

TEA AUCTION LTD. A
v.
GRACE HILL TEA INDUSTRY & ANR.

SEPTEMBER 13, 2006

[S.B. SINHA AND D.K. JAIN, JJ.] B

Code of Civil Procedure, 1908; O. IX R.13:

Filing of a Suit by a company claiming a decree for certain amount with interest against another company—Decreed by High Court ex-parte—Petition for recalling the ex-parte decree—Allowed by Single Judge of the High Court subject to furnishing a security for the amount of decree—Appeal allowed by Division Bench of the High Court holding imposition of such condition as harsh— On appeal, Held: The Court while exercising discretionary jurisdiction under the provisions of Order IX Rule 13 though empowered to put defendants to terms but such terms should not be unreasonable—In the facts and circumstances of the case, it would be appropriate if respondent No. 1/Company is directed to furnish security to the extent of Rs. 5 lakhs—Directions issued— Interpretation of the Statutes. C D

The question which arose for consideration by this Court in this appeal was as to interpretation and application of the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 in the context of exercise of discretionary power of the Courts in setting aside ex-parte decree against the defendant. E

Appellant contended that the Division Bench of the High Court committed a manifest error of law in so far as it failed to take into consideration that the Court had the power to direct furnishing of security as a pre-condition for recalling a money decree passed ex-parte. F

Partly allowing the appeal, the Court G

HELD: 1.1. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also H

A other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The Court, however, is not denuded of its power to put the defendants to terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. [169-C-D-E]

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G.P. Srivastava v. R.K. Raizada & Ors., [2000] 3 SCC 54; *Ramesh & Ors. v. Ratnakar Bank Ltd.*, JT (2000) 10 SC 325 and *Vijay Kumar Madan & Ors. v. R.N. Gupta Technical Education Society & Ors.*, [2002] 5 SCC 30, referred to.

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1.2. The Single Judge of the High Court exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the Single Judge was not correct to direct securing of the entire amount in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case. While setting aside a decree, conditions can be imposed but such conditions should not be unreasonable or harshly excessive. [169-E-F; 172-D]

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Karumuri Surayya v. Thadepalli Pushpavalli Thayaramma & Ors., AIR 37 (1950) Madras 618; *Somalal Nathalal Mistri v. The Vasant Investment Corporation Ltd. & Anr.*, ILR (1954) Bom. 371; *B. Padmavathi Rai v. Parvathamma*, AIR (1976) Karnataka 97; *Packwood v. Union-Castle Mail Steamship Company Limited.* (1903) 20 Times Law Reports 59; *Kavalappara Kottarathil Kochuni (@) Moopil Nayar etc. v. State of Madras & Kerala & Ors.*, AIR (1960) SC 1080 and *The Union of India v. Shri Om Prakash*, [1976] 4 SCC 32, referred to.

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2. Keeping in view the peculiar facts and circumstances, interest of justice would be sub-served if respondent No.1 is directed to furnish security to the extent of Rs.5 lakhs. Such security should be furnished to the satisfaction of the Single Judge. The Court shall consider the matter on merits, if the said defendant-respondent complies with this order, failing which the decree passed by the trial Court shall stand. [172-E-F; G]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4100 of 2006.

From the Judgment and Order dated 2.5.2005 of the High Court of Calcutta in A.P.O.T. No. 86/2005 A

Bhaskar P. Gupta, K. Datta, K.V. Mohan and Nitin Jain for the Appellant.

B. Reghunath, Gireesh Kamal and R. Neduraman for the Respondents.

The Judgment of the Court was delivered by B

S.B. SINHA, J. Leave granted.

