A WADA ARUN ASBESTOS (P) LTD.

v.

GUJARAT WATER SUPPLY & SEWERAGE BOARD

(Civil Appeal No. 7314 of 2008)

DECEMBER 16, 2008

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[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Code of Civil Procedure, 1908 – Order 37 – Summary suit – Conditional leave to defend granted – Conditions not C *complied with – Decree – On appeal, High Court directed defendant to deposit a sum – Duly complied – High Court allowed appeal and remitted matter to the trial court with direction that amount deposited by defendant should deemed to be deposited under leave granted by trial court – Interference with – Held: Not called for.*

D

Appellant supplied certain goods to the respondent. The respondent did not release the outstanding payment. Appellant filed summary suit. Respondent filed an application for grant of leave to defend the suit. By order dated 27.11.2002, a conditional leave was granted, E **whereby respondent was directed to give security of 50% amount of said claim. The said amount was not deposited and as such the condition was not complied with. A decree was passed in terms whereof respondent was directed to pay Rs. 21 lakhs alongwith interest @ 23% per** F **annum. Appeal was filed thereagainst. By an order dated 3.3.2004, High Court directed that the cheque for the amount of Rs.15.50 lacs deposited by respondent may be encashed by the Court of Civil Judge but amount should not be permitted to be withdrawn by decree holders till** G **further orders, and that there shall also be further ad interim stay of further execution proceedings. The said order was complied with. High Court allowed the appeal and remitted the matter to trial Court with the directions that the amount already deposited by respondent would be deemed to be the amount deposited under the leave**

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granted by trial Court. Hence the present appeal. A

Dismissing the appeal, the Court

HELD:1. Indisputably, an appeal was preferred against the decree and not against the order dated 3.3.2004 granting conditional leave in favour of the respondent and the said condition was not complied with. B **[Para 9] [692-E]**

2. Where a conditional leave is granted and the conditions therefor are not complied with, a judgment in favour of the plaintiff can be passed. It is not in dispute that the first appeal was maintainable. Where a decree is C **appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal as envisaged under s.105 CPC. [Para 12] [693-E-F]**

3. An order imposing a conditional leave to defend D **the suit was a jurisdictional question and, thus, a revision application would be maintainable. But if a right of appeal from the decree is conceded to a defendant, he cannot be denied a right to challenge an order which was subject to revision in his memorandum of appeal filed** E **from the decree ultimately passed. [Paras 13 and 14] [693-G-H; 694-B]**

The New Ashapuri Co-operative Housing Society Ltd. and Anr. v. Arvindkumar Manilal Patel **AIR (1975) Gujarat 76;** *Fateh Lal v. Sunder Lal* **AIR (1980) Rajasthan 220;** *Modi Ram and Anr. v. Smt. Sugan Bai* **AIR (2005) Rajasthan 12** F **and** *A.K. Velan v. M/s. Narnyanan and Co. (P) Ltd.* **AIR (1972) Madras 118, affirmed.**

Santosh Kumar v. Bhai Mool Singh **(1958) SCR 1211;** *M/s. MechalecEngineers and Manufacturers v. M/s. Basic Equipement Corporation* **AIR (1977) SC 577;** *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* **(1945) 49 CWN 249** G **and** *Raj Duggal v. Ramesh Kumar Bansal* **(1991) Supp. 1 SCC 191, relied on.**

4. A statutory right conferred on a litigant cannot H

A **ordinarily be taken away. A civil revision application might have been maintainable as against the order dated 27.11.2002 granting conditional leave. The said remedy was also available where leave to defend a suit is refused. Leave to defend a suit, should ordinarily be granted. It**
B **was, therefore, permissible for the defendant to raise the said contention in the appeal although it had asked for time to comply with the conditions. [Para 18] [696-H; 697-A-B]**

5. Keeping in view the rate of interest prayed for by
C **the appellant in terms of the provisions of the Interest on the Late Payment on Small Scale and Ancillary Industrial Undertaking Act, 1993, it was obligatory on the part of the plaintiff to show that he was entitled to take recourse thereto. [Para 19]. [697-C]**

Assam Small Scale Industries Development Corporation
D *Ltd. & Ors. v. J.D. Pharmaceuticals & Anr.* **(2005) 13 SCC 19 and** *Ajay Bansal v. Anup Mehta & Ors.* **(2007) 2 SC 275, relied on.**

