Ajcon Capital Markets Ltd. Vs Maya Rasayan Ltd.

Court: Bombay High Court

Date of Decision: March 27, 2003

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 23 Rule 1, Order 32 Rule 1, Order 32 Rule 14, Order 6 Rule 17, Order 6 Rule 4

Citation: (2003) 6 BomCR 810 : (2003) 3 MhLj 421

Hon'ble Judges: D.K. Deshmukh, J; A.P. Shah, J

Bench: Division Bench

Advocate: Pravin Diwan, . instructed by Prakash Punjabi, for the Appellant; K.D. Suvarna, for the Respondent

Judgement

D.K. Deshmukh, J.
By this appeal, the original defendants in summary suit No. 5307 of 1999 challenge the order dated 4th June 2002

passed by the learned Single Judge of this Court in summons for judgment No. 294 of 2000. The respondents/plaintiffs filed summary suit No.

5307 of 1999. The case of the plaintiffs was that the plaintiffs have given to the defendants as intercorporate loan a sum of Rs. 25,00,000/- for a

period of two months. According to the plaintiffs, the agreed rate of interest was 27% p.a. Certain shares were also pledged by the defendants

with the plaintiffs. The defendants also executed a demand promissory note dated 1st November 1995. The amount of Rs. 25,00,000/- was paid

by the plaintiffs to the defendants by a cheque dated 3rd November 1995. According to the plaintiffs, in the month of January 1996, the

defendants issued two cheques in favour of the plaintiffs for repayment of the loan dated 16th January 1996 and 25th January 1996, but both the

cheques were dishonoured. Thereafter, according to the plaintiffs, the defendants requested for renewal of the loan as they were not in a position

to repay the amount. The loan was renewed and therefore, the defendants executed a fresh demand promissory note dated 15th March 1996 for

Rs. 25,00,000/-. The defendants also issued a post dated cheque dated 4th June 1996 in the amount of Rs. 25,00,00/-. According to the

plaintiffs, this cheque when presented to the Bank was again dishonoured. Ultimately, as the amount was not being repaid, the plaintiffs filed suit for

recovery of the amount. The plaintiffs stated in the plaint that in August 1998 and November 1990, an amount of Rs. 1,00,000/- has been paid by

the defendants to the plaintiffs. In the particulars of the claim, the plaintiffs claim a decree in the amount of Rs. 33,44,825/- which according to the

plaintiffs, has been shown as due and payable by the defendants to the plaintiffs upto 31st august 1997 as per the confirmation letter dated 3rd

September 1997 and the plaintiffs also claim a decree in the amount of Rs. 8,35,000/- being interest at the rate of 18% p.a. on the amount of Rs.

25,00,000/- from 1st September 1997 to 30th August 1999. In the summons for judgment, the defendants applied for leave to defend by filing an

affidavit. The summons for judgment was decided by order dated 4th June 2002. From the order of the learned Single Judge, it appears that the

principal defence that was raised was that as per the promissory note, interest could have been charged at the rate of 18% p.a. whereas according

to the claim of the plaintiffs, interest was charged at the rate of 27% p.a. According to the defendants, therefore, for charging interest at the rate of

27% p.a there is no written agreement between the parties and therefore, the summary suit not maintainable. Perusal of the judgment of the learned

Single Judge, however, shows that according to the learned Single Judge, though statement has been made in the plaint that interest was chargeable

at the rate of 27% p.a., actually the plaintiffs have charged interest at the rate of 18% p.a. The learned Single Judge, however, granted leave to

defend to the defendants on depositing an amount of Rs. 30,00,000/- within a period of twelve weeks from the date of the order.

2. In this appeal, it is this order dated 4th June 2002 granting conditional leave to defend to the defendants which is challenged. Before us, the

learned counsel appearing for defendants argued only one contention. He submits that as per the particulars of the claim given at Exh. "L" to the

plaint, an amount of Rs. 33,44,825/- was claimed as per confirmation dated 3rd September 1997. According to the confirmation dated 3rd

September 1997 at Exh. "H" to the plaint, an amount of Rs. 32,45,590/-is shown as the amount of loan including interest upto 30th June 1997 and

an amount of Rs. 99,235/- is shown as interest upto 31st August 1989 at the rate of 18% p.a. According to the learned counsel, the amount of Rs.