Interpretation and application of the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 (for short, 'CPC') is in question in this appeal which arises out of a judgment and order dated 2nd May, 2005 passed by a Division Bench of the Calcutta High Court in A.P.O.T.No.86 of 2005 arising out of C.S.No.234 of 2002 modifying an order passed by a learned Single Judge of the said court. C

The plaintiff is the appellant before us. It filed a suit on the original side of the Calcutta High Court claiming a decree for a sum of Rs.37,26,498/- with interest against the respondents. Leave under Clause 12 of the Letters Patent of the said court was also obtained. An application was filed for recording a decree under Order XII Rule 6 of Code of Civil Procedure on 23rd May, 2002. On the said application, notice of motion was to be served upon the defendants/respondents. The notice was returnable on 12th June, 2002. On the said notice, nobody had appeared on behalf of defendant No.1. A direction for filing of Affidavit in opposition was issued upon the plaintiff's application. Allegedly the said order was communicated to the respondent No.1 by Registered Post. The matter was again listed on 15th July, 2002. On that date nobody appeared on behalf of defendant No.1. A judgment and decree, upon admission for a sum of Rs.37,26,428/- along with interest, was passed against defendant No.1. D E F

Defendant No.2 was a tea broker of defendant No.1. It was impleaded as the guarantor of defendant No.1. No decree, however, was passed against it. An appeal was preferred by the plaintiff-appellant thereagainst as no decree had been passed against defendant No.2. The said appeal was dismissed. The defendant-respondent No.1, thereafter, filed an application for recalling the said *ex-parte* decree, *inter alia*, contending that they came to know about the institution of the said suit only when a memorandum of appeal together with a copy of the stay petition was served upon them in August, 2002. G H

A In terms of an order dated 7th December, 2004, a learned Single Judge found the said application to be thoroughly mischievous and devoid of any merit but still a direction for recalling the decree was passed on condition that respondent furnishes a security of Rs.37 lakhs either in the form of bank guarantee or in cash within a period of three months therefrom.

B An appeal preferred thereagainst has been allowed by the Division Bench by reason of the impugned judgment. The Division Bench of the High Court while passing the impugned judgment, proceeded on the basis that the learned Single Judge having exercised his discretionary jurisdiction under Order IX Rule 13 of CPC, could not have imposed such a harsh condition, stating :

C “It is also stated before us that the appellant/petitioner was advised by the Lawyers not to appear before this Court without service of writ of summons. Admittedly, no writ of summons even today has been served upon the appellant/petitioner excepting that under the Original Side Rules of this Court Notice of Motion was taken out in respect of Order 12 Rule 6 of the Code and that notice has been served upon the appellant/petitioner. Therefore, there may be misunderstanding by the said litigant on the basis of the advice given by his learned Advocate and thereby prevented by a sufficient cause to appear before the Court when the matter was called on for passing the decree under Order 12 Rule 6 of the Code. When we look into the matter from that angle we feel that the order so passed by the Hon’ble First Court directing to secure claim of the respondent for the same amount, being the order so passed by Court, being a sum of Rs.37 lacs, we feel that order cannot be sustained in law.”

F Mr. Bhaskar P. Gupta, learned Senior Counsel appearing on behalf of the appellant would submit that the Division Bench committed a manifest error of law in so far as it failed to take into consideration that the Court had the power to direct furnishing of security as a pre-condition for recalling a money decree passed *ex-parte*.

G Mr. B. Raghunath, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the condition imposed by the learned Single Judge being too harsh, the Division Bench rightly set aside the same.

H The appellant filed an application for passing a decree on admission.

The decree passed, however, was *ex parte* in nature. Applicability of the provisions of Order IX of Rule 13 of CPC is not in dispute. It reads as under: A

“13. *Setting aside decree ex parte against defendant.* - In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; B

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also: C

Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. D

Explanation. - Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree.” E

We may at once notice that whereas Order IX Rule 7 postulates setting aside of orders passed by the Court upon such terms of costs or otherwise; Order IX Rule 13, *inter alia*, postulates “payment into Court”. F

What would be the meaning of “payment into Court” is the core question.

In *G.P. Srivastava v. R.K. Raizada & Ors.*, [2000] 3 SCC 54, a similar question came up for consideration. A Division Bench of this Court opined that the provision under Order IX Rule 13 of the Code of Civil Procedure should receive a broad construction and no hard and fast guidelines can be prescribed. The courts have a wide discretion to set aside an *ex parte* decree on satisfying itself as regards existence of a “sufficient cause”, opining : G

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A “The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when *ex parte* proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not *mala fide* or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

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In *Ramesh & Ors. v. Ratnakar Bank Ltd.*, JT (2000) 10 SC 325, however, this Court, while directing that the *ex parte* decree be set aside, also directed deposit of a further sum of Rs.5 lakhs over and above the amount of Rs.7 lakhs directed by the Court on an earlier occasion. No law has been, however, laid down therein.