6. It is not a fit case where the impugned judgment
E **of the High Court should be interfered with. [Para 21] [698-E]**

Case Law Reference:

AIR (1975) Gujarat 76	affirmed	Para 13
AIR (1980) Rajasthan 220	affirmed	Para 13
AIR (2005) Rajasthan 12	affirmed	Para 13
F AIR (1972) Madras 118	affirmed	Para 13
(1958) SCR 1211	relied on	Para 15
AIR (1977) SC 577	relied on	Para 15
(1945) 49 CWN 249	relied on	Para 15
(1991) Supp. 1 SCC 191	relied on	Para 19
G (2005) 13 SCC 19	relied on	Para 20
(2007) 2 SC 275	relied on	Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7314 of 2008.

From the final Judgment and Order dated 31.8.2005 of the
H High Court of Judicature of Gujarat at Ahmedabad in First

Appeal No. 474 of 2004.

Shridhar Chitale and Abhijat P. Medh for the Appellant.

Preetesh Kapoor and Hemantika Wahi and Pinky for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. This appeal is directed against a judgment and order dated 31.8.2005 passed by the High Court of Judicature at Gujarat whereby and whereunder a first appeal filed by the respondent herein was allowed setting aside a decree passed in favour of the appellant herein under Order 37 Rule 3(6)(b) of the Code of Civil Procedure and remitting the suit to the trial court with the direction that the amount already deposited with the respondent by them in terms of the directions of the High Court shall be deemed to be the amount deposited under the leave granted by the trial court.

3. The basic fact of the matter is not in dispute.

Appellants supplied AC pressure pipes to the respondents. A sum of Rs.1,57,488/- became due. On the premise that as a small scale industrial unit, it cannot afford to block such a huge amount, plaintiff requested the defendants to release the said payment. The defendants having not released the outstanding payment, plaintiff became entitled to interest at the rate of 23% per annum being 5% higher than the bank rate per annum thereupon. Plaintiff filed a Summary Civil Suit in the court of Civil Judge (SD), Gandhinagar. Respondent filed an application for grant of leave to defend the suit. By reason of an order dated 27.11.2002, conditional leave was granted, directing :

> "The application for leave to defend is hereby granted with a condition that the defendant may give security of 50% amount of the suit claim."

4. Concededly, the said amount was not deposited and, thus, the said condition was not complied with. On the premise that the defendants-respondents having not complied with the said directions, the conditional leave granted by the court would

A be deemed to have been refused, a decree as prayed for in paragraph 17 of the plaint was passed in the following terms:

"The present suit of the plaintiff is hereby allowed.

The decree as prayed for in para 17 of the suit as per Order XXXVII, Rule 3(6)(b) of the CPC is hereby passed
B accordingly and the defendants are hereby directed to pay the sum of Rs.21,18,335.65 ps. Jointly and Severally to the Plaintiff along with interest @ 23% per annum."

5. An appeal was preferred thereagainst. By an Order dated 3.3.2004, the High Court directed as under :

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"At the suggestion of the Court, learned counsel for the parties pray for time to explore possibility of an amicable settlement. Hence S.O. to 16.3.2004.

In the meantime, the cheque for the amount of
D Rs.15,50,000/- deposited by the appellant – Gujarat Water Supply and Sewerage Board (original defendants) may be encashed by the Court of the learned Civil Judge (S.D.), Gandhinagar, but the amount shall not be permitted to be withdrawn by the decree holder till further orders. Till further orders there shall also be further ad-interim stay of further
E execution proceedings."

6. Indisputably, the said order has been complied with. By reason of the impugned judgment, the High Court allowed First Appeal, opining :

F "True it is that details of such defence were not given by the defendant, but non-supply of the material would not deter the defendant from raising a defence that the plaintiff did not perform his part of the agreement in supplying the material. True it is that the Court had granted the conditional leave in favour of the defendant and the
G defendant did not comply with the order but according to Mr. Munshaw, a big amount of Rs.10,59,168/- was to be deposited and before the amount could be arranged after due negotiation, the plaintiff applied for grant of a decree in his favour. It is submitted by Mr. Munshaw, that present
H is the case where this Court should condone lapses in

making deposit and remit matter back to the trial court with a direction to decide matter on merits. A

