

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 15878 of 2021

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YOGI INFRASTRUCTURE PRIVATE LIMITED
Versus

RMC REDIMIX (INDIA) , SUBSIDIARY OF PRISM CEMENT LTD.

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Appearance:

PRATEEK S BHATIA(8629) for the Petitioner(s) No. 1

MR KUNAL S SHAH(5282) for the Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date :25/02/2022

CAV ORDER
(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Heard learned advocate Mr.Pratik Bhatia for the petitioner and learned advocate Mr.Kunal Shah for the respondent, at length.

2. The challenge in this Special Civil Application is directed against order dated 14.9.2021 passed below Exhibit 17 application by learned Principal Senior Civil Judge, Commercial Court, Vadodara in Commercial Civil Suit No.144 of 2019. Thereby, the court rejected the application of the petitioner for leave to defend. The merit were not gone into by the court, however on the ground that there was delay in giving the leave to defend application and that the same was not accompanied by plausible explanation for delay, the application for leave to defend was required to be rejected.

3. Narrating the facts in nutshell, the respondent herein-original plaintiff instituted Summary Suit No.15 of 2012 against the petitioner- defendant on 8.2.2012 before the court at Vadodara for

recovery of Rs.8,38,626/- with interest. It was the case pleaded that the petitioner had approached the plaintiff for purchasing Redimix Concrete material for its project. As per the purchase order dated 15.2.2009, though the delivery was made, the petitioner failed to make outstanding payments as per the invoices made.

3.1 While the petitioner entered his appearance upon issuance of summons in the suit, it is stated that the respondent did not provide neither the list of documents nor the documents forming part of the plaint and referred to in the suit. It was stated that respondent did not serve the summons for judgment on petitioner - defendant within ten days of petitioner entering his appearance in the suit. It appears that the said Summary Suit No.15 of 2012 came to be renumbered as Commercial Suit No.144 of 2019 upon coming into force of the Commercial Courts Act and came to be transferred to the Commercial Court.

3.2 The respondent filed summons for judgment on 23.1.2019 under Order XXXVII Rule 3(4) of the Code of Civil Procedure, 1908 which was served to the petitioner on 28.2.2019, however without necessary documents the petitioner requested the respondent-plaintiff to provide the documents based on which the plaint and the summons for judgment were filed, however such documents were not provided, stated the petitioner.

3.3 On 8.3.2019, the petitioner filed the application seeking extension of time to file leave to defend on the ground that the requisite documents were not made available. The suit was next listed on 1.4.2019 and then adjourned to 26.4.2019 but the documents were not provided by the respondent - plaintiff. It appears that respondent finally provided all the documents to the petitioner on 13.6.2019 and the suit proceedings came to be adjourned to 29.6.2019. On that day the petitioner submitted his

leave to defend. The copy of the *Rojkaam* is produced by the petitioner in the compilation of the petition, also figures on record the list of documents bearing endorsement of receipt dated 13.6.2019.

3.4 The prayer of petitioner to grant the leave to defend came to be refused by the court resulting into the order impugned.

4. Learned advocate for the petitioner assailed the impugned order to submit that it is erroneous in law in as much as the fact has not been considered that the respondent filed application for summons for judgment on 23.1.2019 which was served on 28.2.2019 without necessary documents forming part of the plaint or application for summons for judgment. It was submitted that therefore the application filed by the petitioner seeking extension of time for filing leave to defend was allowed by the court but the proceedings were adjourned to 26.4.2019 and on that date also plaintiff did not provide the documents, which were provided only on 13.6.2019, as above. It was submitted that the court failed to consider that as per the order XXXVII Rule (2) (1) CPC, the documents were required to be supplied by the plaintiff on the date when the defendant enters appearance. Learned advocate for the petitioner relied on the provision of Order XXXVII Rule (2) (1) CPC to submit that the copies of the documents were required to be supplied to the plaintiff. It was also submitted that the liability was disputed and the triable issues were arisen in the suit.

4.1 On the other hand, learned advocate for the respondent proceeded to raise preliminary objections that Special Civil Application would not lie, instead the order was revisable and the petitioner was required to file revision application. He relied on the decision of this court in **Zubedaben Mohammedmiya Vs. Gujarat State Wakf Board**, being **Special Civil Application**

No.18852 of 2014 decided on 16.12.2015, to submit that in that case, the petitioner was relegating to the Sub section (9) of Section 83 of the Waqf Act, 1995 holding that the Special Civil Application was not maintainable. On the other hand, about the maintainability, it was submitted that petition under Article 226 of the Constitution can be filed. Reliance was placed on behalf of the petitioner on the decision of the Madras High Court in **Shivsu Canadian Clear International Limited, Shivsu Towers Vs. Freightcan Global Logistics Private Limited, [2013 (2) Madras Weekly Notes (Civil) 160]**, in that case, the Madras High Court considered the very question about the challenges to the order dismissing the application to defend the suit under Order XXXVII Rule 3 (5), the contents of Section 115, was raised to hold that once the application to defend the suit is dismissed, the defendant can challenge such dismissal order either under Section 115 of the CPC, or by filing petition under Article 227 of the Constitution. Dismissal of the application to leave to defend would result into passing of the decree and the same could be challenged under Article 227 of the Constitution. Article 227 of the Constitution is supervisory jurisdiction available to the High Court. It is difficult to countenance the contention that the challenge to the order refusing to leave to defend would not lie by way of petition under Article 227 of the Constitution before the decree culminates upon refusal to leave.