32,45,590/- contains interest at the rate of 27% p.a. upto 30th June 1997 and therefore, a part of the claim which is made in the summary suit was

not triable in the summary jurisdiction of the Court under Order XXXVII of C.P.C. The learned counsel, relying on a judgment of the Division

Bench of this Court in the case of Randerian and Singh Pvt. Ltd. and Ors. v. Indian Overseas Bank, decided on 24th February 1987 (in Appeal

No. 1060 of 1986), as also a judgment of Division Bench of this Court in the case of Hydraulic and General Engineering Ltd. and Anr. UCO

Bank, reported in 1998 ILJ 793, submits that as the plaintiffs have made in their plaint a claim for interest, unwarranted either by statutory

provision or by contractual document, the suit is one which cannot be tried as a summary suit and therefore, according to the learned counsel,

summons for judgment ought to have been disposed off by the learned Single Judge by granting unconditional leave to defend to the defendants.

3. The learned counsel appearing for plaintiffs, on the other hand, submits that the amount of Rs. 32,45,590/- claimed as loan amount with interest

upto 30th June 1997 in the document at Exh. "H" is the amount of Rs. 25,00,000/- with interest at the rate of 18% p.a. p.a. and not with interest

at the rate of 27% p.a. The learned counsel submits that in any case, even if it is found that a part of the claim made in the summary suit cannot be

tried as a summary suit, the plaintiffs always have an option to give up that claim so that their suit can be tried as a summary suit. The plaintiffs

therefore sought leave of the Court to amend the claim by substituting new particulars of claim, showing principal amount of Rs. 25,00,000/- with

interest at the rate of 18% p.a. from 1st January 1996 till 30th June 199.

4. The request made on behalf of the plaintiffs for leave to amend the particulars of the claim is opposed by the learned counsel appearing for

defendants by relying on the above referred two judgments of the Division Bench of this Court. The learned counsel relies on following paragraph

from the judgment of the Division Bench in the case of M/s. Randerian and Singh Pvt. Ltd. which has been quoted with approval by the Division

Bench in the case of Hydraulic and General Engineering Ltd. It reads as under:-

Under the Rules of this Court strict conditions are imposed on the Defendants in a summary suit. They must file their appearance in Court within a

very short specified period and failure to do so entitled the Plaintiffs to obtain an ex-parte decree against them. It must logically follow that there

must be equally stringent requirements postulated on the plaintiffs. One of these requirements would be that they must not in the suit make a claim

not warranted by the contract or under a statutory provision. If it can be demonstrated, as it can be in the instant case, that the plaintiffs have in the

plaint made a claim for interest not warranted by the statutory provision or by the contractual document, then the suit must be one which cannot be

accepted as a summary suit. Once this is demonstrated, one of two consequences must follow. The first and the more obvious is to grant to

Defendants unconditional leave to defend the suit and transfer the same to the appropriate cause list long cause, short cause or commercial cause.

The present case would fall in the last category. There is another way open and that is for the Plaintiffs who are faced with such defence in the

affidavits made on the summons for judgment to apply for permission to withdraw their summons for judgment with liberty to take out a fresh

summons for judgment after amending the plaint and putting their house in order. Recording of a statement to give up or accept reduced interest is

not sufficient.

The learned counsel submits that once it is found by the Court that a part of the claim made in a summary suit is not triable as summary suit, then

there are only two option available, one to grant the defendants unconditional leave to defend the suit and transfer it for trial as either long cause,

short cause or commercial cause and the second option that is open is that the plaintiffs can be permitted to withdraw the summons for judgment

and then apply for suitable amendment in their suit and then take out a fresh summons for judgment. According to the learned counsel, the option

of amending the plaint so as to bring the suit within the four corners of Order XXXVII of C.P.C. is not open to the plaintiffs.

5. In view of the leave sought by the plaintiffs to amend the particulars of the claim, now making a claim for the principal amount of Rs.

