

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11567 OF 2015**

A-One Engineering Services and
Anr.

..Petitioners

Vs

Yash Enterprises

.. Respondent

Mr.Satishkumar Chetiyar i/b Vishwakarma & Associates,
Advocates for Petitioners.

Mr. Prashant H. Chande, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 24/11/2015

PC:

1. Not on Board. At the request of Mr. Chetiyar, taken up for admission.
2. Heard Mr. Satishkumar Chetiyar, learned counsel for the petitioners and Mr. Prashant Chande, learned counsel for the respondent at length.
3. By this Petition under Article 227 of the Constitution of India, original defendants have challenged the Judgment and order dated 2.11.2015 passed by the learned Judge, City Civil Court, Greater Mumbai, in Summons for Judgment No.9 of 2012 in Summary Suit No.4707 of 2011. By that order, the learned trial judge directed the petitioners, hereinafter referred to as 'defendants', to deposit Rs.94,254/- in Court as an admitted

amount within two weeks and on depositing the said amount by the defendants, Registrar is directed to invest in a nationalised bank initially for a period of one year and continued to renew the same for the like period until further orders. Summons for Judgment No. 9 of 2012 is kept for hearing.

4. Mr.Chetiyar submitted that the respondent, hereinafter referred to as plaintiff, has instituted the Summary Suit under Order 37 of C.P.C for recovery of amount of Rs.3,23,793.00. The defendants filed affidavit-in-reply as also application for leave to defend. He submitted that the defendants partly admitted claim of the plaintiff in paragraphs 4.8 and 5.3 to the extent of 94,254/-. He submitted that the defendants are ready and willing to deposit the said amount in the trial Court and that unconditional leave to defend may be granted. In support of this proposition, he relied upon proviso's to sub rule (5) of Rule 3 of Order 37 as also following decisions:

- (i) The Indian Rayon and Industries Ltd Vs.M/s Sirohya Enterprises, AIR 1992 Bombay 60; and
- (ii) Southern Sales and Services Vs. Sauermilch Design and Handles GmbH, AIR 2009 Supreme Court 320.

5. On the other hand, Mr. Chande submitted that grant of leave to defend is a discretion of Court. The question as to whether leave to defend a suit can be granted or not, is within

the discretionary powers of Court.

6. I have considered the rival submissions advanced by learned counsel appearing for the parties. I have also perused the material on record. Order 37 Rule 3 (5) reads thus :

“(5) The defendant may, at any time within ten days from service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such 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:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the the plaintiff is admitted by the defendant to be due from him, **leave to defend the suit** shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.”

7. Mr Chetiyar submitted that before considering the second proviso to sub-rule (5) of Order 37, the Court has to consider the first proviso. The first proviso lays down that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. The second proviso lays down that where a part of the amount claimed by

the plaintiff is admitted by the defendant to be due from him, **leave to defend the suit** shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

8. Mr. Chetiyar's submission is that as in the present case the defendants have admitted part of the amount claimed by the plaintiff and are willing to deposit, leave to defend the suit unconditionally must follow as a matter of course. It is not possible to accept this contention for more than one reason. In the first place, as per the first proviso of sub rule (5) of Rule 3 of Order 37, Court has to record its satisfaction that the facts disclosed by defendant either indicate or do not indicate that he has a substantial defence to raise or that the defence intended to be put up by defendant is frivolous or vexatious. Thus, the Court will have to adjudicate upon the facts disclosed by the defendant as to whether he is entitled to leave to defend or not. Merely because the defendants have admitted part of the amount claimed by the plaintiff that by, ipso facto, will not entitle them leave to defend the suit unconditionally. On the contrary, as the defendants have admitted part claim of the plaintiff, the Court will not consider the question of granting leave to defend unless the defendants deposit part of the amount admitted by them. In view thereof, reliance placed on the decisions in the case of

Indian Rayon and Industries Ltd (supra) and Southern Sales and Services (supra) does not advance the case of the defendants. Hence, Petition fails and the same is dismissed.

9. At this stage, Mr. Chetiyar submitted that time to deposit the amount as ordered by the trial Court expires today. He, therefore, seeks extension of time to deposit the amount till 27.11.2015 and assures that he will not seek further extension of time. In view of that, notwithstanding dismissal of the petition, the time to deposit the amount in the trial Court is extended till 27.11.2015. Order accordingly.

(R.G.KETKAR, J.)