

Ramchandra Dhondu Dalvi Vs. Vithaldas Gokuldas

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Court : Mumbai

Decided On : Nov-15-1963

Reported in : AIR1964Bom251; (1964)66BOMLR277; 1964MhLJ397

Judge : Patel and ;Chitale, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 148 and 151 - Order 9, Rule 13 - Order 37, Rules 1, 2, 2(1), 2(2), 3, 3(1), 3(2), 3(3) and 4

Appeal No. : Civil Revn. Appln. No. 875 of 1962

Appellant : Ramchandra Dhondu Dalvi

Respondent : Vithaldas Gokuldas

Advocate for Def. : B.L. Padhya, Adv.

Advocate for Pet/Ap. : S.J. Jadhav, Adv.

Judgement :

Patel, J.

1. This is an application in revision against an order setting aside an ex parte decree passed in a summary suit, and the important question that arises is : whether the power of the Court to set aside a decree is limited to a case in which the defendant has failed to appear in answer to the summons for judgment or is wider?

2. Provisions relating to summary suits are contained in Order 37. Rule 1, Clause (a) provides that the order shall apply to the High Courts at Madras and Bombay and enables the High Court to apply the same to any other Court. Rule 2 Sub-rule (1) enunciates classes of suits which can be filed as Summary Suits and prescribes the manner of presentation of plaints. Such suits can be filed in respect of bills of exchange, hundis or promissory notes. In this state the scope of the order is widened and is applied to all suits in which the plaintiff seeks to recover a debt or money payable on demand, with or without interest, arising out of a contract. It is sufficient to state that the present demand of the plaintiff falls within the category of the claims in respect of which, suits can be instituted under this rule. Sub-rule (2) of that rule disables a defendant from defending the suit unless he obtains leave from the Judge as provided in Rule 3 and it provides further that if he makes default in obtaining leave and does not appear and defend in pursuance of the leave, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree as provided in clauses (a), (b) and (c) of the Sub-rule. Sub-rule (3) of the rule provides that a decree so obtained may be executed forthwith. Rule 3 (1) defines conditions under which the Court must give leave to defend to the defendant and Sub-rule (2) of the same rule provides that the leave may be given either conditionally or subject to terms that the Court may fix. Rule 4 relates to the power of the Court to set aside the decree, and is worded as follows :

'After decree the Court may, under special circum-stances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.'

3. Mr. Justice Chandrachud in *Mis. Ramaben Bhagubhai Patel v. Hindustan Electric Co. Ltd.*, : AIR1963Bom85 , restricted the application of this rule to cases where defendant failed to appear in answer to the summons for judgment and then if it appear-ed to the Court that there are special circumstances by reason of which the defendant could not appear in answer to the summons. There he was dealing with a case where the defendant having obtained leave to defend and, which was granted conditionally, failed to fulfil the condition and a decree was passed against him. The trial Court held that the section applied in the circumstances above stated only but acted under Section 151 of the Civil Procedure Code under its inherent powers and set aside the decree on a notice of motion. The learned Judge accepted this construction of the rule.

4. No one can deny the fact that the provisions of Order 37 are made in the general interest of the public with a desire to speedy disposal of simple suits. Consistent with this object, it cannot be denied that such decrees, if ones made, ought not lightly to be set aside. Yet the words are of wide application and must be given their natural meaning. There can be no reason to restrict their meaning by construction unless the language used in the rule justifies such a construction. As stated above, it is clear that Order 37 deals only with the summary procedure. If leave is gained and the condition complied with, if it is conditional leave, the defendant becomes entitled to defend the suit and then, the suit ceases to be a summary suit and must be transferred to the regular list, in which case! there is no question of the application of any of the other rules contained in O. 37. Rule 4 must apply to a suit as has resulted into a decree Under the summary procedure and it enables the Court to set aside 'the decree' which must mean 'the decree' made under Rule 2. Rule 2 contemplates two circumstances under which a decree can be made -- one, where the defendant fails to obtain leave to defend; and second where having obtained such leave, he does not appear and defend the suit in pursuance of the leave. On satisfaction of either of these conditions, the consequences provided by Sub-rule (2) of Rule 2 must follow and result into a decree. The words are 'after decree the Court may' in Rule 4; they must mean after such decree as is made under Rule 2. The word 'decree' is applicable to a decree obtained in either eventuality and in the absence of anything else either kind of decree can be set aside by the Court If conditions laid down in the rule are satisfied.

