
(2005) 01 BOM CK 0046

Bombay High Court (Nagpur Bench)

Case No: Writ Petition No. 4548 of 2004

Pushpa D. Sood

APPELLANT

Vs

Bobcards Ltd.

RESPONDENT

Date of Decision: Jan. 13, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 3, Order 37 Rule 3(5), Order 37 Rule 3(6), 151
- Constitution of India, 1950 - Article 227

Citation: (2005) 3 ALLMR 513 : (2005) 3 BomCR 747 : (2005) 2 CivCC 679 : (2005) 2 MhLj 349

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: S.A. Bari, for the Appellant; R. Issac, for the Respondent

Final Decision: Dismissed

Judgement

B.P. Dharmadhikari, J.

In this writ petition under Article 227 of Constitution of India the petitioner/original defendant in summary suit number 454/2003 on the file of third joint single Judge, Senior Division, Nagpur, challenges the orders dated 2nd September, 2004 and 20 September, 2004 by which the said court has directed the petitioner defendant to deposit 50% of the amount claimed in this suit as a condition for granting leave to defend this suit. I have heard the petitioner in person on 21st December, 2004 and thereafter also heard her learned Advocate Shri Bari on 22nd December, 2004. Advocate Issac for respondent appeared in response to caveat and he was also heard.

2. The suit filed by respondent is expressly under provisions of Order XXXVII of the CPC and it is for recovery of amount outstanding to the credit of present petitioner against a credit card by name "Bobcard Silver" issued to her. The grievance made by petitioner is that she was given initially unconditional leave to defend the case and the said order has

been later on nullified by passing separate order below Exhibit 15 and Exhibit 16 on 2nd September, 2004. Exhibit 15 is the application for grant of leave to defend and for permission to file written statement moved by petitioner and on it the counsel for plaintiff/present respondent has given no objection for short adjournment. The learned Court below has passed one word order "allowed" on this application, it appears that thereafter the petitioner has filed written statement on 8th January, 2004 and also a rejoinder to of application dated 12 April, 2004 (Exhibit 15). On this rejoinder, say has been given by respondent/plaintiff mentioning that no triable issue is involved and therefore the application should be rejected. The learned trial Court has on 2nd September, 2004 passed, order holding that defendant has triable issue with regard to settlement of account but it is only in relation to difference of amount and the transactions have been admitted by her. Hence it allowed the application and granted relief to petitioner/defendant to defend the suit subject to deposit of 50% of the amount of total claim of Rs 1,00,353.40 in Court within period 15 days. Thereafter the petitioner moved application for review contending that on 12 April, 2004 she was already granted leave to defend after considering facts and circumstances which appear in paragraph 3 of that application as grounds (a) to (1). This application has been rejected by trial Court on 20th September, 2004 by observing that no ground for review has been made out. It appears that on same day the defendant moved application u/s 151 of CPC for grant of stay to further proceedings in summary suit and also to review application till decision of application for transfer of these cases (P.C. -- this case) before District and Sessions Judge. This application has also been rejected on same day vide learned trial Court after observing that the application is not tenable as defendant failed to comply with the orders passed below Exhibits 15 and 16 within stipulated period.

3. Petitioner as also her advocate have raised only one ground namely that their application seeking leave to defend was already allowed by the trial Court on 12 April, 2004 and as such it was not open to the said Court to impose any condition of deposit latter on. Advocate for petitioner has argued that said exercise is without jurisdiction. He further contended that the petitioner is ready and willing to settle the matter with the respondents. He has placed reliance upon the judgment of Honourable Apex Court in case between State Bank of Saurashtra v. Ashit Shipping Services Private Limited reported at 2002 supremecourtonline.com case number 225 particularly paragraph 10 in which the earlier judgment of Honourable Apex Court reported at [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#), has been quoted. It is his contention that as the defendant satisfied the Court that she has good defense to make, unconditional leave to defend was granted. As against this learned advocate for the respondent relied upon judgment of this Court reported at [Central Bank of India Vs. Manipur Vasant Kini](#), to contend that suit filed by bank based on the use of credit card is maintainable as summary suit. He also relies upon division bench ruling of this Court reported at [Bombay Enamel Works Vs. Purshottam S. Somaiya](#), to argue that the trial Court was justified in granting conditional leave and no interference is called for in exercise of writ jurisdiction, He also relies upon judgment of this Court reported at 2001(1)

Mh.L.J. 534, Leela Capital and Finance Ltd v. Modiluft Ltd. to argue that when there is admission on part of defendant the trial Court is justified in ordering deposit.

