

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3659 OF 2015
WITH
CIVIL APPLICATION NO. 950 OF 2015

Vandana S. Punwani .. Petitioner/Applicant
vs.
Vashulal M. Talreja and anr. .. Respondents

Mr. Rajiv Narulla and Mr. Madhur Rai i/b PRS Legal for the
Petitioner/Applicant.

Mr. V.M. Talreja, Respondent No.1-party-in-person.

Mr. A.R. Pai i/b Ms N.N. Thakkar for Respondent No.2.

CORAM : M. S. SONAK, J.
DATE : 08 OCTOBER 2015.

P.C. :-

1] The challenge in this petition is to the order dated 7 March 2015, to the extent of condition imposed therein for deposit of Rs.20 Lacs for leave to defend the summary suit.

2] Heard Mr. Madhur Rai, learned counsel for the Petitioner and Mr. V.M. Talreja, Respondent No.1, who appears in person.

3] By the impugned order, the Trial Court has recorded that the triable issues arise in the matter. However, the Trial Court, mainly relying upon the circumstance that the Petitioner has retained an amount of Rs.30 Lacs, which were to be paid as professional fees to

Mr. Talreja (Respondent No.1) and also proceeded to deduct TDS, imposed a condition that the Petitioner deposits an amount of Rs.20 Lacs for leave to defend the summary suit instituted by Mr. Talreja.

4] Mr. Madhur Rai, the learned counsel for the Petitioner, has placed reliance upon the order dated 8 April 2009 made in Chamber Summons No. 588 of 2009 in Execution Application No. 151 of 2009. This execution was instituted by Mr. Talreja for the same purpose for which he has now instituted the summary suit, wherein the impugned order came to be made. In terms of said order, there is an observation that the remedy of Mr. Talreja in respect of his claim towards unpaid professional fees shall *prima-facie* lie *against* his own client, i.e., Ramal Advani.

5] In view of this *prima-facie* finding and relying upon the decision of the Hon'ble Apex Court in case of ***Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation***¹, the learned counsel for the Petitioner submits that this is a fit case to grant unconditional leave.

1 1976 (4) SCC 687

6] Mr. Talreja (Respondent No.1), who appears in person, submitted that the Consent Terms between the Petitioner and Ramal Advani were very clear, in that, it was the responsibility of the Petitioner to clear the amounts towards professional fees payable to him. The Consent Terms were varied by the parties without any notice or without his involvement. Besides, there are letters which make it clear that the Petitioner had admitted the liability to make payments. Mr. Talreja submitted that the Petitioner is holding the amount of over Rs.30 Lacs in trust for him. Taking into consideration of all these circumstances, including the circumstance that he is 72 years of age and has been deprived of his professional fees for a period of over seven years, Mr. Talreja submitted that the impugned order be not interfered with.

7] Mr. Pai, the learned counsel who appears for Mr. Advani- Respondent No.2 herein, disputes his obligation to pay any amounts to Mr. Talreja. No doubt, this is a matter which will be dealt with by the Trial Court on its own merits and in accordance with law.

8] Having considered the arguments of both sides and perused the record, in my judgment, the impugned order will have to be

modified. The Chamber Summons No. 588 of 2009 was taken out by Mr. Talreja seeking *inter alia* to execute Consent Award dated 9 August 2007. After hearing all parties, including Mr. Talreja, this Court in its order dated 8 April 2009 expressed the following *prima-facie* opinion :

4. *The Applicant was neither a party to the original Consent Terms before the Arbitrator nor for that matter was he a party to the Arbitral proceeding. Similarly, he is not a party to the Consent Terms that were arrived at before this Court on 07.08.2008 in the Insolvency Proceedings. The remedy of the Applicant in respect of his claim towards unpaid professional fees must therefore prima facie lie as against his own client namely the judgment creditor. In these circumstances, there shall be an ad-interim order in terms of prayer clause (c) of the Chamber Summons. The Chamber Summons is made returnable on 15th June, 2009.*

(emphasis supplied)

9] No doubt, the aforesaid expression of opinion was *prima-facie*. In terms thereof, it was observed that the remedy of Mr. Talreja in respect of his claim towards unpaid professional fees must *prima facie* lie as against his own client, i.e., Ramal Advani.

10] The Hon'ble Apex Court in case of ***Mechelec Engineers and Manufacturers (supra)*** has approved the following principles in matters of grant of leave to defend in suits instituted under Order 37 of the Code of Civil Procedure, 1908 (CPC).

8. In *S. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee*, (1945) 49 Cal WN 246 at p. 253, Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, C.P.C. in the form of the following propositions (at p. 253):

"(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.

(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.

(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 had a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs 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.

(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.

(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, 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".

11] In this case, the impugned order itself records that the Petitioner has raised a triable issue. That apart, at least at the stage

of grant of leave, credence shall have to be given to the *prima-facie* opinion expressed by this Court in the above referred order dated 8 April 2009. In the light of observations therein, it cannot be said that the defence raised by the Petitioner is illusory, sham or practically moonshine.

12] In view of the aforesaid circumstances, the condition for deposit of Rs.20 Lacs is required to be set aside and is hereby set aside.

13] The Petitioner shall be entitled to and is hereby granted conditional leave to defend the summary suit. Mr. Talreja, however, is right in his submission that on account of arrangements between the Petitioner and Advani, Mr. Talreja should not be unduly deprived of his professional fee with regard to which, he has taken up the proceedings. From the tenor of the case set out by the Petitioner, it is not as if the Petitioner is disputing that professional fees are payable to Mr. Talreja, the dispute mainly is whether the Petitioner should pay the same or whether Ramal Advani should pay the same. In these circumstances, it is appropriate that the directions are issued to the Trial Court to dispose of the summary suit as expeditiously as possible and in any case within a period of nine months from today.

14] The Petitioner to file a written statement within a period of two weeks from today.

15] It is further made clear that the observations in the order dated 8 April 2009 as well as observations in this judgment and order are only *prima-facie* and the Trial Court need not be influenced by those observations, at the stage of deciding the summary suit, on its own merits and in accordance with law.

16] All contentions of all parties are kept open, as this Court has only examined the issue as to whether the Petitioner ought to have been granted unconditional leave to defend the suit.

17] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

18] In view of disposal of main petition, Civil Application No. 950 of 2015 does not survive and same is disposed of accordingly.

19] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)