Stamp No.17704/2024 is dismissed.

(ROHIT W. JOSHI, J.)

C.L. Dhakate