(1988) 07 BOM CK 0072

Bombay High Court

Case No: Appeal No''s. 68 to 76 and 187 to 191 and 192 and 193 to 198 of 1988 and 799 of 1987

D. Shanalal and — APPELLANT

Vs

Bank of Maharashtra — RESPONDENT

Date of Decision: July 27, 1988

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 2, Order 37 Rule 3, 100, 96

Citation: AIR 1989 Bom 150 : (1988) 3 BomCR 114 : (1988) MhLj 956

Hon'ble Judges: C. Mookerjee, C.J; S.P. Bharucha, J

Bench: Division Bench

Advocate: K.S. Cooper and S.K. Cooper, instructed by Thakordas Madagaonkar and Co, for the Appellant; A.P. Chinoy, S.J. Vazifdar, I.M. Chagla and J.D. Dwarkadeas, instructed by Little and Co., for the Respondent

Judgement

Mookerjee, C.J.

The Bank of Maharashtra which is the Respondent in all twenty-two Appeals before us had instituted suits against the Appellants in the respective Appeals under O.XXXVII of the Civil P.C., 1908, seeking to recover moneys payable by the Defendants-Appellants upon bills of exchange. After summonses of the suits were served upon them, the Defendants-Appellants had entered appearances whereupon the Plaintiff-Respondent Bank had served upon each set of Defendants summonses of judgment under O.XXXVII, R. 3(2) of the Code. Thereupon the Defendants-Appellants had applied before the learned single Judge for leave to defendant the respective suits against them. The learned single Judge had granted them such leave upon condition of depositing the amounts mentioned in the orders. Being aggrieved by the said conditional orders granting leave, the Defendants-Appellants had preferred Appeals before the Division Bench. The Division Bench had up held the learned single Judge''s orders granting conditional leave but had reduced the amounts of security deposits to be furnished by the

Defendants. The Appellants had thereafter filed Special Leave Petitions to the Supreme Court against the said orders granting conditional leave to defend the suits brought by the Respondent-Plaintiff. The Supreme Court had rejected the Special Leave Petitions. A statement at the Bar has been made the Review Petitions filed in the Supreme Court were also rejected.

2. Each of the Defendants-Appellants had failed to give the security and the learned single Judge had proceeded to dispose of the suits in terms of O.XXXVII R. 3(6)(b) of the Code. When the suits were called out for disposal. Counsel for the Defendants had appeared before the learned single Judge and had prayed for adjournment. The learned single Judge had rejected the said prayer. The learned single Judge took the non-deposit certificates on record and also marked the documents filed by the Plaintiff as Exhibit "A" (collectively). The learned single Judge ordered that there would be decrees as prayed in favour of the Plaintiff and against the Defendants. Being aggrieved by the said judgments and decrees, the Defendants have preferred these Appeals.

3. The learned counsel for the Respondent Bank has raised a preliminary objection as regards the maintainability of these Appeals which have been preferred against decrees passed summary suits under O.XXXVII of the Code after the Defendants had failed to deposit the conditional securities. Mr. Coooper, the learned Counsel for the Appellants, on the other hand, has contended that there Appeals are maintainable. He has made broadly the following submissions in support of these Appeals:-

his first submission is that an appeal lies from every decree save as other wise expressly provided by s. 96 of the Civil P.C. The learned Counsel for the Respondent, however, has rightly pointed out that these Appeals have been preferred under Cl. 15 of the Letters Patent, but none the less the general principles embodied in S. 96 of the Code would be attracted. We are inclined to uphold the Appellants" first submission that O.XXXVII does not expressly or by implication bar presentation of appeals against decree passed in summary suits governed by O.XXXVII of the Code. The question as regards the maintainability of an appeal against the decree passed in a summary suit under O.XXXVII of the Code is settled, by more than one reported decision of this Court and this point is no longer res integra. Chief Justice Marten and Mr. Justice Kemp in the case of Madanlal v. Kedarnath, AIR 1930 Bom 354 , had, inter alia, held that an appeal lies from the final judgment passed in a summary suit directing the defendant to pay the amount of the decfee claim in default of security not having been furnished to defend the suit under O.XXXVII R. 3(2). The learned Chief Justice in his judgment had referred to the Full Bench case of Narayan Putapa Chandragatgi and Others Vs. Vaikunt Subaya Sonde, , Mr. Cooper has also placed before us several other decisions of other High Courts where appeals were entertained against decisions made in summary suits, vide Venkatachalapathi Nidhi v. Nanjappa AIR 1933 Mad 299. In view of the binding decisions of this Court, it is unnecessary for us to further pursue the point.

