

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/APPEAL FROM ORDER NO. 94 of 2022**

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SHREE TRADING COMPANY
Versus
HARSON LABS PRIVATE LIMITED

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Appearance:

MR KV SHELAT(834) for the Appellant(s) No. 1
MR SP MAJMUDAR(3456) for the Respondent(s) No. 1

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CORAM: HONOURABLE MS. JUSTICE SONIA GOKANI
and
**HONOURABLE MR. JUSTICE HEMANT M.
PRACHCHHAK**

Date : 30/06/2022

**ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)**

1. This Appeal from Order arises from the order dated 22.11.2021 passed by the Commercial Court, Vadodara in Commercial Civil Suit No.151 of 2019 (Old Number Special Summary Civil Suit No.43 of 2017).
2. The appellant is aggrieved and dissatisfied by the interim order dated 22.11.2021 passed below Exh.1 and 23 where the Court held that it has no jurisdiction to decide Exh. 23.

3. The plaintiff seeks relief of recovery of Rs.47,34,513/- due and payable by the respondent. It is a business transactions that the plaintiff had entered into with the defendant on the basis of the terms of the consignee agency agreement enter into by and between the parties from 2007. The same had been reduced into writing in the year 2009. The written agreement was prepared in the month of April 2009. Although, the business transaction continued from the year 2002. It is averred that the respondent had confirmed an amount of Rs.9,81,264/- due and payable to the appellant-plaintiff, where it confirms the payment of Rs.10,00,000/- as security deposit.

4. Summary Civil Suit No. 43 of 2017 has been filed before the Court of learned Senior Civil Judge, Vadodara, under provision of Order 37 of the Code of Civil Procedure. As summary suit for the recovery of amount of Rs.47,34,513/- as an ascertain amount and prayed for the decree on 27.8.2017. The summons came to be issued on the very day and was made returnable on 27.9.2017.

5. The notification of the District Court had indicated the transfer of the case on 20.7.2019 to the Court of learned Additional Senior Civil Judge, Vadodara as Commercial Civil Suit No. 151 of 2019 on 29.7.2019 and the Court issued the notice to the parties.

6. The grievance on the part of the appellant is that the suit is filed as Summary Suit but, the registry had issued the summons in the Form No.4 in Appendix-B, which is an ordinary summons in a Regular Civil Suit and not a summons required under Order 37 of the Civil Procedure Code.

7. Learned advocate for the appellant came to know of such mistake committed by the registry and therefore, an application came to be filed vide Exh.17 drawing the attention of the Court about the mistake committed. Request is made to rectify the same and to issue the summons as contemplated under Order 37 Rule 2 (2) of Civil Procedure Code for appearance in Form-4 Appendix-

B. The Court allowed the same and directed issuance of the summons for appearance, which was duly served upon the respondent on 28.8.2018. The grievance on the part of the appellant is that the respondent chose not to file any appearance nor comply with the mandatory provision of Order 37 Rule 3 (1)(2)(3) of Civil Procedure Code, though served on 16.11.2018.

8. According to the appellant, as the decree for the sum narrated in the summons for judgment was required to be passed, it gave an application vide Exh.23 to the Court, requesting to view the facts accordingly. However, the Court came to the conclusion that the Commercial Court lacks jurisdiction to decide the present application and disposed of the same without adjudicating the mistake of the registry. The validity of the order below Exh.17 Court chose not to adjudicate and hence, this challenge with the following prayers:-

"16. (A) This Hon'ble Court may be pleased to admit and allow this petition;

(B) This Hon'ble Court be pleased to set aside the impugned order dated 22.11.2021 passed below

Exh.1 and 23 by the Ld. Commercial Court and Senior Civil Judge, Vadodara in the interest of justice;

(C) This Hon'ble Court be pleased to pass order below Exhibit 1 and 23 in view of the above facts and legal mandatory provision as contemplated in order 37 of CPC and further be pleased to passed judgment and decree in favour of the Appellant plaintiff against the defendant as prayed for in the summons for judgment;

(D) Pending hearing and till final disposal of this petition, this Hon'ble Court may be pleased to stay the execution, operation and implementation of the judgment and decree of the Ld. Commercial Court in Commercial Civil Suit No.151 of 2019 (Old Number Special Summary Civil Suit No. 43 of 2017);

