

Sabitri Devi Bhotika and ors. Vs. S.A.E. (India) Ltd.

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Court : Delhi

Decided On : Aug-25-1988

Reported in : 1988(15)DRJ295

Judge : S.S. Chadha and; Santosh Duggal, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 37, Rule 3

Appeal No. : Civil Miscellaneous Appeal Nos. 852 and 3549 of 1985 and First Appeal No. 1 of 1983

Appellant : Sabitri Devi Bhotika and ors.

Respondent : S.A.E. (India) Ltd.

Advocate for Def. : Mr. G.L. Sanghi

Advocate for Pet/Ap. : G.L. Sanghvi,; D.P. Bhandari,; Rachna Joshi,;

Judgement :

S.S. Chadha, J.

(1) S.A.E. (India) Ltd., plaintiff, took on lease in June, 1966 from defendant No. I, Smt. Sabitri Devi Bhotika, premises No. 2-B, Victoria Terrace, Calcutta. The tenancy was surrendered on May 22, 1978 and at that time a sale and purchase agreement in respect of various additions, fixtures and fittings was executed

between the parties. Defendant No. 1 agreed to purchase the same and undertook to pay Rs.1,75,000.00 by December 31, 1978 and in default defendant No. 1 was to pay interest at a rate of 18% per annum and Rs. 25,000.00 by way of liquidated damages. The other defendants are guarantors. Defendant No. 1 had paid a sum of Rs. 50,000.00 on or about 9th July, 1980 and the remaining amount was due. With these allegations, the plaintiff filed a suit under Order xxxvii of the Code of Civil Procedure on 22nd May, 1982 claiming a decree for the recovery of Rs. 2,17,093.14 with interest at the rate of 18% per annum. Summons were issued under the provisions of Order xxxvii of the Code of Civil Procedure. The defendants filed 1.A. No. 3383 of 1981 for leave to defend the suit. G.C. Jain, J. in the judgment dated October 29, 1982 expressed the view that the defendants practically had no defense and the pleas raised were illusory and sham. He, however, in order to protect the interest and rights of the defendants granted permission to the defendants to defend the suit on furnishing bank guarantee for about 50% of the amount in suit plus the court fee amount. The defendants were called upon to furnish a bank guarantee by a nationalised bank within one month of the date of the order to the satisfaction of the Registrar of this Court in the sum of Rs. 1,11,000.00 .

(2) The defendants, who are appellants before us, then filed Fao (OS) I /83 for setting aside the order of the learned Single Judge and for modifying the order so as to entitle the defendants to defend the suit without complying with the condition of the bank guarantee. The appeal came up for preliminary hearing before a Division Bench of this Court on 10th January, 1983 when the appeal was admitted. Sh. Mukhi, Advocate, accepted the notice on behalf of the respondent-plaintiff. Arguments were heard. The Division Bench after going through the records felt that grant of leave conditionally in any way could not be objected to. The Division Bench, however, opined that considering that the house property which is owned by the defendants is said to be fetching a rent of Rs. 30,000.00 is a valid and good security. It was directed that instead leave would be granted subject to the defendants furnishing security of the said house in the said amount to the satisfaction of the Registrar of the High Court and that the documents of title of the property would be deposited also with the Registrar of the Court. Six week's time was granted for compliance of that order. The appeal was disposed of.

(3) The proceedings recorded by the Registrar on March 2, 1983 show that the security of the said house was not furnished nor title deeds deposited. The defendants, instead, wanted to file security of machinery about which a valuation report was also filed. This was not in obedience or compliance .of the orders of the Court and reflects contumacious conduct. The Registrar lightly did not consider it a valid security and as desired by the defendants listed the mailer before Court on March 10, 1983.

(4) The defendants prayed before the Division Bench that they wanted to substitute the security with a fresh security. As the earlier order was passed in the presence of Sh. Mukhi, counsel for the plaintiff, a notice was issued for 20th April, 1983. The matter was mentioned before the Division Bench on 23rd March, 1983. It was represented that the suit came up for hearing before the learned Single Judge who had granted the decree after expressing the opinion that the defendants had not complied with the orders of the conditional leave granted to them. It is a fact that J.D. Jain, J. in the judgment and decree dated March 23, 1983 granted a decree for the recovery of Rs. 2,17,093-14 P. in favor of the plaintiff and against the defendants with costs and pendente lite and future interest @ 12% per annum. This was after holding that the defendants failed to comply with the conditional order within the period allowed. The Division Bench felt that they had not rejected the leave application but had only issued notice to the other side for substitution of the security and that it could not be said that the leave was taken to have been. refused. The stay of the operating of the decree passed by the learned Single Judge was then granted and notice issued returnable for 20th April, 1983.

