

INDIAN BANK

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v.  
MAHARASHTRA STATE CO-OPERATIVE  
MARKETING FEDERATION LTD.

MAY 5, 1998

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[S.C. AGRAWAL AND G.T. NANAVATI, JJ.]

*Code of Civil Procedure, 1908 :*

S.10, Order XXXVII—Trial of Suit—Stay of—Summary suit filed under Order 37—Dependent seeking stay of the suit on the ground that it has already filed a regular suit in respect of the dispute between the parties—Single Judge of the High Court declining to stay the summary suit holding that concept of trial in s.10 applies only to a regular suit and not to a summary suit—Division Bench of the High Court, in appeal, held that s. 10 applies to summary suit also and the word 'trial' cannot be construed in a narrow sense but would mean entire proceedings after defendant entered his appearance—Held, provisions of s.10 and order 37 have to be interpreted harmoniously—Words 'trial of any suit' occurring in s.10 will have to be construed in the context of provisions of order 37—In the context of summary suit wider interpretation of the word 'trial' is not called for—Judgement of single Judge of High Court restored.

*Word and Phrases :*

Words 'trial of any suit' occurring in s.10 CPC—Interpretation of.

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A suit under order 37 of the Code of Civil Procedure, 1908 was filed by the appellant-Bank against the respondent—Federation, which had been granted Letter of Credit by it, for recovery of certain amount, which as alleged by the Bank become recoverable under the said Letter of Credit. The Federation appeared before the court to seek stay of the summary suit on the strength of s.10 of the Code, contending that prior to the filling of the summary suit by the Bank, it had filed a suit against the Bank. The single Judge of the High Court held that the concept of trial as contained in s.10, CPC was applicable only to a regular/ordinary suit and not to a summary suit filed under order 37 CPC and, therefore, further, proceedings under the summary suit filed by the Bank were not required to be stayed. On appeal,

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- A** the Division Bench held that s.10 CPC applied to the summary suit also as in its view the word 'trial' in s.10 could not be construed in a narrow sense, and would mean the entire proceedings after the defendant entered his appearance. It stayed the summary suit till the disposal of the suit filed by the Federation. Aggrieved, the Bank filed the present appeals.
- B** It was contend for the appellant—Bank that the Single Judge of the High Court rightly held that s.10 CPC would not apply to the summary suits, otherwise the very object of making a separate provision for summary suits would be frustrated.
- C** **Allowing the appeals, this Court**
- HELD : 1.1.** Considering the objects of both the provisions i.e. Section 10 and order 37 of the Code of Civil Procedure, 1908, wider interpretation of the word 'trial' is not called for. The word 'trial' in section 10, in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint.
- 1.2.** The provisions contained in section 10 is a general provision applicable to all categories of cases. The provisions contained in order 37 apply to certain classes of suits. One provides a bar against proceeding with the trial of a suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated. Accordingly, the words 'trial of any suit' occurring in s.10 will have to be construed in the context of the provisions of order 37 of the Code. The stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave or the court grants him leave to defend the suit. The trial would really begin thereafter. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code. Therefore, the court or the judge dealing with the summary suit can proceed upto the stage of hearing the summons for judgement and passing the judgement in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted.

- 1.3.** The word 'trial' in section 10 of the Code will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition to 'proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted

suit'. The object of the prohibition is to prevent the courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matter in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit; nor is it a bar to the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier one, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the court has to follow according to section 10 is not to proceed with the 'trial'. Thus the word 'trial' in section 10 is not used in its widest sense. A

*Harish Chandra v. Triloki Singh*, AIR (1957) SC 444 - [1957] SCR 370, held inapplicable. B

1.4. The judgment of the Division of the High Court is set aside and the order passed by the Single Judge is restored. C

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2580-81 of 1998. D

From the Judgment and Order dated 7.8.96 of the Bombay High Court in A. No. 953-954 of 1994.

Sameer Parekh, Ms. Bina Madhavan and P.H. Parekh for the Appellant. E

D.M. Nargolkar for the Respondents.

The Judgment of the Court was delivered by

NANAVATI, J. Leave granted. F

The question which arises for consideration in these appeals is whether the bar to proceed with the trial of subsequently instituted suit, contained in section 10 of the Code of Civil Procedure, 1908(hereinafter referred to as the 'Code') is applicable to summary suit filed under Order 37 of the Code. G

The respondent Federation applied to the appellant Bank on 5.6.1989 to open an Irrevocable Letter of Credit for a sum of Rs.3,78,90,000 in favour of M/s. Shankar Rice Mills. Pursuant to that request the Bank opened an Irrevocable Letter of Credit on 6.6.1989. The agreed arrangement was that the documents drawn under the said Letter of Credit when tendered to the H

