

2008-(DR3)-GJX-0003-SC

Neebha Kapoor, Petitioner

Vs.

Jayantilal Khandwala & Ors., Respondent.

Court :

Decided On :

January 22, 2008

Judge(s) :

S B Sinha, V S Sirpurkar

Judgment :

NEEBHA KAPOOR, PETITIONER v. JAYANTILAL KHANDWALA & ORS., RESPONDENT.

Appeal (civil) 573 of 2008, Arising out of S.L.P. (Civil) No. 5629 of 2007, decided on January 22, 2008.

JUDGMENT

S. B. SINHA, J. :

Leave granted.

Appellant herein questions a judgment and order dated 13.02.2007 passed by a learned Single Judge of the Bombay High Court granting unconditional leave to defend in a summary suit wherein summons for judgment had been taken out.

Appellant filed the aforementioned suit for recovery of a sum of Rs. 25,00,000/- with interest, which amount he is said to have advanced to the respondents by a cheque. Respondents allegedly executed a promissory note for the said amount. An amount of Rs. 5,27,293/- was said to have been repaid by way of interest. A certificate of deduction of tax at source under Section 203 of the Income Tax Act, 1961 for the amount of tax deducted is said to have been issued to the appellant. A post dated cheque for Rs. 25,00,000/- was also given. Respondents also allegedly issued the following cheques towards

payment of interest accrued, the details whereof are as under :

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-----	Cheque No.	Date	Amount	-----
-----	948921	2-1-2003	67,903/-	-----
948928	31-1-2003	12,500/-	-----	948929
2003	12,500/-	-----		3-2-

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All the four cheques having not been honoured, complaint petitions were filed. Allegedly all original documents, viz., promissory note and four cheques, which were filed in the criminal court were misplaced.

The writ of summons in the summary suit was served upon the respondents. They appeared on 14.08.2006. An application for a judgment in the said suit was applied for by way of Summons for Judgment on 07.12.2006, which by reason of the impugned judgment has been disposed of.

Mr. Shekhar Naphede, learned senior counsel appearing on behalf of the appellant, would submit that a suit having been filed on the basis of bill of exchange within the meaning of Order 37, Rule 1 of the Code of Civil Procedure (for short "the Code") read with Section 6 of the Negotiable Instruments Act, 1881 (for short "the Act"), the High Court committed a manifest error in passing the impugned order.

In any event, the learned counsel would contend that the court ought to have, keeping in view the facts and circumstances of the case, imposed conditions.

Mr. Jatin Zaveri, learned counsel appearing on behalf of the respondents, on the other hand, would submit that the promissory note, having not been properly stamped, was not admissible in evidence and as such even a summary suit is not maintainable.

A summary suit, as provided for in Order 37, Rule 1 of the Code is maintainable if it is filed on bills of exchange, hundis and promissory notes.

A cheque is a bill of exchange within the meaning of Section 6 of the Act. Order 37, Rule 2 of the Code provides as to what should a 'Plaint' contain.

Rule 3 thereof provides for the procedure to be adopted in such a suit. Sub-Rule (1) of Rule 3 provides for entrance of appearance by the defendant within ten days from the date of service of summons. Sub-rule (4) of Rule 3 provides for service of a summons for judgment in Form No. 4A upon the defendant. Defendant within ten days from the service of such summons by affidavit or otherwise may disclose facts which would be deemed sufficient to entitle him to defend, apply for leave to defend such suit. Leave to defend, however, may be granted unconditionally upon such terms as may appear to the court to be just. Sub-Rule (6) of Rule 3 of Order 37 of the Code provides for hearing of such summons for judgment stating :

"6. Recovery of cost of noting non-acceptance of dishonoured bill or note. - The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note."

A decree in a summary suit is to be granted provided it fulfills all the criteria laid down therein. What is mandatory is the entering of appearance by the defendant in the suit. Appellant took out summons for judgment under Order 37, Rule 3 on 5.01.2007. It was served on the respondents on 8.01.2007. It was listed for hearing on 13.02.2007. Time was sought for by the respondents to file their affidavit in reply. However, an unconditional leave to defend was granted by the learned Judge having regard to the admitted position that the appellant was not in a position to produce the original documents.

For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. Appellant, therefore, is obligated to prove the loss of documents. Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking. We have noticed the fact situation obtaining herein. The High Court was of the opinion that it is a case where unconditional leave should be granted. The question as to whether the defence of the respondents is 'moonshine' or not was not a matter which required consideration of the High Court at that stage. A decree could not have been granted on the basis of even photostat copies of the documents. [Food Corporation of India v. Dena Bank, Indore and another AIR 2004 MP 158] Presumption in regard to a negotiable instrument or a bill of exchange in terms of Section 118 of the Act is also an evidence. It is true that a presumption can be raised that a bill of exchange was correctly stamped as provided for under Clause (f) of Sub-section (2) of Section 128 of the Code but a decree is to be passed by a court of law upon application of mind.

Order 37 of the Code has been prescribed in terms of the provisions contained in Clause (f) of Sub-section (2) of Section 128 of the Code so as to expedite trial of suits specified therein. We have no

doubt in our mind that the underlying public policy behind Order 37 is expeditious disposal of suits of commercial nature. It provides for such disposal as expeditiously as possible by prescribing time frame therefor. Where, however, applicability of Order 37 of the Code itself is in question which appears to be the principal reason behind the impugned judgment, in our opinion, grant of leave may be permissible. The court before passing a decree was entitled to take into consideration the consequences therefor.

Reliance has been placed by Mr. Naphede on a decision of this Court in *M/s. Mechelec Engineers & Manufacturers v. M/s. Basic Equipment Corporation* [(1976) 4 SCC 687] wherein this Court quoted with approval a decision of the Calcutta High Court in *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* [49 CWN 246 : AIR 1949 Cal 479] in the following terms :

"(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

Admissibility of secondary evidence would be subject-matter to evidence. Only if a court is to go into the evidence, presumptive evidence could also be taken into consideration. Although the burden may be on the defendant, he may discharge the same only when it is raised. The Code does not put any embargo on the courts exercising a suo motu power of granting leave in a case of this nature. If a court does so even when an application was not filed, keeping in view the admitted position of the case, we do not see any illegality therein. As a decree in summary suit may not be automatic and the court can always refuse to exercise its discretionary as the original documents were not produced and, thus, the plaintiff is called upon to prove that the documents are lost in the criminal proceedings.

In view of the fact that no application for leave was filed, it is not possible for us to consider submission of Mr. Naphede in regard to the presumptions arising under Clause (f) of Sub-section (2) of Section 128 of the Code or purported acknowledgement contained in the balance sheet of the respondents.

We, however, are of the opinion that the question as to whether the respondents should be put to any terms or not should be determined afresh by the High Court as the High Court did not address itself on the aforementioned question. We, however, express no opinion thereupon.

For the reasons aforementioned, we are of the opinion that the impugned judgment warrants no interference at this stage. The appeal is dismissed accordingly, subject, however, to the aforementioned observations. No costs.