Though learned counsel for the plaintiff opposed the prayer but taking into consideration the totality of the circumstances and the fact that under the directions and orders of this Court 50 per cent of the suit amount has already been deposited and further that the defendant is raising certain defences which if are allowed then same may non-suit the plaintiff, we are of the opinion that the decree granted in favour of the plaintiff under Order 37 Rule 3(6)(b) of the Civil Procedure Code deserves to be set aside. The matter is remitted to the trial court with the direction that the amount already deposited by the defendant under the directions of this Court shall be deemed to be amount deposited under the leave granted by that Court. The defendant would be allowed proper opportunity to submit his written statement. The appeal is allowed. No order as to costs." B C D

7. Mr. Shridhar Chitale, learned counsel appearing on behalf of the appellant, in support of this appeal, would submit :

(1) Respondent having been granted conditional leave to defend the suit and as a Revision Application was maintainable thereagainst which having not been availed of, their contention before the High Court that unconditional leave should not have been granted was liable to be rejected. E F

(2) The decree passed in a summary suit by the Trial Judge should not have been overturned without adequate reasons.

8. Mr. Pritesh Kapoor, learned counsel appearing on behalf of the respondent, on the other hand, would contend : G

(1) That the appeal having been preferred against the decree under Section 96 of the Code of Civil Procedure, the appellate Court could exercise its jurisdiction in the manner as has been done. H

(2) It is not correct to contend that the High Court accepted the respondent's contention that in a case of this nature, the Trial Judge should have granted unconditional leave but it proceeded on the basis that the direction to deposit the amount in terms of the High Court's order dated 3.3.2004 having been complied with, the lapse on the part of the respondents to comply with the Trial Judge's order should be condoned.

(3) In any event unconditional leave ought to have been granted as was prayed for by the appellant.

(4) For grant of interest at the rate of 23% per annum in terms of the Interest on the Late Payment on Small Scale and Ancillary Industrial Undertakings Act, 1993, appellant was bound to prove that the provisions of the said Act were applicable in which event, respondents were entitled to take recourse to the provision for taking recourse to arbitration as contained in sub-section (2) of Section 6 thereof.

9. Indisputably, an appeal was preferred against the decree and not against the order dated 3.3.2004 granting conditional leave in favour of the respondent. Indisputably again, the said condition was not complied with. The question which, therefore, arises for consideration is as to whether in the aforementioned situation, the respondent could raise a contention that it was a fit case where unconditional leave should have been granted.

10. Order XXXVII of the Code of Civil Procedure provides for a summary procedure. It is not in dispute that having regard to the prayer made in the suit, Order XXXVII of the Code was attracted. Rule 3 of Order XXXVII provides for the procedure for appearance of the defendant. Rule 5 reads as under :

"5. *Power to order bill, etc. to be deposited with officer of Court*-In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith depositing with an officer of the Court, and

may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

11. Whether leave is granted unconditionally or upon terms, in view of the aforementioned provision in a case of this nature for all intent and purport, stand on the same footing. However, it is well settled that the defence in the suit should not be considered to be a mere 'moonshine' ruse or sham. Ordinarily, the court shall grant leave to defend the suit in favour of the defendant in terms of the first proviso appended thereto. Rule 3 of Order XXXVII provides for a judgment at the hearing of such summons; clause 6(b) whereof reads as under :

"(6)

(a) ...

(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."

12. Where a conditional leave is granted and the conditions therefor are not complied with, a judgment in favour of the plaintiff can be passed. It is not in dispute that the first appeal was maintainable. Where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal as envisaged under Section 105 of the Code of Civil Procedure.

13. It is in the aforementioned backdrop, the question as to whether a revision petition was maintainable against an order granting conditional leave must be considered. We will proceed on the basis that an order imposing a conditional leave to defend the suit was a jurisdictional question and, thus, a revision application would be maintainable as has been held by various High Courts, notable amongst them are *The New Ashapuri Co-operative Housing Society Ltd. & Anr. v.*

A *Arvindkumar Manilal Patel* [AIR 1975 Gujarat 76]; *Fateh Lal v. Sunder Lal* [AIR 1980 Rajasthan 220]; *Modi Ram & Anr. v. Smt. Sugan Bai* [AIR 2005 Rajasthan 12] and *A.K. Velan v. M/s. Narnyanan and Co. (P) Ltd.* [AIR 1972 Madras 118].