(5) It is clear from the record that no process fee was deposited by the defendants to enable service to be effected on Shri Mukhi, counsel for the plaintiff for the dates 20th April, 1983, 13th July, 1983 and 14th November, 1983. The court noticed the defaults and opined that if court fee was not filed then the matter would be deemed to be dismissed. Again on the adjourned date of 19th December, 1983, the report of registry was that notices could not be issued for want of process fee, but the counsel for the defendants represented that he had filed the same and office had misplaced it. The Court directed issue of fresh notice for 9th

January, 1984. On 9th January, 1984, counsel for the defendants represented that Sh. M.K, Garg, Advocate had inspected the file on behalf of the plaintiff and, thus, service was deemed to have been effected on the counsel. The Court, however, adjourned the case to 20th February, 1984 for effecting service on the counsel. In the meanwhile the plaintiff moved an application being Cm No. 202/84 and that is how the plaintiff came to participate in the future proceedings.

(6) The Division Bench ultimately disposed of CMs No. 202/84, 995 and 1142/83 by the order dated 27th February, 1984. We are not referring in detail to the circumstances and the conduct of the defendants noticed by the Division Bench and it may be seen from there. Suffice it to say that the Division Bench adversely commented upon the un-satisfactory manner in which the defendants conducted in not carrying out the orders of the Court in not filing the process fee on many occasions. The negligence of the defendants and undesirable conduct was also recorded. However, the Division Bench gave leave to the defendants to defend the suit conditional on their furnishing either a bank guarantee of Rs. 1,75,000.00 in the name of the Registrar or in the alternative they could give fixed deposit receipt of the same amount i.e. Rs. 1,75,000.00 made out in the name of the Registrar of this Court, or part amount in bank guarantee and part in fixed deposit, so long as the total amount for which security was furnished totaled Rs. 1,75,000.00 . This security was directed to be available to the Court and was to be subject to any orders that may be passed by the Court at the conclusion of the suit. The security was directed to be furnished to the satisfaction of the Registrar within four weeks. It was made clear that if that security was not furnished within time, the order would be of no effect and the decree passed by the learned Single Judge would stand. The parties were directed to appear before the Deputy Registrar on 26th March, 1984 to take necessary steps. Mr. Mukbi contends that this order of the Division Bench was conditional and on the non-fulfilment of the condition within the time allowed, the conditional order is discharged automatically.

(7) The matter came up before the Deputy Registrar on 26th March 1984. A copy of the order of the Division Bench dated 27th February, 1984 was on the record, and it was noticed that the leave to defend the suit had been granted on furnishing of security within four weeks from the date of the order of the Division Bench. Sh.

H.M. Singh, appearing for the defendants did not apprise the Deputy Registrar that the bank guarantee had been furnished or not. Since the period of four weeks had not expired, the Deputy Registrar listed the case for further proceedings on 26th April, 1984. It, however appears that a bank guarantee dated 22-3-1984 was filed by the defendants in the registry on 26th March, 1984 Along with an application being I.A. No. 1712/84 praying for acceptance of the bank guarantee. The bank guarantee was filed within the period prescribed in the order dated 27th February, 1984.

(8) The case came up before the Registrar on 24th April, 1984 for consideration of the bank guarantees. The counsel for the defendants requested for a short adjournment for getting the same verified and attested, and the matter was adjourned to 21st May, 1984. On 21st May 1984, the counsel for the defendants again requested for an adjournment to some date in August for getting the surety verified as the Bank Manager was to come from Calcutta and he could not arrive on that day. The case was adjourned to 8th August, 1984 for verification.