4. so far as this Court is concerned, it is also settled law that the order of a single Judge refusing or granting leave to defend the suit instituted under O.XXXVII of the Code is a ''judgment'' within the meaning of Cl. 15 of the Letters Patent and would be appealable, vide Ramanlal v. Chunilal 34 Bom LR 252 : AIR 1932 Bom 163. It may be noted that in the case of Madanlal v. Kedarnath AIR 1930 Bom 364 (supra), two appeals had been preferred from the learned chamber Judge''s order, the first one being against granting of conditional leave and the other being against the decree passed in default of the security being furnished. The Division Bench held that an appeal did lie from the final order and that in presenting that appeal the appellant was entitled to challenge the interlocutory order by which he had been granted conditional leave to defend. The Division Bench in Madanlal''s case (supra) had, therefore, though in unnecessary to decide whether the appeal against the order granting conditional leave would also lie.

5. Our attention has been drawn to a decision of the Division Bench of the Calcutta High Court reported in L.B.P. Chowdhury v. P.Jain 74 CWN 972 . The Division Bench of the Calcutta High Court in the said case had, inter alia, held that a preliminary order granting or refusing leave to defend would not be a ''judgment'' within the meaning of Cl. 15 of the Letters Patent. The point now seems to be concluded by the Supreme Court decision in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , in favour of the view that such a conditional order would be also a ''judgment'' within the meaning of Cl. 15 of the Letters Patent.

6. In the instant case, the order of the learned single Judge granting conditional leave to defend to the Defendants were challenged by preferring appeals before the Division Bench. The Division Bench had decided the said appeals on merits and while upholding the conditional orders had reduced the amounts of security. The matter was further carried to the Supreme Court which, as already stated, had rejected the Special Leave Petitions field by the Defendants-Appellants. Therefore, it is not disputed by the learned Counsel for the Appellants that it is no longer open to the Appellants to make any submission about the correctness and/or propriety of the said orders of the learned single Judge granting conditional lave to defend the suits. The Defendants admittedly did not deposit the amounts or furnish the security. Therefore , they cannot any more question that the Plaintiffs were not entitled to judgment against them. Mr. Cooper, however, submitted that the expression "entitled to judgment" means judgment according to law. According to the learned Counsel for the Appellants, even if the Defendants were not entitled to defend the suit, the Court which had the power to pronounce ex parte judgments was under a duty to itself consider the merits of the Plaintiffs case and was not entitled to pass any judgment which was contrary to law. The learned Counsel has himself submitted that there is no difference in the legal position between the cases where the Defendant does not obtain leave or is refused leave and the cases where because of his failure to furnish the security the conditional leave is revoked. In each of these cases the Court must ask the Plaintiff to prove his case as in the case of a

suit heard ex parte by reason of the Defendant''s absence. According to the learned Counsel for the Appellants, when the Defendants are not granted leave to defend while proceeding summarily under O.XXXVII, the Court must assume all facts stated in the plaint to be true, but the Court still ahs a duty to look into the question regarding the legality of the plaintiffs claim and as to whether there is nay bar is the way of the Defendants obtaining the leave. Where the leave is not applied or where the Defendant cannot follow as matter of course. In case an illegal decree is passed, in appeal the Division Bench ought to look into this point and pass its judgment in accordance with law.

7. After leave to defend is refused or is not obtained, the Plaintiff is entitled to judgment. By reason of the Defendant not appearing the facts stated in the plaint must be admitted by the Defendant. Undoubtedly, there are some similarities between the procedure of the suit which becomes ex parte by reason of the default on the pat of the Defendant and that of a summary suit under O.XXXVII of the Code in which the Defendant either did not apply for leave or leave to defend was refused to him or having obtained leave did not furnish the security and, therefore, was precluded from contesting the suit. Undoubtedly, the decree passed in such suits ex parte decided would be on merits and, therefore, the principles or res judicata would be attracted.