14. But if a right of appeal from the decree is conceded B to a defendant, in our opinion, he cannot be denied a right to challenge an order which was subject to revision in his memorandum of appeal filed from the decree ultimately passed.

15. This Court in *Santosh Kumar v. Bhai Mool Singh* [1958 SCR 1211] noticing that a clear defence to the suit C having been made out, no condition could be imposed, stated the law thus :

"This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence D that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

18. The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed E to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether "if the facts alleged by the defendant are duly proved" they will afford a good, or even F a plausible, answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

G 19. The learned High Court Judge is also error in thinking that even when the defence is a good and valid one, conditions can be imposed. As we have explained, the power to impose conditions is only there to ensure that there will be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade H

a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action." A

This Court again in *M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation* [AIR 1977 SC 577] reiterated the following principles laid down in respect of grant of leave in a summary suit by Das J. in *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* [(1945) 49 CWN 249] : B

"(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend. C

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend. D

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action be may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security. E F

(d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend. G

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, H

A the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

B It was opined that the case did not fall within clause (e) and unconditional leave should have been granted.

16. Yet again in *Raj Duggal v. Ramesh Kumar Bansal* [1991 Supp.(1) SCC 191, this Court held :

C **"3.** Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. 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 D a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle E the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted F where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency."

17. We fail to persuade ourselves to agree with the G contention of Mr. Chitale that although a revision from an order granting conditional leave was maintainable, the same could not have been a subject matter of challenge in an appeal from a decree as envisaged under Section 105 of the Code of Civil Procedure.

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18. A statutory right conferred on a litigant cannot ordinarily be taken away. A civil revision application might have been maintainable as against the order dated 27.11.2002 granting conditional leave. The said remedy was also available where leave to defend a suit is refused. Leave to defend a suit, as noticed hereinbefore, should ordinarily be granted. It was, therefore, permissible for the defendant to raise the said contention in the appeal although it had asked for time to comply with the conditions.

19. Mr. Kapoor, in our opinion, is right in his submission that keeping in view the rate of interest prayed for by the petitioner in terms of the provisions of the 1993 Act, it was obligatory on the part of the plaintiff to show that he was entitled to take recourse thereto.

20. This Court in *Assam Small Scale Industries Development Corporation Ltd. & Ors. v. J.D. Pharmaceuticals & Anr.* [(2005) 13 SCC 19], held :

> **"40.** We, therefore, are of the opinion that in relation to the transactions made prior to coming into force of the said Act, simple interest at the rate of 9% per annum, which was the bank rate at the relevant time, shall be payable both prior to date of filing of the suit and *pendente lite* and as future interest in terms of Section 34 of the Code of Civil Procedure. Interest, however, will be payable in terms of the provisions of the 1993 Act (compound interest at the rate of 23.5% per annum) in relation to the transactions made after coming into force of the Act, both in respect of interest payable up to the date of institution of the suit and pendente lite and till realisation. The judgment and decree to that extent requires to be modified. It is directed accordingly."

In *Ajay Bansal v. Anup Mehta & Ors.* [(2007) 2 SC 275], this Court held as under :

> "12. A decree passed in a summary suit where leave to defend the suit has been refused is almost automatic. The consequence of passing a decree cannot be avoided.

A 13. Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India
B would not be entertained.

14. A decree passed subsequent to the refusal of leave to defend could either be under Order 37 Rule 3(6) of the Code or it could be based on the affidavit evidence on the side of the plaintiff and the documents produced or even
C based on oral evidence formally proving, say, the execution of a promissory note by the defendant. It may not be proper or necessary to apply the theory of "dependent order" in such circumstances. For one, the theory may not apply. Even if this Court were to set aside the order of the court below and give the defendant leave to defend the suit, the
D decree that is passed may not go automatically. It may have to be set aside. Secondly, the defendant can always go to the court which passed the decree and move under Rule 4 of Order 37 of the Code to reopen the decree."

21. Keeping in view the facts and circumstances of this
E case, we are of the opinion that it is not a fit case where the impugned judgment of the High Court should be interfered with. This appeal is dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.

D.G. Appeal dismissed.