

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5344 OF 2014

1.Vijaykumar Shankarrao Thakur ..Petitioners.
& Ors

Vs

1.Smt. Kalawatibai Shankarrao .. Respondents
Thakur and Ors

Mr. Shailendra S. Kanetkar, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 09/06/2015

PC:

1. Heard Mr. Shailendra Kanetkar, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants', have challenged the order dated 11.2.2014 passed by the learned 5th Jt. Civil Judge, Sr. Dn., Pune below Exhibit 17 in Special Summary Suit No.66 of 2004. By that order, the learned trial Judge granted the defendants conditional leave to defend the suit subject to their collectively giving bank guarantee of any nationalised bank for the principal suit claim of Rs.18,95,522/- until next date and thereafter they can file written statement.
3. In support of this Petition, Mr. Kanetkar submitted that basically the suit instituted as a summary suit, is not

maintainable as the respondents, hereinafter referred to as 'plaintiffs', have not claimed any liquidated amount. He submitted that Order 37(2) provides that subject to the provisions of sub-rule (1), Order 37 applies to following clauses of suits; namely

- (a) suits upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising,-
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt (other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

He submitted that the suit does not fall in any of the classes of sub-rule (1) of Order 37. He further submitted that the suit also does not comply the requirements of Order 37 Rule (2). In that, the Plaintiff does not contain a specific averment to the effect that the suit is filed under Order 37. He invited my attention to the Plaintiff in support of his submission. He submitted that though the suit is based on Consent Terms entered into between the parties on 30.5.1997, the said Consent Terms are not filed along with the suit. He submitted that pursuant to the Consent Terms filed on 30.5.1997, the parties arrived at a settlement on or about

6.3.2001. However, the basic requirement of claiming any liquidated amount lacks in the present suit. He submitted that the learned trial Judge has not properly considered various decisions cited before him. In any case, the learned trial Judge ought to have granted unconditional leave to defend the suit.

4. I have considered the submissions advanced by Mr. Kanetkar. I have also perused the material on record. Before the learned trial Judge, parties relied upon the following decisions:

1. M/s. Mechalec Engineers and Manufacturers v. M/s Basic Equipment Corporation, AIR 1977 SC 577;
2. Santosh Kumar Vs. Bhai Mool Singh, AIR 1958 SC 321;
3. Neebha Kapoor Vs. Jayantilal Khandwala, 2008 (5) Mh.L. J. 87;
4. Ravi Prakash Khemka Vs. Bank of India, 2007 (3) Mh. L. J. 8.
5. The learned trial Judge considered the submissions advanced on behalf of the defendants, namely, that the respondents -plaintiffs have not claimed any liquidated amount and the accounts between the parties are not settled. In paragraph 8, the learned trial Judge noted that the plaintiffs have relied upon the various facts which are expressly admitted by the defendants about settlement amongst the groups of firms and company and the only tribal issues attempted to be raised by the defendants is that the accounts as per those settlements are

not yet finalized. The learned trial Judge further observed that the plaintiff came with a specific case on various settlement accounts proof and, therefore, the defendants were expected to falsify the same to uphold that their defence is bonafide. However, they failed to establish that their defence is bonafide. The learned trial Judge further held that though the defence is not found bonafide, yet it raises the triable issue in respect of the real settlement amongst the parties and, therefore, they are entitled to conditional leave to defend. Accordingly, the learned trial Judge has directed the defendants to give bank guarantee of any nationalised Bank of the principal suit claim of Rs.18,95,522/-

6. In the case of M/s. Mechalec Engineers and Manufactures (supra), the Apex Court considered decision of Calcutta High Court in Smt. Kiranmoyee Dassi & Anr. Vs. Dr. J. Chatterjee, (1995) 49 Cal. WN 246 and culled out the propositions in paragraph 8 which are to the following effect.:

"(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 has 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 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.

(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".

7. In the present case, the trial Court came to the conclusion that the case falls in clause (c), extracted herein above, and accordingly in its discretion, has imposed the condition of furnishing security. In my opinion, the learned trial Judge has correctly applied the decision laid down herein above and has exercised the discretion which cannot be said to be perverse.

8. Mr. Kanetkar submitted that the plaintiff ought to have filed regular suit instead of summary suit and the Plaintiff does not conform the requirements of Order 37 Rule 2. Perusal of the Plaintiff shows that the plaintiff has styled the suit as summary suit

and in fact in paragraph 18 it is specifically asserted that the suit is filed under Order 37 of C.P.C. Therefore, it cannot be said that no compliance of Order 37 Rule 2 is made. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)