25,00,000/- with interest at the agreed rate of interest of 18% p.a. it is not necessary for us to go into the question whether the amount claimed in

the particulars of claim by the plaintiffs was at the rate of 18% p.a. or some amount was claimed at a higher rate of interest. By seeking leave to

amend the claim, the plaintiffs concede the position that they had made some claim which was not triable in the summary jurisdiction of the Court

under Order XXXVII of C.P.C.

6. In view of the request made by the plaintiffs to permit the plaintiffs to give up a part o the claim their claim was not capable of being entertained

as a summary suit, the question that arises for consideration is can a plaintiffs in a summary suit give up a part of the claim made by them in the

plaint, without it being necessary for them to withdraw the summons for judgment.?

7. Perusal of the judgment of Division Bench shows that the Division Bench has considered only two options or consequences that can follow on

the Court finding that the plaintiffs have made in their plaint a claim for interest not warranted by the statutory provisions or by a written contract

and therefore, the suit as framed and filed is not maintainable as a summary suit. One option that is considered by the Court is that the Court

hearing the summons for judgment grants unconditional leave to defend the suit to the defendants and second is that the plaintiffs withdraw their

summons for judgment with liberty to take out a fresh summons for judgment after amending the plaint. The judgment of the Division Bench further

shows that the Division Bench has taken into consideration the possibility of the plaintiffs applying for amendment of their suit so as to bring it within

the four corners of the provisions of Order XXXVII of C.P.C. and then taking out a summons for judgment. But the Division Bench has not

considered a possibility or an option available to the plaintiffs to make a motion before the same Court which was hearing their summons for

judgment for permission to delete that part of their claim made in the suit which cannot be tried in the summary jurisdiction. In our opinion, this

option of applying to the same Court for giving up a part of their claim because of which their suit cannot be tried as a summary suit is also

available and open to the plaintiffs.

8. It is Order XXIII of the CPC which incorporates the provisions regarding abandonment of a part of claim by the plaintiff. Provisions of Rule 1

of Order XXIII of the C.P.C. are relevant, they read as under:-

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the

suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such

other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the

benefit of the minor or such other, person.

(3) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh

suit in respect of the subject matter of such suit or such part of the claim,

(4) where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraws from a suit or part of claim without the permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or

such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule

(1) or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

Perusal of the provisions of Rule 1 quoted above shows that if the plaintiff wants to give up or abandon a part of the claim made in the suit, he can

do so at any time and it is not necessary for him to seek permission of the Court to do so. Leave of the Court for abandoning a part of the claim

becomes necessary if the plaintiff intends to institute a fresh suit for recovery of the claim which is being abandoned in the suit which is pending

before the Court. If the plaintiff does not desire to institute a fresh suit for the abandoned claim, then the plaintiff can give up or abandon a part of

the claim made in the suit without seeking any permission or leave from the Court. It is further clear that when a plaintiff abandons a part of the

claim made in the suit without seeking leave of the Court, he cannot institute a fresh suit for that claim and he also becomes liable for such costs as

the Court may impose. In other words, Rule 1 of Order XXIII of C.P.C. confers on a plaintiff an absolute right to give up a part of him claim.

Therefore, when a plaintiff in a summary suit finds that because of a particular claim made by him in the summary suit, his entire claim in the suit

becomes incapable of being tried as a summary suit, he has an option of abandoning that particular claim and if the plaintiff does not desire to

institute a fresh suit for that claim, he need not even make an application to the Court or leave of the Court. A mere statement made by the plaintiff

before the Court that he wishes to abandon that part of the claim would be enough. It is further to be seen here that the reason why such a right is

given to the plaintiff is that by the plaintiff abandoning a part of this claim no prejudice is caused to the defendants and therefore, a provision has

been made that if the plaintiff proposes to institute a fresh suit for the abandoned claim, then he has to seek leave of the Court. It is obvious that

when the plaintiff applies for such a leave, the Court will decide it after granting an opportunity of being heard to the defendant because grant of

such leave to the plaintiff may result in causing prejudice to the interest of the defendant. It is further to be seen here that the provisions of Rule 1 of