8. Mr. Cooper has relied upon the decision of Chagla, C.J. and Dixit, J. in the case of Baldevdas v. Mohanlal, AIR 1948 Bom 232. The Division Bench had dismissed an appeal preferred against the decision of the learned single Judge dismissing a suit which had been filed for a declaration that the promissory note on which an ex parte decree under O.XXXVII of the Code had been passed was without consideration. The Division Bench held that an ex parte decree passed in a summary suit filed on the Original Side of the High Court, on the Defendant''s non-compliance with the condition precedent of his getting leave to defend the suit operated as res judicate being a decree on merits. While pointing out the similarities between the ex parte decree and the decree passed under O.XXXVII against a defendant who failed to comply with the condition precedent to getting the leave to defend the suit, the court had observed that in one class of decrees that absence of the Defendant was voluntary, while in the case of a decree passed under O.XXXVII R. 3 the absence of the Defendant was enforced. In other words, when leave is not obtained or leave is refused or where the Defendant fails to comply with a conditional order, the Defendant is precluded from further contesting the Plaintiffs claim. By reason of the wordings of O.XXXVII Rr. 2 and 3 of the Code, there is further disability upon the Defendant. The facts stated in the plaint must be considered to have been admitted by the Defendant and the Plaintiff becomes entitled to judgment. Order XXXVII of the Code not only provides for abridgment of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiffs claims. When the matter is carried in Appeal the Defendant who did not obtain leave or had failed to comply with the

conditional order continues to suffer under the same disability. It could never be contended that by reason of presenting an Appeal from the ex parte decree the Defendant would have any greater right to contest the Plaintiff''s claim. The Appeals preferred from such ex parte decrees passed in summary suits must proceed on the basis that such Defendants had admitted the Plaintiffs case as stated in the plaint and that the Plaintiff were entitled to judgment . therefore, although there are undoubtedly similarities between an ex parte decree and a decree passed under O.XXXVII, R. 3 of the Code, the analogy cannot be carried too far in view of the basic differences between the two kinds of decrees. For the same reason, once an Appeal is filed against an ex parte decree passed under O.XXXVII R. 3 there is no unchartered right for a Defendant who had preferred an earlier Appeal against conditional order granting leave and had been unsuccessful. It is not necessary for us to exhaustively indicate the grounds which could be urged by the Defendant in an Appeal preferred against the decree passed under O.XXXVIIR.3 of the Code. It would be more pertinent to consider whether the points which are sought to be urged in these Appeals could be legitimately an lawfully urged. Even in the reported decisions, in which right of a Defendant to appeal against an ex parte decree under O.XXXVII was upheld, the learned Judges have pointed out the limited scope of such appeals. In Madanlal''s case AIR 1930 Bom 364 (supra). Marten C.J., with reference to the scope of an appeal from a final judgment, had thus observed:
" ..... technically an appeal lies from that judgment, though whether on the merits it would have the slightest chance of success is another matter, That distinction between ''which an appeal lies'' and ''whether it has any chance of success '' was indeed pointed out in the Full Bench case of Narayan Putapa Chandragatgi and Others Vs. Vaikunt Subaya Sonde, .

The Chief justice had thus quoted in his earlier judgment in the Full Bench decision:

" But to avoid nay misconception I may add that though pro forma an appeal may lie, still in the vast majority of cases, the appeal will be one of those known as ''hopeless'' because the conditions imposed by the lower Court will be reasonable ones, and accordingly if they are not fulfilled, the only result will be that the appeal will be dismissed with costs ".

Again, in the case of Ramanlal v. Chunilal 34 Bom LR 252 : AIR 1932 Bom 163 (supra), Beaumont, C.J. at page 254 (of Bom LR): (at p. 164 of AIR) of the judgment had observed:

"But, however that may be, it seems to me to be clear that the effect of O.XXXVII, R. 2, is that if the Judge refuses leave to defend, or gives leave to defend on terms which the defendant is not able to comply admitted, and the plaintiff is taken to be admitted, and the plaintiff is entitled to an order on that basis. Rule 206 of the rules of this High Court provides how the plaintiff is to obtain his order. He is to set the case down for hearing before the Chamber Judge, but having done that it seems

tome that the making of the order will automatically follow in view of the provision of R. 2 of O.XXXVII that all the allegations in the plaint are to be taken as admitted."