4. The relevant legal provisions in this respect is contained in Order 37, Rule 3 of the Code of Civil Procedure. The controversy between parties is covered by provisions of Sub-rules 5 and 6 of this Rule 3. Said sub-rules read as under :--

"(5) The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just :

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in the Court.

(6) At the hearing of such summons for judgment,--

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith."

Thus the defendant/petitioner has to move application disclosing such facts as are sufficient to enable the trial Court to gather that she has a substantial defense to raise and said defense is neither frivolous nor vexatious. The law on this point is settled in view of the judgment of Honourable Apex Court in State Bank of Saurashtra case and the case of [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#), . Paragraph 10 of State Bank of Saurashtra explains the position as under :--

"10. The law on the subject is well settled. In the case of [Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation](#), . It has been held that the question of granting leave to defend has to be considered in the light of following principles.

(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 raised 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 shows 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 plaintiffs 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 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."

Perusal of the provisions of CPC and also of above case law unequivocally show that the trial Court has to apply its mind to the material placed on record by defendant while seeking leave to defend the suit. Thus, the order granting leave to defend must show appreciation of material by trial Court while recording a conclusion that the triable issue is raised by the defendant. In this case, the order dated 12 April, 2004 on which the petitioner defendant is placing reliance, does not reveal any such exercise by the trial Court. Said application at Exhibit 15 has got heading "application for grant of leave to defend the abovesaid case and to file written statement". It contains only one para which states "That, the case is fixed for to-day for notice returnable and the defendant appearing to-day for defending the case and wants to file W.S. reply. Hence permission may be granted in the interest of justice." Prayer clause appearing after this paragraph reads "The honourable Court be pleased to grant of leave, to defend the case and to file WS in the interest of justice". The say given by respondent plaintiff in the margin of this Exhibit 15 is "no objection for short adjournment" and the order dated 12 April, 2004 passed by trial Court is "Allowed." All this is required to be reproduced to show that in this application the petitioner-defendant has not pleaded any material which can go to show that she has a plausible defense to make against the suit of respondent. It also does not disclose any application of mind as contemplated above on part of trial Court while granting leave to defend or while rejecting it. It is apparent that respondent/plaintiff has given no objection for adjournment and the Court has allowed the adjournment. This

order cannot be interpreted in any other way or even to mean that leave to defend has been granted by trial Court. The respondent/plaintiff has filed a summary suit and has also taken out a summons for judgment and no objection given by it cannot be read as no objection for grant of leave to defend the suit in favour of present petitioner.

5. It is also important to note as to how this order is understood by the petitioner defendant. On June, 2004 she has filed written statement vide Exhibit 17 and on same date she has also filed rejoinder at exhibit 16. The heading of said rejoinder is "rejoinder to the application dated 12-4-2004 to defend the suit in reply to claim affidavit". In this rejoinder in specific pleadings it is mentioned that the application filed on 12-4-2004 be treated as filed on affidavit and she is filing the affidavit (solemn affirmation) and Court should pass necessary orders. Thus, it is more than clear that defendant herself was not satisfied with the orders passed on 12-4-2004 on Exhibit 15.

6. The learned trial Court has considered the situation on 2nd September, 2004 and has held that its order dated 12-4-2004 cannot be read as an order granting leave to defend to the defendant. This conclusion is neither perverse nor requires any interference in writ jurisdiction. The learned trial Court has found that the defendant before it admitted that she was facing some financial problems and wanted to settle the accounts and also filed a pursis vide Exhibit 19 on those lines. It found that the dispute between parties is only in relation to the quantum of amount and therefore while granting leave to defend to the defendant, made it subject to deposit of 50% of total amount. The judgments on which reliance has been placed by respondent before this Court support such course of action and no fault can be found with conditional leave granted by the trial Court. The law has left the matter to the discretion of trial Court and facts and circumstances above do not reveal any mistake in exercise of the same by it. Hence no interference is called for even on that account.

7. The application at Exhibit 15 dated 12 April, 2004 cannot be independently viewed as application seeking permission to defend the summary suit. The respondent has given no objection for short adjournment under some wrong impression and the one word order of trial Court on it also reveals some confusion. However in the process, the petitioner defendant also thought it fit to approach this Court in writ after moving trial Court unsuccessfully for the review. The period of 15 days granted by trial Court to the petitioner defendant has expired in the meanwhile. Under the circumstances and in the interest of justice, the said period is extended by 15 days more from to-day to enable the petitioner to comply with the condition of deposit as per order dated 2nd September, 2004 passed by trial Court.

8. No case is made out for interference in writ jurisdiction. The petition accordingly fails and is dismissed with no order as to costs. Liberty to the petitioner to deposit 50% amount as per impugned directions within 15 days from today.