Order XXIII of C.P.C. do not contemplate even an application being made by the plaintiff when the plaintiff wants to abandon a part of this claim

without any leave to institute a fresh suit for the abandoned claim. The application would be necessary only in case the plaintiff wants the Court to

grant him leave to institute a fresh suit for the abandoned claim. The abandonment of part of the claim can be done by the plaintiff voluntarily by an

unilateral act of the plaintiff. In such a situation, the only procedure to be followed would be that the plaintiff makes statement before the Court that

he abandons a part of his claim and the Court records that statement. Therefore, when in a summary suit at the hearing of the summons for

judgment, a plaintiff finds that because of a particular claim made by him, the defendant is likely to get unconditional leave to defend the suit, it is

open to the plaintiff to make a statement before the Court that he abandons that part of the claim and requests the Court to consider only that claim

for which a summary suit can be entertained. It is apparent from the judgment of the Division Bench relied on by the learned counsel appearing for

defendants that the provisions of Order XXIII of C.P.C. were not pointed out to the Division Bench and therefore, the Division Bench proceeded

on the assumption that even when a plaintiff wants to abandon a part of his claim, then also plaintiff has to seek an amendment in the plaint and

therefore, the Division Bench observed that plaintiff in such a situation can withdraw the summons for judgment, thereafter amend the plaint and

then take out a fresh summons for judgment. In our opinion, merely for abandoning a part of the claim, no amendment in the plaint is necessary and

no permission of the Court is also necessary. The third option is also available to a plaintiff viz. to make a statement before the Court that he

abandons the part of his claim which may not be triable in the summary jurisdiction. It is further to be seen here that following such a course of

action would also be in the interest of justice. In that event, it will not be necessary for the plaintiff to withdraw the summons for judgment and then

again take out a fresh summons for judgment and wait for that summons for judgment to become ripe for hearing. Following such a course of

action also does not cause any prejudice to the interest of the defendant because when the plaintiffs gives up a part of his claim, the plaintiff seeks

decree against the defendant in a lesser amount than the one which is claimed in the suit. The provisions have been incorporated in the CPC for

trial of certain suits in summary jurisdiction to provide a speedy remedy to persons whose claims are based on written contracts, statutory

enactments etc. In our opinion, providing an option to a plaintiff to abandon a part of his claim made in the suit because of which his suit becomes

un tribal as a summary suit would advance the remedy which has been provided by the statute.

9. Even assuming that for abandonment of a part of the claim without the leave of the Court to institute a fresh suit an application for amendment in

the plaint is necessary, in our opinion, the course of requiring the plaintiff to first withdraw his summons for judgment with liberty to take out a fresh

summons for judgment and then apply for amendment of the plaint is not proper. Perusal of the provisions of Rule 17 of Order VI of C.P.C.

shows that the Court has the power to permit a plaintiff to amend his suit at any stage of the proceedings if such amendment is found by the Court

to be necessary for the purpose of determining the real question in controversy between the parties. Rule 2 of Order VI of C.P.C. lays down that

every pleading shall contain a concise statement of material facts on which the party relies for his claim or defence. Rule 4 of Order VI indicate

cases in which particulars of pleadings must be set out by a party. Rule 6 of Order VI requires to put only such condition precedents distinctly

specified in pleadings as a party wants to put it in issue. Rule 7 of Order VI contains a prohibition against departure of proof from the pleadings

except by way of amendment of pleadings and then Rule 17 of Order VI empowers the Court to allow amendment in the pleadings at any stage of

proceedings. The only condition is that the amendment should be necessary for the purpose of determining the real question in controversy

between the parties. It is clear from the provisions of the Code referred to above that subject to such terms as to costs and giving of all parties

concerned necessary opportunities to meet exact situations resulting from amendments, amendments in pleadings are intended for promoting the

ends of justice. Even if a party or its Advocate is inefficient in setting out his case initially, the shortcoming can certainly be removed generally by

appropriate steps taken by a party subject to such costs for the inconvenience or expenses caused to the other side due to the omission. The

situation is not incapable of being rectified so long as remedial steps do not unjustifiably injure the accrued rights. The Supreme Court in its

judgment in the case of Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, has observed thus:-

Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some

mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amendment the pleading of a party,

unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be

compensated for by an order of costs, however, negligent or careless may have been the first omission, and, however, late the proposed

amendment, the amendment may be allowed if it can be made without injustice to the other side.