5. Mr. Jadhav for the plaintiff relies on the words and may give leave to the defendant to appear to the summons and to defend the suit, and on such terms as the Court thinks fit.' He says that these words can apply to only one eventuality under which the decree was made i.e. where the defendant had not appeared in answer to the summons and therefore the rule must be construed to be limited in scope. This is not so. What the rule means is that the power is general -- to set aside the decree and any of the other things including the granting of leave may be done if necessary. The power given to the Court is discretionary and the words could not have been intended to limit the power of the Court to set aside decrees only as are made in the absence of the defendant in answer to the summons. The Court while setting aside the decree may exercise any of the several powers which it thinks fit. If the decree is made in the absence of the defendant in answer to the summons, then only the Court may consider whether he is entitled to leave in terms of Rule 3 and either refuse it or grant it on such conditions as it deems necessary, in a case where conditional leave is granted, but the conditions are not complied with and if the Court sets aside the decree, the suit must be proceeded with from the stage it was, and the court cannot review the earlier decision, rule of res judicator applying. Of course while set-ting aside the decree the Court is entitled to Impose such terms as it deems fit. In our view there is nothing in the rule itself which limits the power of the Court to set aside the decree only if it is made against a defendant, who has failed to appear in answer to the summons.

6. In the above case the learned Judge observes that if the construction adopted by us above were accepted it would produce startling consequences. He says that in a case where conditional leave were granted but the defendant failed to comply with the same and a decree followed, If the decree were set aside, it would be open to the Court not only to set aside the decree, but also the conditional leave which cannot be done except

by the High Court in its revisional jurisdiction and that too in exceptional cases. With respect, it is not possible to accept that such result must necessarily follow. As pointed out above the power to give leave to defend has to be exercised only, if necessary, as the other power of staying the suit or setting aside the execution of the decree and not otherwise. If, therefore, a case arises where conditional leave is granted and the condition is not complied with and the decree follows, and if the Court is satisfied that there are special circumstances which require the setting aside of the decree then it has to set aside the decree, and the only effect would be to enable the Court to extend the time for complying with the condition, which it otherwise has under Section 148 of the Civil Procedure Code, if an application were made before the expiry of the period. If the ambit of the rule is to be limited we have necessarily to add words qualifying 'the decree' which the Court cannot do. Additions to the language, of the statute would be permissible only when it is meaningless or absurd. When the language is clear the Court cannot import limitations on the basis of supposed intention of the legislation. With respect we must therefore differ from the interpretation of the learned Judge and hold that, Rule 4 applies to all decrees which are made under Rule 2 and the Court can pass interim orders as required by the circumstances of the case as indicated by us above.

7. The present case, however, cannot be disposed of only on the decision of this point. The learned Advocate for the plaintiff contended that the learned trial Judge has not realised the limitation of Rule 4 for setting aside such a decree. The language of Rule 4 is in marked contrast with that of Order 9, Rule 13. This would suggest that the Court has to be very careful in the exercise of its powers and be fully satisfied about the grounds made by the defendant for setting aside the decree. Merely because a defendant comes to the Court and makes some sort of excuse it does not give power to the Court to set aside the decree. In the present case the defendant came with a bare allegation that his mother was ill and, therefore, he was not able to comply with the order of the Court. He also said that though his Lawyer had intimated to him the date of the hearing of the suit for the same reason he could not attend Court. It is significant to note that the order was made for making a deposit within certain time and the time was further extended to 3rd October 1961. Thereafter the case was placed on 31st October 1961 on which date the decree was passed and the application was made to the learned Judge as late as 20th November, 1961. It was incumbent upon the defendant to have given all particulars of his mother's illness and explain how he could not attend Court. The allegations are vague and on a careful analysis, cannot possibly be accepted. It may be that defendant's mother may have become ill but when an application is made to the Court to set aside an ex parte decree the Court ought to seriously apply its mind to the merits of the defence, in particular the stage at which and the time when the defence of the particular nature was taken by him for the first time and if the Court is satisfied, that there is some substance in the defence and the other conditions of the rule are satisfied then only the Court can set aside the ex parte decree.

8. It is however within our discretion to interfere in revision or not. A part of the amount due to the plaintiff is deposited in the trial Court. A balance of Rs. 900/- remains and we are inclined not to interfere in this application provided the defendant within 1 month from today deposits Rs. 900/-, being the balance of the amount alleged to be due to the plaintiff in the lower Court. If he makes the deposit of the above amount within 1 month from the date of this order, the order of the learned trial Judge will stand confirmed. If he fails to make the deposit of balance as directed above, the rule will automatically become absolute with costs of this Court and of the trial Court and the ex parte decree restored.

9. In case he makes the deposit, costs will be costs in the cause.

10. Order accordingly.