(9) In the meanwhile, the plaintiff filed an application being I.A. No. 2723/84, stating that the guarantee bond filed by the defendants was not in accordance with the orders of the Court and he also filed an objection petition to the application to the defendants. A copy of the application was given to the counsel for the defendants and the case was directed to be listed for arguments on 29th May, 1984. It was adjourned to 30th May, 1984 and again to 16th July, 1984. It is recorded in the order of the Registrar dated 16th July, 1984 that in order to rectify the objections about the conditions stipulated in the bank guarantee, the defendants had filed a fresh amended bank guarantee. Counsel for the plaintiff raised objections even on the amended bank guarantee on the grounds that the validity period had not been specified in the same and it was not mentioned that the bank guarantee was on behalf of all the defendants. The Registrar directed that the defendants should file amended bank guarantees indicating that the same would be valid till the pendency of the suit and should be on behalf of all the defendants. The amended bank guarantee was directed to be filed on 21st August, 1984.

(10) When the matter came up before the Registrar on 21st August, 1984, the counsel for the defendants stated that he should be given another two weeks' time for filing the amended bank guarantee. This was opposed by the counsel for the plaintiff. However, the Registrar granted last opportunity for filing of the amended bank guarantee till 13th September, 1984.

(11) Learned counsel for the parties have addressed arguments at considerable length about the construction of the order dated 13th September, 1984. The Registrar records that 'the amended bank guarantee was filed on 7th July, 1984', but the same was not available on the record. The Registrar directed the registry to trace out the same and place it on the record. Mr. G.L. Sanghi learned counsel for the defendants construes this as the filing of the alleged amended bank guarantee dated 18th August, 1984 and not the amended bank guarantee dated 7th July, 1984. It appears to us that this submission is wholly unfounded, for the following reasons.

(12) The initial bank guarantee executed by New Bank of India, Calcutta, dated 22nd March, 1984 was filed on 26th March, 1984. This wa(r) filed in the registry along with an application, being I.A. No. 1712/84. There is no dispute to this fact. Objections were raised by the plaintiff in I.A. No. 2723/84 and in reply to I.A. No. 1712/84 to the original bank guarantee. It is noted in the order dated 16th July, 1984 that in order to rectify the same the defendants had filed fresh amended bank guarantee. This is obviously referring to the letter dated 7th July, 1984 of the New Bank of India filed in the registry on 13th July, 1984 along with letter of the counsel and the index to the documents. The Registrar noticed the objection of the counsel for the plaintiff that even the amended bank guarantee had not specified the validity period and it was not on behalf of all the defendants. The Registrar then allowed the defendants to file the amended bank guarantee on 21st August, 1984. Another last opportunity was given to the defendants to file the amended bank guarantee on 13-9-1984. If the alleged amended bank guarantee dated 18th August, 1984 had, in fact, been filed prior to 13th September, 1984, then that should have been on the record. If that was not on the record, as there is no index or covering letter, then a statement ought to have 'been made by the counsel for the defendants as to how it was filed. The original bank guarantee dated 22-3-

1984 was filed along with an application and the amendment dated 7-7-1984 was filed along with a covering letter and index of documents. There is no reason why this practice and procedure of the Court was not adopted. When any document is filed in the registry, the registry gives an acknowledgment but none is forthcoming. Then any documents filed at the counter are duly registered, but there is no registration of that document. If, in fact, the alleged amended bank guarantee dated 18th August, 1984 was relied upon by the defendants and it was not on record then there was no reason why it was not mentioned on 25th September, 1984 when the Registrar directed for verification of the bank guarantee and filing of affidavit to the effect that the defendants would get the bank guarantee extended till the time the same was required by the Court. The affidavit dated 26th November, 1984 is on the record of the trial court. The affidavit is filed in pursuance of the order dated 25th September, 1984. There is no reference to the alleged amended bank guarantee dated 18th August, 1984, in this affidavit. There is a letter dated 3rd January, 1988 as subsequently amended on 7th July, 1984 in favor of the Registrar of the High Court of Delhi. There is no reference to the alleged amended bank guarantee dated 18th August, 1984 in this letter.