It is thus clear that power of the Court to permit amendments is to be used for advancing justice and unless the Court finds that grant of the

amendment in the pleading would result in injustice to the other side, the Court will always rule in favour of granting an amendment in the pleading.

Therefore, when a Court which is hearing the summons for judgment in summary suit, finds that a substantial part of the claim made in the summary

suit is capable of being tried in the summary jurisdiction only because a claim also has been made which is not capable of being tried in the

summary jurisdiction because of an error or a mistake of the plaintiff or his Advocate and when the plaintiff seeks leave of the Court to amend the

Plaint so as to delete the offending part, in our opinion, there would be no justification for the Court not to permit the plaintiff to make such an

amendment in the plaint. It is pertinent to note here that grant of such amendment in no event is likely to cause prejudice to the interest of the

defendant because the result of granting such amendment is that the claim made by the plaintiff against the defendant in that suit gets reduced.

Perusal of the judgment of the Division Bench shows that the Division Bench as observed that in case the plaintiff wants to effect amendment in his

plaint, then he has to withdraw the summons for judgment. However, we do not find that any reason is given in tat judgment for requiring the

plaintiff to withdraw the summons for judgment every time he wants to amend the plaint. In so far as a notice of motion taken out in a suit is

concerned, the learned Single Judge of this Court in his judgment in the case of Chimanram Motilal v. Shankarmal Sabu, reported in 1946 BLR

439, relying on a passage of Halsbury''s Laws of England, has held that the amendment of a plaint pending notice of motion operates as

abandonment of the notice unless the plaintiff obtains leave to amend without prejudice to the pending notice. It is thus clear that a plaintiff can seek

leave of the Court to amend the plaint without prejudice to the pending notice of motion and it is not necessary for the plaintiff to withdraw the

notice of motion every time an amendment in the plaint is sought. In our opinion, there is no reason why the same principle should not be made

applicable to a pending summons for judgment. The plaintiff faced with the situation that without he amending his plaint by reducing the claim he

cannot have his suit tried as a summary suit, cant apply to the same Court which is hearing his summons for judgment for leave to amend the plaint

and the summons for judgment so as to bring both the suit as also the summons for judgment in conformity with the provisions of Order XXXVII

of C.P.C. and as following such a course of action is not likely to result in causing any prejudice to the defendant and is not likely to result in taking

away any accrued right to the defendant, the Court generally would grant such an amendment so that the very purpose for which provision has

been made in the C.P.C. for trial of certain suits summarily is achieved without making the plaintiff wait for some more years to get a decree in his

favour.

10. In so far as the present case is concerned, the learned counsel for plaintiffs has handed in fresh particulars of the claim. A comparison of the

existing particulars of the claim and the particulars of the claim now handed over by the plaintiffs shows that the plaintiffs previously were seeking a

decree in the amount of Rs. 40,69,825/- with interest from the date of filing of the suit till realisation and now according to the fresh particulars of

claim, the plaintiffs are seeking decree in the amount of Rs. 39,75,000/- with interest from the date of institution of the suit till realisation. Thus, the

plaintiffs are abandoning a part of their claim and therefore, in terms of the provisions of Rule 1 of Order XXIII of C.P.C. the plaintiffs are entitled

to do so. The learned counsel appearing for both the parties stated that in case this Court permits the plaintiffs to substitute the particulars of the

claim in terms of the particulars that have been handed over to the Court, then the summons for judgment should be remitted back for fresh

decision in the light of the particulars of the claim now submitted. In this view of the matter therefore, the order dated 4th June 2002 passed in

summons for judgment No. 294 of 2000 is set aside, the plaintiffs are permitted to substitute the fresh particulars of the claim, the defendants are at

liberty to file any additional affidavit that the defendants may be advised to file in the summons for judgment. Summons for judgment No. 294 of

2000 is remitted back for fresh hearing, consideration and decision in accordance with law. Appeal is disposed off.

Parties to act on the copy of this order duly authenticated by the Associate/Personal Secretary as true copy.

Certified copy expedited.