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In *Vijay Kumar Madan & Ors. v. R.N. Gupta Technical Education Society & Ors.*, [2002] 5 SCC 30, this Court deprecated the practice of imposing an undue condition and putting the defendant on onerous terms, stating :

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“Power in the court to impose costs and to put the defendant-applicant on terms is spelled out from the expression “upon such terms as the court directs as to costs or otherwise”. It is settled with the decision of this Court in *Arjun Singh v. Mohindra Kumar* that on an adjourned hearing, in spite of the court having proceeded *ex parte* earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be reflected back and reopen the proceedings from the date wherefrom they became *ex parte* so as to convert the *ex parte* hearings into bi-partite. While exercising power of putting the defendant on terms under Rule 7 the court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been in if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the court may not in the garb of exercising power of placing upon terms make an

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order which probably the court may not have made in the suit itself. As pointed out in the case of *Arjun Singh* the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation.”

However, the interpretation of the expression “payment into Court” did not directly fall for consideration in those cases.

Order IX Rule 13 of CPC did not undergo any amendment in the year 1976. The High Courts, for a long time, had been interpreting the said provision as conferring power upon the courts to issue certain directions which need not be confined to costs or otherwise. A discretionary jurisdiction has been conferred upon the court passing an order for setting aside an ex parte decree not only on the basis that the defendant had been able to prove sufficient cause for his non-appearance even on the date when the decree was passed, but also other attending facts and circumstances. It may also consider the question as to whether the defendant should be put on terms. The court, indisputably, however, is not denuded of its power to put the defendants on terms. It is, however, trite that such terms should not be unreasonable or harshly excessive. Once unreasonable or harsh conditions are imposed, the appellate court would have power to interfere therewith. But, it would not be correct to hold that no error has been committed by the Division Bench in holding that the learned Single Judge did not possess such power. The learned Single Judge exercised its discretionary jurisdiction keeping in view that the matter has been disposed of in fact finally at the interim stage at the back of defendant and it was in that view of the matter a chance was given to it to defend the suit, but, then the learned Single Judge was not correct to direct securing of the entire sum of Rs.37 lakhs in the form of bank guarantee or deposit the sum in cash. The condition imposed should have been reasonable. What would be reasonable terms would depend upon facts and circumstances of each case.

In *Karumuri Surayya v. Thadepalli Pushpavalli Thayaramma & Ors.*, AIR (37) 1950 Madras 618, a learned Single Judge of the Madras High Court stated the law in the following terms :

“It seems to me that the wording “upon such terms as to” in the Rule should be read as applying not only to costs but to “payment into Court or otherwise as it thinks fit” as well. I do not think that the punctuation referred to above in the rule in any way lends support to

A the contention of the advocate for the petitioner. It looks to me that
the Rule does not restrict the power of the Court to impose conditions
for setting aside an *ex parte* decree to payment of costs only. The
wording of the Rule is comprehensive enough to include conditions
as to payment into Court of decretal amount or such other conditions
B as the Court thinks fit. Ordinarily the Court will not impose onerous
conditions upon the defendant, such as the payment into Court of the
whole or part of the decretal amount or as to furnishing of security
therefor etc. The conditions as to deposit of decretal amount or such
similar terms are imposed only under special circumstances. It is one
C thing to say that it is either inequitable or unjust to put the defendant
to such onerous terms, but it is quite a different thing to say that the
Court has no jurisdiction at all to impose such terms under any
circumstances.”

In *Somalal Nathalal Mistri v. The Vasant Investment Corporation Ltd.*
& Anr., ILR (1954) Bom. 371, it was held :

D “The next question is whether the condition which has been
imposed by the Court below is a reasonable condition. The expression
“such terms as to costs, payment into Court or otherwise as it thinks
fit” suggests that the matter is one of discretion, but the discretion is
E to be exercised in a judicial manner. The condition to be imposed,
therefore, upon a defendant should be reasonable and not oppressive.
What condition should be imposed in a particular case must depend
upon the facts of each case. In a particular case the Court may come
to the conclusion that the defendant should pay into Court the entire
amount. In another case the Court may come to the conclusion that
F it will suffice if the defendant is ordered to pay a portion of the
decretal amount, and in a third case it is conceivable that the Court
may come to the conclusion that the ends of justice will be met if the
defendant is made to pay the amount of costs only. The true principle
seem to me to be that while the Court has got power to impose
G conditions upon a defendant including the condition of the payment
of the entire amount of the decree, the conditions to be imposed
should be reasonable and should not be oppressive or at least should
not be conditions which will result in the defendant not being able to
defend the suit.”

