

SUPREME COURT OF INDIA

Southern Sales & Services

Vs.

Sauermilch Design & Handels GMBH

S.L.P.(Civil) No.20544 of 2008

(Altamas Kabir and Markandey Katju JJ.)

03.10.2008

JUDGMENT

Altamas Kabir, J.

1. Leave granted.

2. This appeal, which is directed against the order passed by the Karnataka High Court on 26th June, 2008, in a proceeding under Order 37 of the Code of Civil Procedure, raises an interesting question of law regarding the interpretation of Rule 3, Sub-rule (5) thereof.

3. Rule 3, as it now reads, was introduced in Order 37 of the Code by way of amendment with effect from 1st February, 1977. Prior to such amendment, Rule 3 of Order 37 was as follows:-

"Rule 3. (1) The Court shall, upon an application by the defendant, give leave to appear and to defend the suit upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application. (2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit."

By virtue of the *Code of Civil Procedure (Amendment) Act, 1976*, Rule (3) of Order 37 was substituted by Rule 3 as it now exists and introduced various changes of which one of the more significant changes was the introduction of Sub-rules (4) and (5) which read as follows:-

"3. (4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No.4A in Appendix or such other Form as may be prescribed from time to time, returnable not less than ten 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. (5)

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 such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judges to be just: Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious: Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

It may also be profitable to refer to Sub-rule (6) which provides as follows:-

"(6) At the hearing of such summons for judgment, -

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith."

4. In the instant case, the respondent filed a suit under Order 37 of the Code of Civil Procedure, hereinafter referred to as "the Code", for recovery of a sum of Euro 757,885.42 equivalent to Rs.3,86,52,156.42 in Indian currency. On being served with Summons for Judgment in terms of Rule 3, Sub-rule (4), of Order 37 of the Code, the petitioner filed an affidavit providing various details which made out triable issues in the suit. On the basis of the said affidavit the learned XXXI Additional City Civil Judge, Bangalore, granted conditional leave to the petitioner to defend the suit.

5. Being aggrieved by the said order, the respondent company moved in revision before the High Court which after considering the submissions made and the defence taken by the defendant/appellant came to the conclusion that a triable issue had been raised in the suit which would have to be decided in a full-fledged trial. However, the High Court also came to a finding that though the defendant/appellant had raised a triable issue, the defence taken did not exonerate them from payment of the entire amount claimed by the respondent herein.

6. The High Court held that despite the admission of the defendant regarding the amount claimed by the respondent in the suit, since the same had not been paid to the

plaintiff/respondent, it would be in the fitness of things to direct the defendant/appellant to deposit a substantial portion of the amount which had been admitted to be due and payable even if the defence set up by the defendant/appellant was not sham, moonshine or illusory. The High Court accordingly modified the unconditional leave granted to the defendant/appellant to defend the suit and restricted the same to the claim of the plaintiff-company to the amount excluding the total demand of Euro 3,20,967.51 covered under the documents Annexures G-1 and G-2. The High Court directed that leave to defend the suit in respect of the claim of the plaintiff-company for the said amount of Euro 3,20,967.51 would be subject to the condition that the defendant/appellant firm would deposit in the trial court 55% of the said amount within eight weeks from the date of the orders of the High Court.

7. The defendant/appellant has come up to this Court challenging the said order of the High Court.

8. On behalf of the defendant/appellant it was urged that the consistent view taken by this Court in relation to summary trials under Order 37 of the Code is that when a Court is satisfied that a triable issue has been raised in defence of the claim made on behalf of the plaintiff, unconditional leave has to be granted to the defendant to contest the suit and no direction could be given while granting such leave to the defendant to deposit any amount by way of security. Mr. T.V. Ratnam, learned advocate, who appeared for the defendant/appellant submitted that this view had been taken by the Calcutta High Court as far back as in 1949 in the case of *Kiranmoyee Dassi vs. Dr. J. Chatterjee*¹, and was subsequently reiterated and followed by this Court in the case of *Santosh Kumar Vs. Bhai Mool Singh*² in which this Court set aside the order of the High Court upon holding that the imposition of a condition while granting leave to defend a suit in which a triable issue has been raised was illegal. If the Court was satisfied that there was a genuine triable issue, leave had to be given and given unconditionally to defend the suit.

9. Mr. Ratnam submitted that same view was taken by this Court in *Milkhiram (India) Private Ltd. vs. Chamanlal Bros.*³, and in *M/s.Mechelec Engineers and Manufacturers Vs. M/s. Basic Equipment Corporation*⁴, wherein it was further clarified that it is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed, that the exercise of discretion by the trial court to grant unconditional leave to defend may be questioned.