In this concurring judgment, Rangnekar, J. in the case of Ramanlal v. Chunilal (supra) had observed that if the Defendant is refused leave then he cannot appear and defend the suit and he would be deemed to have admitted the allegations contained in the plaint and the Plaintiff will be entitled to a decree as a matter of course. The result, therefore, of a refusal of an application for leave to defend is to deprive the Defendant of the right to defend the suit and so far as the Defendant is concerned, the order practically determines the whole cause. While preferring an Appeal against the ex parte decree passed under O.XXXVII R.3 of the Code, the Defendant continues under the same disability. We had invited the learned Counsel for the Appellants to point out any reported decision in which the Defendant against whom an ex parte decree had been passed under O.XXXVII R.3 of the Code had successfully urged any point on merits of the Plaintiff''s claim. In most of the reported cases cited before us the Defendant''s Appeal had been in substance an Appeal from an order on summons wherein the conditional order granting leave had been appealed against. In the instant cases, the said question of granting leave to the Defendant on condition of furnishings security is no longer open. Therefore, even in law although an Appeal lies from the ex parte decree passed under O.XXXVII R.3 the consistent judicial view has been that the finality of a conditional order practically precludes'' the Defendant-Appellant from assailing the decree on merits.

9. The decision of the supreme Court in Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas, , which was cited by the learned Counsel for the Appellants, is hardly of any assistance to the Appellants. In the case before the Supreme Court the moot question was whether in view of the express provisions for setting aside a decree passed under O.XXXVII of the Code, the Court could invoke its inherent powers under S. 151 of the Civil P.C. to set aside an ex parte decree. The Supreme Court held that resort to s. 151 of the Code was not open. In p.(3) of his judgment. Sarkar, J. (as he then was) has pointed out that the effect of an order in that case was to give a conditional leave to defend so that on failure to perform the conditions, the tenant had no longer the right to defend the action. In para (10) of the same judgment the learned Judge had observed that in making a decree under Sub-r.(2) of R. 2 of O.XXXVII the Court had to jeep in mind that the allegations in the plaint shall be deemed to have been admitted. If the law required the Court to exercise discretion in the facts deemed to be admitted, it would have to do so. In the next paragraph of his judgment the learned Judge had further observed that the Defendant may not be allowed at the hearing to place his side of the case for assisting the Court in the exercise of that discretion, but that did not create any conflict with the Rent Act . in the instant case, the learned Counsel for the Appellants urged that the bills of exchange viz the negotiable instruments upon which the Plaintiff founded its claim were insufficiently stamped and, therefore, under the proviso to s. 35 of the Stamp Act the said negotiable instruments could not be

received in evidence nor could have been acted upon by the learned single Judge. The learned Counsel for the Appellants, in view of the provisions of bar of S. 36 of the Stamp Act , tried to urge that even if the Appellants were no longer entitled to question admissibility of these negotiable instruments produced by the Plaintiff, they could still contend that these documents would not have been acted upon. In our view, these submissions are no longer open to the Appellants to make. In the first place, these submissions really amount, to raising defences by the Appellants even after they had failed to comply with the conditional orders granting leave to defend. The question of proof of admissibility of documents in a contested suit could have been raised by a party against whom such documents are attempted to be brought on record and used. But in view of their failure to furnish the security the Defendants who had failed to obtain leave to contest must be deemed to have admitted the contents of the plaints filed by the Plaintiff. Secondly, the Plaintiff Bank had become entitled to a decree. We are unable to accept the submission made on behalf of the Appellants that objections under S. 35 relate to matter of jurisdiction on the part of the Court to pass a decree. At the highest, the same relate not to existence but to exercise of jurisdiction by the learned single Judge in granting leave. Apart from being precluded under the provisions of O.XXXVII of the Code itself, in view of the bar under S. 36 of the Stamp Act , the Defendant were not entitled to urge in Appeals the question which were not open to them to raise in the trial Court.

10. We have also perused the judgment of the Division Bench in the Appeals preferred by the Defendants-Appellants against orders of the learned single Judge granting conditional leave to defend the suit. The Division Bench had gone into the question of the inadmissibility of the defences of the Defendants. As regards admissibility of the negotiable instruments vis-�-vis the provisions of S. 35 of the Stamp Act , the Division Bench had rejected the contentions raised on behalf of the plaintiffs.

11. For the foregoing reasons, we hold that these Appeals have no merit. We affirm the decrees passed by the leaned single Judge and dismiss these Appeals with costs.

12. The learned Counsel for the Appellants prayed for granting certificate to prefer Appeals in the Supreme Court. for the reasons already given in our judgment, we are of the view that these Appeals do not involve substantial questions of law fit to be considered by the Supreme Court. we accordingly reject the prayer for granting leave to appeal to the Supreme Court.

13. Appeals dismissed.