

(1925) 10 BOM CK 0038

Bombay High Court

Case No: O.C.J. Suit No. 2639 of 1925

Mohanlal Manordas Goradia

APPELLANT

Vs

C.K. Daruwala

RESPONDENT

Date of Decision: Oct. 13, 1925

Acts Referred:

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

Citation: (1926) 28 BOMLR 1080 : 97 Ind. Cas. 766

Hon'ble Judges: Mirza, J

Bench: Single Bench

Judgement

Mirza, J.

This is an application on behalf of the defendant in a summary suit to excuse the delay of five days in taking out the summons for leave to defend the suit. The writ of summons was served upon the defendant on September 28. The period for obtaining the summons expired on October 9. The applicant in his affidavit states that owing to an attack of strong malarial fever, he was unable to take steps in time in the matter.

2. The application is made under Rule 193 of the High Court Rules That rule provides as follows:-

193. (1) The application for leave to appear and defend n suit filed under Order 37 of the CPC shall be made by summons. Such summons shall be taken out within 10 days from the date of the service of the Writ of Summons, and it shall be returnable not lees than 4 clear days after service. The summons shall be supported by an affidavit or affidavite.

(2) If no such summons is taken out by the defendant within the aforesaid period or within such further period as may be allowed under Order 87, Rule 3, or if leave to appear and defend is refused, the plaintiff shall be at liberty to put the suit down for

hearing forthwith before the sitting Judge in Chambers.

3. The application for extension of time now made to me is under Rule 193, Sub-rule (2). The wording of that rule is not . free from ambiguity. The clause under which the application is made is-" or within such further period as may be allowed under Order XXXVII, Rule 8." The clause implies that there is a provision for extension of time under Order XXXVII, Rule 3, of the Civil Procedure Code. When we turn to Order XXXVII, Rule 3, of the Civil Procedure Code, we find that it contains no such provision, What the draftsman intended by this rule evidently was that the discretion should be vested in the Chamber Judge, in a fit case, to extend the period of ten days allowed under Rule 193, Sub-rule (1), in cases to which Order XXXVII, Rule 3, was applicable. Section 148 of the Code of Civil Procedure, however, empowers the Court to enlarge the time prescribed or allowed by it. I consider this to be a fit case for the exercise of that power.

4. I, therefore, grant the application and adjourn the summary suit which is put on my board for hearing today until to-morrow. The defendant will take out a summons today, which will be returnable to-morrow, and supply a copy of his affidavit to the plaintiff's attorneys in the course of the day. The plaintiff will be at liberty, in showing cause against the summons, to rely upon any circumstances which may tend to show that the extension of time allowed to the defendant was not proper, In case leave to defend is refused, the plaintiff will be entitled to ask for a decree in the summary suit to-morrow.

5. The plaintiff waives the service of the Chamber summons. Costs to be costs in the summons. The affidavit already made by the defendant will be treated as an affidavit in support of the summons.