(13) A copy of the letter dated 18th August, 1985 (and not 1984) is at page 303 of the trial court records, purported to have been received by post on 18th April, 1985. It says that the guarantee dated 22nd March, 1984 be treated as issued on behalf of all the defendants. It further states that the bank agrees to extend the validity period of the guarantee for such period as may be desired by the Registrar and only at the request of all the defendants. On whose behalf the guarantee has been issued. The letter dated 3rd January, 1985 says that the bank does not have the scope of providing bank guarantee for an indefinite period as it has to run with limitation clause and as such there is scope of its extension/revalidation and its expiry period as per existing condition. The two cannot be reconciled, if they were, in fact, in existence. Then there is another letter of the bank dated 11-3-1985 extending the validity of the bank guarantee up to 31-3-1986. It was filed along with index of documents and bears the date of registry of filing according to the practice and procedure of this Court. It makes no reference to the alleged amendment dated 18th August, 1984. The inference is irresistible that the alleged amendment of the bank guarantee dated 18th August, 1984 was never before the

Registrar at all relevant times, or produced or propounded by the defendants before the Registrar.

(14) The matter came up for attestation of the bank guarantee before the Registrar on 29th November, 1984. Instead of producing the official who gave the original bank guarantee or the amended bank guarantee on behalf of the Bank, one Assistant Manager of the Bank from New Delhi Branch was produced. After recording the statement of that bank official partly, the case was adjourned to 20th December, 1984 for verification of the bank guarantee. Even on that day the executant of the bank guarantee was not produced and no reason was assigned as to why the bank official had not been called. The Registrar granted last opportunity for verification of the bank guarantee. It was made clear that the last opportunity was being granted failing which it would be deemed to be rejected. On 4th January, 1985, counsel for the defendants stated that he was not in a position to call the bank's official and, therefore, either the summons be issued in the name of Bank's counsel or summons be issued in the name of the Registrar, Calcutta High Court. The Registrar of this Court opined that the bank guarantee had been furnished by the defendants and it was for them to get it verified. As the defendants failed to produce the official of the bank with authority to depose despite several opportunities the case was placed before the Court for orders.

(15) There were several adjournments before the learned Single Judge. Ultimately the application being 1.A. No. 108/85 was disposed of in the order dated August 20, 1985 by H.C. Goel, J. The learned Single Judge posed a question, whether on the facts and circumstances of the case, the defendants should be allowed any further opportunity to take steps so as to get the bank guarantee verified by the Registrar. The learned Single Judge felt that there was absolutely no ground for granting any further time to them whether for summoning of a witness from Calcutta or for producing any witness on their own for getting the bank guarantee verified. However, it was observed that the bank guarantee dated March 22, 1984 was admittedly not valid by itself and it was amended by the amendment dated 7th July, 1984. The first flaw noticed was that the correct particulars of the orders of the Court in pursuance of which the bank guarantee was furnished were not given. The second error was that whereas the bank guarantee was sought to be

furnished on behalf of the four defendants, it was nowhere stated so in the bank guarantee. Another flaw in the guarantee bond as furnished was that it was stated that the bank guarantee was for a period of one year from the date of issue thereof, but as per the directions of the Division Bench the bank guarantee was to be furnished for a period till the decision of the suit. On consideration of these facts and circumstances, the learned Single Judge rejected the prayer of the defendants to allow any further time to them for getting the bank guarantee bond verified and the guarantee bond as furnished was rejected. The result is that the decree already passed by the Court in favor of the plaintiff and against the defendants stood revived.

(16) In the meanwhile the defendants had filed the present application, being Cm No. 852/85 on 16th March, 1985 before the Division Bench. This application came up for hearing after notice before the Division Bench of this Court on March 19, 1985. The Division Bench felt that the proper thing at that stage was to hold over the application and let the matter be decided by the learned Single Judge. That application was adjourned sine die. After the judgment of the learned Single Judge dated 20th August, 1985, the defendants moved an application being Cm No. 3549/85 for revival of Cm No. 852/85 and for extension of time for furnishing of the bank guarantee and for verification of the same by the bank official before the Registrar. The applications and the appeal against the orders of the learned Single Judge dated August 20, 1985 are being disposed of by this common order.