H In *B. Padmavathi Rai v. Parvathiamma*, AIR (1976) Karnataka 97,

Shetty, J., as the learned Judge then was, opined :

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“.....The question herein is, whether the Court, while setting aside the *ex parte* decree under Order IX, Rule 13, is competent to impose such conditions apart from the direction to pay costs. The scope of Order IX, Rule 13, was considered in *Shyam Lal Sahai v. Ram Narain Lal Seth*, (1920) 57 Ind Cas 300 = (AIR 1920 Pat 660) in which Miller, Chief Justice, observed :

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“The Court may, first of all, impose conditions as to the payment of costs, it may, secondly, impose conditions as to the payment into Court and, in my opinion, this covers the payment into Court of the decretal amount or some portion thereof or payment into Court of the costs.”

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I respectfully agree with the above view. The Court is competent to ask the defendant to pay a portion of the decretal amount or of the costs while setting aside the *ex parte* decree, but such conditions should not be unreasonable or illegal.

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In the instance case, I feel that the circumstances amply justify a direction to the defendant to deposit the admitted portion of the suit claim. The defendant does not dispute her liability to pay the balance of unpaid purchase money with 5½ per cent interest from 3-6-1970. All that she prayed in the reply notice dated 15-5-1970 was that she might be given two years time for that payment.”

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The expression “or otherwise” is also required to be construed widely.

In *Packwood v. Union-Castle Mail Steamship Company Limited*, (1903) 20 Times Law Reports 59, it was observed :

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“.....But the clause went on “or otherwise,” and he thought that meant “in any other way,” and that the clause did apply to the negligence of the butcher in allowing the dog to go loose and be lost.”

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In *Kavalappara Kottarathil Kochuni @ Moopil Nayar etc. v. State of Madras & Kerala & Ors.*, AIR (1960) SC 1080, this Court opined:

“On the basis of this rule, it is contended, that the right or the custom mentioned in the clause is a distinct genus and the words “or otherwise” must be confined to things analogous to right or contract

A such as lost grant, immemorial user etc. It appears to us that the word “otherwise” in the context only means “whatever may be the origin of the receipt of maintenance”. One of the objects of the legislation is to by-pass the decrees of courts and the Privy Council observed that the receipt of maintenance might even be out of bounty. It is most likely that a word of the widest amplitude was used to cover even acts of charity and bounty. If that be so, under the impugned Act even a payment of maintenance out of charity would destroy the character of an admitted sthanam which *ex facie* is expropriatory and unreasonable.”

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C In *The Union of India v. Shri Om Prakash*, [1976] 4 SCC 32, it is observed :

“The words “or is otherwise invalid” in clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference.”

D While setting aside a decree, conditions can be imposed but such conditions should not be unreasonable or harshly excessive.

E Keeping in view the peculiar facts and circumstances, we are of the opinion that interest of justice would be sub-served if respondent No.1 herein is directed to furnish security to the extent of Rs.5 lakhs. Such security should be furnished to the satisfaction of the learned Single Judge. The security, other than the deposit of the amount in cash, should be furnished within 12 weeks from the date. Plaintiff-Appellant would be entitled to press his application for passing a decree on admission. Defendant-Respondent No.1 would also be entitled to file his objection as to why a decree under Order XII Rule 6 shall not be passed. Such a cause, if not already filed, must be filed within 8 weeks from date.

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G The Court shall consider the matter, upon hearing the counsel for the parties, on the expiry of said period of 12 weeks on merits, if the said defendant-respondent complies with this order, failing which the decree passed by the trial court shall stand.

This appeal is allowed to the extent aforementioned. No costs.

S.K.S.

Appeal partly allowed.