SUPREME COURT OF INDIA

Milkhiram (India) Private Ltd.

Vs.

Chamanlal Bros.

C.A.No.94 of 1965

(P. B. Gajendragadkar, C.J.I., K. N. Wanchoo, J. C. Shah and J. R. Mudholkar, JJ.)

23.04.1965

JUDGEMENT

MUDHOLKAR, J.:

1. The question which we have to consider in this appeal by special leave is whether the trial Judge was right in granting leave to the appellants to defend the suit based upon promissory notes executed by the appellant No. 1, which was instituted on the original side of the High Court at Bombay on condition that the appellants deposited security to the extent of Rs. 70,000. The other appellants are sought to be made liable upon an indenture of guarantee dated 20-11-62 with respect to the amounts advanced to the appellant No. 1. The procedure followed in the case was that set out in Order 37, Civil Procedure Code. Rules 2 and 3' of this Order have been amended by the Bombay High Court. Sub-rule (1) of R. 2 provides that suits of certain kinds specified therein may be instituted by presenting a plaint in the form prescribed but the summons shall be in Form 4 in Appendix III or in such other Form as may from time to time be prescribed. Suits upon bills of exchange, hundis or promissory notes or for liquidated amounts are some of the kinds of suits which can be instituted under this provision. Sub-r. 2 provides that in suits of this kind the defendant shall not defend the suit unless he enters an appearance and obtains leave from the judge as provided in O. 37 so to defend. It further provides that in default of entering an appearance and of his obtaining such leave to defend the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree as prayed for in the plaint. Sub-rr. 2 and 3 of R. 3 of O. 37 as amended by the High Court run thus :

"(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just."

The appellants filed an affidavit as required by sub-r. 3 purporting to disclose facts sufficient to entitle them to defend the suit. Upon a perusal of the plaint and the affidavits of parties and documents filed along with the plaint the learned Judge thought it fit to grant only conditional leave

to the appellants to defend the suit. The amount for which the plaintiff-respondents have claimed relief in the suit is Rs. 4,05,434.38. As against this claim the Court has ordered the appellants to deposit security for Rs. 70,000 only. The appellants considering themselves aggrieved by the order preferred an appeal under Letters Patent which was summarily dismissed by the appeal Court. They have now come up by special leave to this Court. In support of the appeal Mr. Yogeshwar Prasad has raised two points. The first is that the defence disclosed by the appellants in their affidavit raises a triable issue and that, therefore, it was incumbent upon the learned trial Judge to grant unconditional leave to defend. The second ground is that the promissory notes upon which the suit is based is only a collateral security for the performance of the agreement between the parties relating to the export of pulses and, therefore, the suit was not of a nature which fell within the ambit of O. 37, R. 2 of the Code.

2. It will be convenient to deal with the second point first. The respondents in their plaint have alleged that from time to time they advanced monies to the appellants and obtained promissory notes from them. They are four in number and the total amount advanced under them was Rs. 3,45,000. The execution and consideration for these promissory notes is admitted by the appellants. The respondents have further stated in their plaint that Mikhiram (India) Private Ltd., appellant No. 1, had been permitted by the Government of India to export 5250 tons of pulses on certain conditions and that at the request of the other appellants the respondents agreed to finance the company's business of export of pulses on the terms and conditions set out in a letter dated February 7, 1962 addressed to them by the company. One of the terms set out in the letter is to the effect that the company will act in consultation with the respondents and also under their control. Another term is that 50 per cent of the profits will be paid to the respondents in consideration of the financial accommodation given by them. The plaint proceeds to state that on account of a change in the political and economic condition in India soon after the agreement was entered it became necessary to revise and alter the terms of the agreement of February 7, 1962 and that a further agreement was arrived at between the parties the terms of which are set out in a letter D/- November 20, 1962 addressed by the company to the respondents. One of the revised terms was that if the business which the company was to do became impossible or "obviously unprofitable" the agreement dated February 7, 1962 would stand cancelled forthwith and that in that event the company would repay to the respondents on demand the advance made to the company under the first agreement together with interest at 9 per cent per annum from the date of the advance till realisation. The company further agreed to reimburse the respondents for and on account of any loss incurred by them up to the date of the cancellation of the first agreement with further interest at 9 per cent. The revised agreement also provided that the company would try to obtain a revision of the conditions concerning export of pulses from the Ministry of Commerce and Industry and that thereupon it would be in the absolute discretion of respondents to decide whether to continue the financing of the business thereafter or to cancel and terminate the original agreement. The plaint recites that on November 20, 1962 the appellants 2 to 4 executed an indenture of guarantee to secure repayment to the respondents up to the limit of Rs. 7,00,000 and interest thereon. The Ministry, however, did not revise the original terms and conditions relating to the export of pulses but only extended the period from that originally fixed upto June 30, 1963. For these reasons and for some other reasons set out in the plaint the respondents formed an opinion that it became unprofitable for them to continue to finance the appellants any further and cancelled the agreement dated February 7, 1962. It is because of this that they called upon the appellant to repay the amounts advanced by the respondents together with interest at 9 per cent. In paragraph 12 of the plaint the plaintiffs have averred as follows:

"The plaintiffs say that under the said further Agreement dated 20th November 1962 and under the

Guarantee dated 20th November 1962 the plaintiffs are entitled to claim from the defendants the losses suffered in the said business up to the date of cancellation of the said Agreement dated 7th February,1962. The plaintiffs submit that the relief with regard to the claim for losses is a separate and independent relief and would entail a taking of accounts. The plaintiffs, therefore, pray for leave under. O. 2, R.2 of the Civil Procedure Code to sue the defendants for further reliefs in respect of losses suffered by them in the said business up to the date of cancellation of the Agreement dated 7th February 1962 together with interest."

On the basis of these averments in the plaint the appellants contend that the only claim which the respondents had or could have against them is on the basis of the agreement that that claim would be for an unliquidated amount and that consequently the suit could not be brought under O. 37, Rr. 2 and 3 of the Code. It seems to us, however, to be clear from the perusal of the plaint as well as the affidavits of the appellants that the cause of action for respondents' claim as laid in the suit is prima facie independent of the aforesaid agreement. No doubt they advanced the money by way of financing the export business of the company but the right to repayment was absolute and unconditional. This is made clear by the subsequent agreement executed by the appellants 2 to 4. No doubt the respondents contend that they are also entitled to recover damages from the appellants under the agreement but according to them this claim is in addition to and not in substitution of that based upon the promissory notes and the indenture of guarantee. The suit for its enforcement could, therefore, be instituted under O. 37, R. 2. A mention may be made of a decision in Bimal Kumari v. Asoka Mitra, AIR 1955 Cal 402 at p. 408, upon which reliance was placed on behalf of the appellants in support of the contention that where the plaintiff is entitled to two reliefs but sues for only one the whole suit is liable to be dismissed. Without expressing any view as to the correctness of the decision it is sufficient to say that what the High Court was dealing with there was a suit in which upon the same facts the plaintiff was, according to the High Court, not only entitled to sue but bound to seek two reliefs but sued only for one of them. In the case before us the reliefs claimed in the suit are distinct from the relief claimable on the basis of the agreement between parties.

3. Mr. Yogeshwar Prasad contended that it was incumbent upon respondents to claim in their suit not only what they say was payable to them under the promissory notes but also the damages to which they were entitled by virtue of the agreement between the parties. A suit of this kind would certainly be out of purview of O. 37, R. 2. The short answer to the question is that the respondent did make an application to the Court under O. 2, R. 2, subr.3, C.P.C., for leave to reserve their claim under the agreement for being adjudicated in another suit. The Court granted leave to them and, therefore, no further question arises. Moreover what we are concerned with is the claim made by the respondents in the present suit. Here they have sought relief only on the basis of the promissory notes and the indenture of guarantee. Even assuming that they were also entitled to other relief on the same cause of action it was certainly open to them even to relinquish their claims for other reliefs. The mere fact that they did so to avail themselves of the summary procedure provided in O. 37, could not affect their suit adversely. However, in this case the respondents obtained leave to reserve their claim based upon the agreement before they took out summons against the appellants under O. 37, R. 2, sub-r. 2. That order was not challenged by the appellants and has become final between the parties so far as the present suit is concerned.

4. Now we will come to the first point Mr. Yogeshwar Prasad contends that the order of the High Court by which it damanded security from the appellants was wrong in law inasmuch as no reasons were given by the trial judge for making it. In support of the contention reliance is placed upon the decision in Waman Vasudeo Wagh v. M/s. Pratapmal Dipaji and Co. ILR (1962) Bom. 206 : (AIR 1960 Bom 520). That case is however distinguishable. There what was challenged was the order of

the City Civil Court which granted leave to the defendant to defend that suit for recovery of a sum of Rs. 18725/- upon the condition of depositing Rs. 7500/- as security. It was urged before the High Court that where a subordinate court makes an order which is open to appeal or revision it should give some reasons in support of that order. No reasons having been given the order was set aside and the matter was remitted to the City Civil Court for passing a fresh order in accordance with law. While laying down the normal rule it does not appear to have been intended to make it inflexible. Nor again it appears to have been contemplated that elaborate reasons to support the imposition of conditions must be given. In the case before us the order made is by the High Court itself and not by the subordinate court. No doubt an appeal lay against it under the Letters Patent but that is merely an internal appeal in a High Court, which cannot be likened to an appeal under S. 96 or a revision application under S. 115 of the Code. Moreover O. 49, R. 3 sub-r.(5) provides that nothing contained in Rr. 1 to 8 of O. 20 will apply to any Chartered High Court in exercise of its ordinary or extraordinary civil jurisdiction. The provision relating to the giving of reasons in support of a decision are to be found in R. 4 of O. 20. Since these provisions do not apply to Chartered High Courts, like the High Court at Bombay the decision relied upon cannot be pressed in aid.