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5. Now, the same suit was summary suit, therefore, provisions of all procedure laid down in Order XXXVII of the CPC dealing with summary procedure goes to apply. Rule (1) of the said Order mentions about the classes of suits to which the Order is to apply. As per the Rule (2), the manner of institution of summary suits, specific averments needed to be made in the plaint and the nature of relief etc. are mentioned in Sub rule (2). Sub rule (3) of Rule 2 provides that defendant shall not defend any suit unless he enters

appearance. And in default of his entering appearance, the allegations made in the plaint shall be deemed to be admitted. Consequentially, plaintiff in such eventuality shall be entitled to decree.

5.1 Rule (3) of Order XXXVII dealing with procedure for appearance of defendant is relevant. Sub rule (3), reads as under,

“(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an a address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes, required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader.....

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A.....

(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 Judge to 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 vexations:

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.

(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.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

5.2 On bare reading of Sub rule (1) of Rule (3), it is clear that the plaintiff shall have to serve together with the summons under Rule (2) on the defendant a copy of the plaint and the annexures thereto. The defendant is thereafter enjoined to enter appearance of such service either in person or by pleader. In other words, it is expressly provided that defendant shall be served with the plaint and the annexures of the plaint, therefore it necessary implies that all the documents which are part of the plaint as annexures are required to be supplied to the defendant

while serving the summons.

5.3 Under Sub rule (5), the defendant may after service of such summons for judgments, may file affidavit within ten days disclosing the facts as may be deemed sufficient entitle defendant to defend and apply for leave to defend such suit. The Court may grant the leave to defend to the defendant either unconditionally or upon such terms as may appear just to the Court. If the defendant has not applied for leave to defend or such leave is refused, the plaintiff becomes entitled to judgment forthwith.

5.4 From conjoined reading of Sub rule (1) and Sub rule (5) of Rule (3) of Order XXXVII, it is clear that on one hand the plaintiff is required to serve the summons on the defendant together with the annexures of the plaint and on the other hand the defendant may file leave to defend application within ten days therefrom. The defendant would be able to file his leave to defend application and seek to leave the defend from the court raising the triable issues by countering the facts of the case of the plaint as disclosed from the plaint and the annexures served on the defendant alongwith summons. It is therefore that the requirement of serving documents together with the plaint are expressly provided for in the Rule. Whether any triable issues arise in the case and whether the defendant is entitled to unconditional leave to defend or on what terms such leave is to be granted or to be refused, would depend upon the total case and contentions emerging from the plaint together with the annexures.

5.5 Therefore making available the annexures to the defendant together with the plaint while serving summons in the summary

suit, cannot be said to be an empty formality. It has the bearing on substantive right of the defendant to seek leave to defend and to contend before the court by filing leave to defend application that he has strong defence and triable issues arises in the controversy. It is after the requirement of serving the summons alongwith plaint and annexures that the future course of summary suit would be decided. There cannot be due service of summons unless the plaint is sought to be together with the annexures.

5.6 In the present case it could not be disputed by learned advocate for the respondent that the respondent- plaintiff had not supplied the annexures together with the plaint. If time elapsed for the defendant in filing leave to defend application as the documents annexed in the plaint were not made available, such delay was undoubtedly required to be condoned for, the summons could not have to be said completely served in absence of documents when the annexures to the plaint were not given.

5.7 Not only that Sub rule 7 of Order XXXVII provides that the court may excuse the delay of the defendant in entering appearance or in applying leave to defend the suit on sufficient cause being shown by defendant. Non compliance of Rule 3(1) namely not furnishing the annexures with the plaint to the defendant was the reason for the defendant who was rendered unable to submit the application for leave to defend. It indeed constituted sufficient cause. Therefore from that count also under Rule 7 of Order XXXVII, delay ought to have been condoned by the court. From both standpoint, the order is not liable to be sustained in law.

6. The order dated 14.9.2021 passed below Exhibit 17

application by learned Principal Senior Civil Judge, Commercial Court, Vadodara in Commercial Civil Suit No.144 of 2019 is set aside.

6.1 Resultantly, the petitioner shall be entitled to be granted leave to defend in accordance with law. The court concerned shall pass appropriate orders below Exhibit 17 application granting such leave either conditionally or unconditionally depending upon the facts and circumstances of the case. Further proceedings of Commercial Civil Suit No.144 of 2019 shall be guided and shall progress accordingly.

7. The present Special Civil Application is allowed.

(N.V.ANJARIA, J)

(SAMIR J. DAVE,J)

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