(E) This Hon'ble Court may be pleased to grant any such and further orders as may be deemed just and proper;"

9. On due service, the respondent appeared and filed his *affidavit-in-reply* urging *inter alia* that the appeal is not maintainable as per the provisions of Commercial Court's Act. Section 13 of the Commercial Court's Act provides appeal shall lie only in case, which is enumerated under Order 43 of the Civil Procedure Code. In the present case against the impugned order passed below Exh. 1 and 23, no appeal is enumerated. It is further the say of the respondent that appellant has suppressed the fact that pursuant to the issuance of

ordinary summons, the respondent has filed appearance and also filed the written submission. It is urged that the respondent has received the summons of ordinary civil suit and accordingly the appearance is filed, no summons under Order 37 as required in Form-B Appendix-B of the Code of Civil Procedure was received. The respondent also filed number of adjournment applications which were granted by the learned Trial Court and the written statement also came to be filed in the suit proceedings on 25.6.2018. The respondent filed an application below Exh.19 for framing of the issues. Therefore, moving of an application below Exh.23 for summons for judgment on the ground that the respondent has not filed appearance after issuance of summons, is misconceived and the appearance had already been filed on 3.10.2017. The grievance raised, according to the respondent is not sustainable under the law.

10. The *affidavit-in-rejoinder* has been filed by the appellant reiterating the request of quashing and setting aside the combined order below Exh.1 and 23.

11. This Court has heard the learned advocates on both the sides.

12. It is strenuously urged before this Court by learned advocate Mr. Shelat, that the appellant filed the suit on 22.8.2017. The summons upon the respondent was of ordinary civil suit, where the date for appearance was fixed on 27.9.2017. He has urged that as per Order 37 of CPC, the summons is required to be served as provided in Appendix-B Form-4 of the Code of Civil Procedure 1908. However, no such summons is served in the present case. Numbers of adjournment application have been filed by the respondent between 27.9.2017 to 21.5.2018. The written statement came to be filed on 25.6.2018 but prior thereto he already had moved a request to the Court concerned for correcting the mistake of the registry of issuance of summons under Order 37 in Appendix-B Form-4. Knowing fully well the consequences, the written statement came to be filed by the respondent. He has urged this has defeated the right of the appellant.

Therefore, the move on the part of the respondent to file the written statement is to defeat his right, in circumvention of his application below Exh.23 for summons for judgment.

13. According to learned advocate Mr.Majmudar, much water has flown. Appearance of the respondent is on 3.10.2017. His numbers of adjournment applications have been granted by the Trial Court and his written statement has been filed on 21.6.2018. Even if this Court presumes that the summons was not issued as required under the law, the very summary suit has lost its significance, as five years have already passed. He, though has strongly objected to the very findings of this appeal from order by pointing out the provisions of the Commercial Court Act, according to him, he would not mind if the suit is expedited and the Court does not go into the merits of the matter.

14. Learned advocate Mr. Shelat, on taking instructions, has given up his request with regard to the quashment of the order passed below Exh. 1 and 23 and his

insistence on issuance of the summons for judgment as provided under CPC and Appendix-B, Form-4. He urged this Court to expedite the proceedings of the suit pending before the Vadodara Court, being Commercial Civil Suit No. 151 of 2019.

15. The two issues which have been raised before this Court, although require consideration. One of which is whether the appeal from order in the present form will be maintainable, considering Section 13 of the Commercial Court Act which provides for appeal to lie only in cases an enumerated under Order 43 of the Civil Procedure Code. Keeping this issue open and also holding that the act of the Court should not prejudice any litigating parties, admittedly the summons issued was not in form of Appendix-B Form-4 and such a mistake of the registry could not have prejudiced the right of the parties which had come before the Court for summary suit. As the parties have agreed for expeditious hearing of the matter without adjudicating the matter further, we deem it appropriate to dispose it of with the direction that the

summary suit pending before the Court of Vadodara shall be decided as far as possible within **six months** from the date of receipt of certified copy of present order. Both the sides shall cooperate in the proceedings.

16. With aforesaid directions, present appeal from order stands disposed of accordingly.

(SONIA GOKANI, J)

(HEMANT M. PRACHCHHAK,J)

SURESH SOLANKI