5. Learned counsel relied upon a decision of this Court in Santosh Kumar v. Bhai Mool Singh, 1958 SCR 1211 : (AIR 1958 SC 321), and particularly upon a passage at p. 1216 (of SCR) : (at p. 324 of AIR).That was a case in which the Court of Commercial Subordinate Judge. Delhi had held that the defence raised a triable issue but that defence was vague and was not bona fide because the defendant had produced no evidence to prove his assertion. For these resaons the Court granted leave to defend the suit on the condition of the defendant giving security for the entire claim in the suit and costs thereon. This Court held that the test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given unconditionally. This Court further held that the trial Court was wrong in imposing a condition about giving security on the ground that documentary evidence had not been adduced by the defendant. This Court pointed out that the stage of proof can only arise after leave to defend has been granted and that the omission to adduce documentary evidence would not justify the inference that the defence sought to be raised was vague and not bona fide. While dealing with the matter Bose, J., who spoke for the Court observed (at p.1216 (of SCR) : (at p. 324 of AIR)):

"Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts."

The latter part of the observations of the learned Judge has to be understood in the background of the facts of the case this Court was called upon to consider. The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The state for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage. If upon consideration of material placed before it the Court comes to the conclusion that the defence is a sham one or is fantastic or highly improbable it would be justified in putting the defendant upon terms before granting leave to defend. Even when a defence is plausible but is improbable the Court would is justified in coming

to the conclusion that the issue is not a triable issue and put the defendant on terms while granting leave to defend. To hold otherwise would make it impossible to give effect to the provisions of O. 37 which have been enacted, as rightly pointed out by Bose, J. to ensure speedy decisions in cases of certain types. It will be seen that O. 37, R. 2 is applicable to what may be compendiously described as commercial causes. Trading and commercial operations are liable to be seriously impeded if, in particular, money disputes between the parties are not adjudicated upon expeditiously. It is these considerations which have to be borne in mind for the purpose of deciding whether leave to defend should be given or withheld and if given should be subjected to a condition.

6. It may be mentioned that this Court relied upon the decision in Jacobs v. Booth's Distillery Co. (1901) 85 LT 262, in which the House of Lords held that whenever a defence raises a triable issue leave must. be given and also referred to two subsequent decisions where it was held that when such is the case leave must be given unconditionally. In this connection we may refer to the following observations of Devlin, L. J. in Fieldrank Ltd. v. Stein (1961) 3 All ER 681 at pp. 682-3.

"The broad principle, which is founded on (1901) 85 LT 262, is summarised on p. 266 of the Annual Practice (1962 Edn.) in the following terms :

"The principle on which the Court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition."

If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on (1901) 85 LT 262. They will be found at pp. 251 and 267 of the Annual Practice, 1962. It is suggested (see p. 251) that possibly the case if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267 the learned editors of the Annual Practice have this note:

"The condition of payment into Court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff."

It is worth noting also that in Lloyd's Banking Co. v. Ogle (1876) 1 Ex. D. 262, at p. 264 in a dictum which was said to have been overruled or qualified by (1901) 85 LT 262, Bramwell, B., had said that

". . . . . those conditions (of bringing money into Court or giving security) should only be applied when there is something suspicious in the defendant's mode of presenting his case."

I should be very glad to see some relaxation of the strict rule in (1901) 85 LT 262. I think that any Judge who has sat in chambers in R.S.C., Ord. 14 summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into Court, I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency;"

These observations as well as some observations of Chagla, C.J., in Rawalpindi Theatres Private Ltd. v. M/s. Film Group Bombay, 60 Bom LR 1378 at p. 1374, may well be borne in mind by the

Court sitting in appeal upon the order of the trial Judge granting conditional leave to defend. It is indeed not easy to say in many cases whether the defence is a genuine one or not and, therfore, it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately however, the majority of cases cannot be dealt with in a clear cut way like this and the judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to O. 37, R. 2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the order applies is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application.

7. For these reasons we uphold the order of the trial Judge and affirmed by the appeal Court and dismiss the appeal with costs. At the request of the counsel for the appellants we extend the time for depositing security by a period of two months from the date of our judgment.

Appeal dismissed.

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