- A appellant Bank were to be forwarded to the Federation for their acceptance and thereafter the Bank had to make payments to M/s. Shankar Rice Mills on behalf of the Federation. On 6.2.1992 the Bank filed Summary Suit No. 500 of 1992 in the Bombay High Court under Order 37 of the Code against the Federation for obtaining a decree for Rs.4,96,59,160 alleging that the said amount has become recoverable under the said Letter of Credit. The Bank took out summons for judgment (No. 278 of 1992). The Federation appeared before the Court and took out Notice of Motion seeking stay of the summary suit on the ground that it has already instituted a suit being Suit No. 400 of 1992 against the Bank for recovery of Rs. 3,70,52,217.88 prior to the filing of the summary suit.
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- C A learned Single Judge of the Bombay High Court, who heard the summons for judgment and the Notice of Motion, held that the concept of trial as contained in Section 10 of the Code is applicable only to a regular/ordinary suit and not to a summary suit filed under Order 37 of the Code and, therefore, further proceedings under Summary Suit No. 500 of 1992 were not required to be stayed. The learned Judge was also of the view that there was no merit in the defence raised by the Federation. He, therefore, granted leave to the Federation to defend the suit conditionally upon the Federation depositing Rs. 4 crores in the Court. The summons for judgment was disposed of accordingly and the Notice of Motion was dismissed.
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- E Aggrieved by the order of the learned Single Judge in summons for judgment the Federation filed Appeal No.953 of 1994 before the Division Bench of the High Court; and, against the order passed on Notice of Motion it preferred Appeal No.954 of 1994. The Division Bench was of the view that the word 'trial' in section 10 has not been used in a narrow sense and would mean entire proceedings after the defendant enters his appearance, held that section 10 of the Code applies to a summary suit also. It also held that the summary suit filed by the Bank being a subsequently instituted suit filed by the Bank being a subsequently instituted suit was required to be stayed. It allowed both the appeals, set aside the orders passed by the learned Single Judge and stayed the summary suit till the disposal of the prior suit filed by the Federation.
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- H The submission of the learned counsel for the appellant was that the view taken by the learned Single Judge was correct and Division Bench has committed an error of law in taking a contrary view. It was his contention that if section 10 is made applicable to summary suit also the very object of making a separate provision for summary suits will be frustrated. The learned counsel

for the respondent, on the other hand, supported the view taken by the A Division Bench.

Section 10 of the Code prohibits the court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit provided other conditions mentioned in the section are also satisfied. The word 'trial' is no doubt of a very wide import as pointed out by the High Court. In legal parlance it means a judicial examination and determination of the issue in civil or criminal court by a competent Tribunal. According to Webster Comprehensive Dictionary, International Edition, it means the examination, before a tribunal having assigned jurisdiction, of the facts or law involved in an issue in order to determine that issue. According to Stroud's Judicial Dictionary (5th Edition), a 'trial' is the conclusion, by a competent tribunal, of question in issue in legal proceedings, whether civil or criminal. Thus in its widest sense it would include all the proceedings right from the stage of institution of a plaint in a civil case to the stage of final determination by a judgment and decree of the Court. Whether the widest meaning should be given to the word 'trial' or that it should be construed narrowly must necessarily depend upon the nature and object of the provision and the context in which it used.

Therefore, the word "trial" in section 10 will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition to 'proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit'. The object of the prohibition contained in section 10 is to prevent the courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit. It has been construed by the courts as not a bar to the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier suit, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the court has to follow according to section 10 is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial' in Section 10 is not used in its widest sense.

The provision contained in section 10 is a general provision applicable H

- A to all categories of cases. The provisions contained in Order 37 apply to certain classes of suits. One provides a bar against proceeding with the trial of a suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated. This being the correct approach and as the question that has arisen for consideration in this appeal is whether the bar to proceed with the
- B trial of subsequently instituted suit contained in section 10 of the Code is applicable to a summary suit filed under Order 37 of the Code, the words 'trial of any suit' will have to be construed in the context of the provisions of Order 37 of the Code. Rule 2 of Order 37 enables the plaintiff to institute a summary suit in certain cases. On such a suit being filed the defendant is required to be served with a copy of the plaint and summons in the prescribed form.
- C Within 10 days of service the defendant has to enter an appearance. Within the prescribed time the defendant has to apply for leave to defend the suit and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to judgment forthwith. If the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith. Sub-rule (7) of Order 37 provides that save as provided by that order the procedure in summary suits shall be the same as the procedure in suits instituted in the ordinary manner. Thus in classes of suits where adopting summary procedure for deciding
- E them is permissible the defendant has to file an appearance within 10 days of the service of summons and apply for leave to defend the suit. If the defendant does not enter his appearance as required or fails to obtain leave the allegations in the plaint are deemed to be admitted and straightaway a decree can be passed in favour of the plaintiff. The stage of determination of the matter in issue will arise in a summary suit only after the defendant
- F obtains leave. The trial would really begin only after leave is granted to the defendant. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code.

- G Considering the objects of both the provisions, i.e., Section 10 and Order 37 wider interpretation of the word 'trial' is not called for. We are of the opinion that the word 'trial' in section 10, in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with the summary suit can H proceed up to the stage of hearing the summons for judgment and passing

the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted. A

In our opinion, the Division Bench of the Bombay High Court was in error in taking a different view. It had relied upon the decision of this Court in *Harish Chandra v. Triloki Singh*, AIR (1957) SC 444 = [1957] SCR 370. That was a case arising under the Representation of People's Act and, therefore, it was not proper to apply the interpretation of word 'trial' in that case while interpreting section 10 in the context of Order 37 of the Code. B

We, therefore, allow these appeals, set aside the impugned judgment of the Division Bench of the High Court and restore the order passed by the learned Single Judge. In view of the facts and circumstances of the case, we make no order as to costs. C

R.P.

Appeals allowed. D