(17) We have given the narration of the facts in great detail before the Division Bench of this Court as well as before the learned Single Judge of this Court in the suit. The contumacious conduct of the defendants is clearly reflected in the proceedings right from the year 1983. The defendants did not even offer to furnish the security of immoveable property or deposit of title deeds as directed in the Court's order dated 10th January, 1983, but instead offered to give security of some machinery for which there was no warrant. This contumacious conduct of the defendants is also noticed by J.D. Jain, J. that instead of furnishing securities of the house, as directed by the appellate court the defendants furnished the security of machinery, but the same was not accepted by the Registrar because there was no proper compliance. This Court had adversely commented in the

order dated 27th February, 1984 and we reiterated the same. The defendants have made false averments of facts in their applications and affidavits contrary to the record in the orders of the Court. They relied upon the amendment of the bank guarantee dated 18th August, 1984 which, infact, was never filed before the Registrar at the relevant time. The copy of the amendment dated 18th August, 1985 (not of 18th August, 1984) was sent by the bank through an ordinary post and seems to have been received by the registry on or about 18th April, 1985. The copy of the amendment dated 18th August, 1985 on our record is not accompanied by any letter or Explanationn as to why it was being sent and for what purpose. The order of the Division Bench dated 27th February, 1984 calls upon the defendants to furnish the bank guarantee to the satisfaction of the Registrar of the Court within four weeks and at the same time gives a warning to the defendants that if that security was not furnished within time, this order would have no effect and the decree passed by the learned Single Judge would stand. The bank guarantee was to be for Rs. 1,75,000.00 to be furnished by all the defendants and with terms so as to be available to the Court at the conclusion of the suit and subject to the orders of the Court. The security was to be furnished to the satisfaction of the Registrar of the Court. Despite that the bank guarantee furnished on 26th March, 1984, the last day, was admittedly not the bank guarantee in terms of the orders of the Division Bench. The amendments to the original bank guarantee dated 7th July, 1984 were filed but that also did not comply with the terms of the orders of the Division Bench. The second alleged amendment in the letter dated 18th August, 1984 was, in our opinion, not filed.

(18) The defendants were granted several opportunities by the Registrar for verification of the bank guarantee that had been furnished. On the failure of the defendants, the matter was laid before the learned Single Judge for his orders. For the reasons recorded by the learned Single Judge, with which we are in respectful agreement, the prayer of the defendants for extension of time in furnishing the bank guarantee and its verification was rightly rejected. The original bank guarantee dated 22-3-1984 mentions the date of the orders as the 28th February, 1984, passed in is No. 3548, which is factually incorrect. The bank guarantee is not on behalf of all the defendants. The bank guarantee is not unconditional guarantee for an indefinite period so as to be available to the court at the

conclusion of the suit. Then there is the failure of the defendants to produce the signatory of the evidence, despite several adjournments, for attestation.

(19) The Division Bench in the order dated 19th March, 1985 left the matter to be decided by the learned Single Judge and merely held over the application (CM No. 852/85) which we are now reviving by this order. The prayer made in this application is for extension of time for filing the bank guarantee and for acceptance of the Bank guarantee by placing it for verification before the Registrar. For the reasons stated above, we find that the defendants did not comply with the conditional order of the furnishing of the bank guarantee in terms of the court's order within the time prescribed. The bank guarantee was amended once by the amendment dated 7-7-1984, but still it did not conform to the laid down conditions. The alleged amendment dated 18-8-1984 was never, in fact, filed. The bank official even was not produced for verification of the bank guarantee that was filed despite several adjournments. We find no sufficient ground for any further indulgence.

(20) In all fairness to Mr. Mukhi, Advocate, we may notice two legal arguments. Firstly, he states that the period for furnishing of the bank guarantee as well as its attestation was four weeks from the date of order. The contention is not well founded, as it goes against the practice and procedure of this Court. The Registrar, parties and the counsel in this case as also in other similar cases have always understand the order when time for furnishing of the bank guarantee or security is prescribed by the court. It means that the security must be furnished within the period prescribed by the Court but the verification and attestation to the satisfaction of the Registrar may be within that period or may be after that period. Secondly, he submits that this Court has no power to extend the time fixed by the Court for furnishing of the bank guarantee, and he relies upon a number of decided cases of other Courts. We are not inclined to express any considered opinion on this. We have proceeded on the basis that we have jurisdiction to extend the time but on the facts and circumstances of the case, we find no justification for any further extension of time.

(21) Cm No. 3549/85 is allowed and Cm 8525 is revived. Cm No, 852/85 is dismissed with no orders as to costs. All the interim orders in favor of the defendants as to the stay of the execution are hereby vacated.

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