10. In addition to his aforesaid submissions Mr. Ratnam urged that in the absence of any error of jurisdiction or the illegal exercise of jurisdiction or the exercise of jurisdiction with material irregularity, the High Court had no jurisdiction to entertain the revisional application filed by the respondent. Mr. Ratnam submitted that as a legal proposition, it was well established that in revisional jurisdiction even a wrong order cannot be corrected or interfered with and that the scope of interference is limited to jurisdictional error only as was explained in the case of *The Managing Director (MIG) Hindustan Aeronautics Ltd., Balanagar, Hyderabad vs. Ajit Prasad Tarway*⁵. Mr. Ratnam submitted that on both counts the order of the High Court impugned in the appeal was liable to be set aside.

11. Replying to the submissions made on behalf of the appellant, Mr. Niraj Sharma, counsel for the respondent submitted that the legal parameters in which the earlier decisions cited on behalf of the appellant had been rendered stood significantly altered after the amendment of the Code in 1976. Learned counsel submitted that with the substitution of Rule 3 of Order 37, the earlier decisions, right up to the decision in the case of M/s. Mechelec Engineers and Manufacturers (supra) were to a large extent rendered ineffective in view of the addition of Sub-rules (4), (5) and (6) to Rule 3.

12. It was urged that Sub-rule (5) of Rule 3 of Order 37 is important to this case in the sense that it recognizes a dichotomy between a disputed claim and an admitted claim in a suit filed under Order 37 of the Code. As far as the disputed claim is concerned, once the Court comes to a conclusion that there is a triable issue, unconditional leave has to be given to the defendant to defend the suit. However, in view of the second proviso to Sub-rule (5) of Rule 3, any amount of the claim, if admitted by the defendant to be due from him, has to be deposited in Court before the leave to defend a suit can be granted.

13. Mr. Sharma submitted that the admission by the appellant that there were certain dues which would be paid by the end of December, 2002, the High Court was justified in directing the appellant to deposit 55% of the admitted amount as a condition precedent for grant of leave to defend the suit in accordance with the provisions of the second proviso to Sub-rule (5) of Rule 3 of Order 37 as it now stands after the amendment effected with effect from 1st February, 1977. Mr. Sharma urged that there was, therefore, no ground or reason for this Court to interfere with the discretion exercised by the High Court in the impugned order.

14. Having considered the submissions made on behalf of the respective parties and the decisions cited, there appears to be force in Mr. Sharma's submissions regarding the object intended to be achieved by the introduction of Sub-rules (4), (5) and (6) in Rule 3 of Order 37 of the Code. Whereas in the unamended provisions of Rule 3, there was no compulsion for making any deposit as a condition precedent to grant of leave to defend a suit by virtue of the second proviso to Sub-rule (5), the said provision was altered to the extent that the deposit of any admitted amount is now a condition precedent for grant of leave to defend a suit filed under Order 37 of the Code. A distinction has been made in respect of any part of the claim, which is admitted. The second proviso to Sub-rule (5) of Rule 3 makes it very clear that leave to defend a suit shall not be granted unless the amount as admitted to be due by the defendant is deposited in Court.

15. The High Court has come to a finding that a certain portion of the plaint has been duly admitted by the appellant herein and accordingly directed 55% thereof to be deposited as a pre-condition for grant of leave to defend the suit.

16. As has been pointed out by Mr. Sharma, it is now well established as a principle of law that even if a wrong order is passed by a Court having jurisdiction to pass an order in such cases, the revisional Court will not interfere with such an order unless a jurisdictional error is pointed out and established by the person who questions such order.

17. In the instant case, the High Court did not lack jurisdiction to pass an order with regard to the subject matter of dispute, though the order itself may be incorrect. There is, therefore, little scope for this Court to interfere with the directions given to the appellant herein to deposit in Court 55% of the admitted dues as a pre-condition to grant of leave to defend a suit. The judgment of the High Court impugned in this appeal does not warrant any interference since the trial Court had exercised its jurisdiction under the second proviso to Sub-rule (5) of Rule 3 of Order 37 of the Code. The earlier concept of granting unconditional leave when a triable issue is raised on behalf of the defendant, has been supplemented by the addition of a mandate, which has been imposed on the defendant, to deposit any amount as admitted before leave to defend the suit can be granted. The question as to whether leave to defend a suit can be granted or not is within the discretionary powers of the High Court and it does not appear to us that such discretion has been exercised erroneously or with any irregularity which warrants interference by this Court.

18. The appeal is, therefore, dismissed.

19. There will be no order as to costs.

¹[AIR 1949 Calcutta, page 479]

²[1958 SCR 1211]

³[AIR 1965 SC 1698]

⁴[1976 (4) SCC 687]

⁵[AIR 1973 SC 76]