IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12037 OF 2015

Lawrence Crasta ..Petitioner

Vs

Vasant Upendra kamat .. Respondent

Mr.Vishal Kanade a/w Mr. Vivek Rana i/b I.R.Josh & Co, Advocates for Petitioner.

Mr. Karl Tamboli with Sanket Mungale, Advocates for Respondent.

CORAM : R.G.KETKAR,J.
DATE : 05/12/2015

PC:

1. Heard Mr. Vishal Kanade, learned counsel for the petitioner and Mr. Karl Tamboli, learned counsel for the respondent at length.

2. By this Petition under Article 227of the constitution of India, original defendant has challenged the Judgment and order dated 7.10.2015 passed by the learned Judge, City Civil Court & Sessions Court, Gr. Bombay in Summons for Judgment No.78 of 2007 in summary Suit No.7206 of 2006. By that order, the learned Judge granted conditional leave to defend to the petitioner, hereinafter referred to as defendant, upon his depositing Rs.2,22,000/- in the Court within a period of two months from the date of the order, failing which the respondent,

hereinafter referred to as 'plaintiff', will be at liberty to move the Court for passing appropriate order. Upon depositing the amount as directed, the defendant shall file written statement within 30 days from the date of such deposit.

3. Mr. Kanade submitted that the plaintiff has instituted Summary Suit under Order 37 of C.P.C. Before instituting the suit, the plaintiff had issued notice dated 16.5.2005. In paragraph 1 of that notice, the plaintiff asserted that he had advanced friendly loan to the defendant from time to time which he had received and in discharge of that liability had issued five cheques. The defendant gave reply dated 7.7.2005 and denied that the loan was given. He also sought particulars as to when the loan was given as also cheques were given to the plaintiff. It was asserted that as the plaintiff was in a financial difficulty and wanted certain cheque to be issued to him so that on that basis he would raise finance from financiers or money lenders. Cheques were issued with clear understanding that they would be used only as a friendly gestures to come out of financial difficulty.

4. Mr Kanade submitted that initially suit was instituted on the Original Side of this Court. Pending that suit, the defendant took out Chamber Summons No.392 of 2007 seeking further and better particulars of the vague statement made by the plaintiff in

the suit. The defendant prayed for direction to the plaintiff to furnish particulars in respect of :

a) As to when i.e. on what different dates such alleged loans were advanced.

b) What are the different amounts advanced on different dates.

c) Whether such advances were in cash and/or in cheques;

d) If the said advances were in cheques the inspection of counter foils and bank statements be given.

e) If the alleged loans were in cash the plaintiff must produce and give inspection of acknowledgments receipts, if any, duly signed by the defendant.

5. Mr. Kanade submitted that the plaintiff took out Summons for Judgment No.78 of 2007 for entering Judgment for the plaintiff. The defendant filed affidavit-in-reply dated 8.6.2007. The plaintiff filed rejoinder dated 11.6.2007. In paragraph 2 the plaintiff asserted that he had given friendly loan to the defendant by paying diverse amounts in cash prior to April 2005. He did not keep details of the said diverse amounts. The defendant used to write amounts in a diary and the plaintiff and the defendant both used to sign diary which the defendant is suppressing.

6. Mr. Kanade submitted that after hearing both sides, by order dated 12.8.2008 Chamber Summons was made absolute in terms of prayer clause (a) and the plaintiff was directed to comply the order within two weeks. The plaintiff, however, did

not comply this order. On the contrary, he challenged that order by filing Appeal in this Court. That Appeal was dismissed by order dated 5.1.2010. It is only thereafter by communication dated 31.3.2010, the plaintiff gave details as regards different dates and loan amount advanced to the defendant from time to time.

7. In the first place, he submitted that the plaintiff did not comply the order dated 12.8.2008 by giving all details as sought for by the defendant. Secondly, the letter dated 31.3.2010 is, in fact, contrary to the stand taken by the plaintiff in the suit. Mr. Kanade submitted that basically the suit is based on friendly loan given by the plaintiff to the defendant and not on the five cheques issued by the defendant to the plaintiff. In fact, after disdhonour of these cheques, the plaintiff had instituted criminal complaint under section 138 of the Negotiable Instruments Act, 1881 (for short, 'Act'). In that complaint, the learned Magistrate had issued process and in Revision Application preferred by the defendant, the said order was set aside. In other words, the complaint instituted by the plaintiff was dismissed as it did not disclose cause of action. The defendant had raised triable issues. In that basically the plaintiff came out with a case that he had advanced friendly loan to the defendant. The plaintiff has not given further and better particulars despite the order passed by this Court. He, therefore, submitted that as the defendant has

made out a triable issue, the learned trial Judge ought to have granted unconditional leave to defend. In support of this proposition, he relied upon the decision of the Apex Court in the case of Mechelec Engineers Vs. Basic Equipment Corporation, (1976) 4 S.C.C. 687 and in particular he relied upon paragraph 8(b) to contend that if the defendant raises triable issue indicating that he has a fair and bonafide 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.

8. On the other hand, Mr. Tamboli supported the impugned order. He submitted that basically the suit is instituted by the plaintiff on the basis of cheques given by the defendant to the plaintiff in discharge of lawful liability. He relied upon Section 118(a) and 139 of the Act. He submitted that in reply to the Summons for Judgment, the defendant contended that two cheques of Bank of Maharashtra, Grant Road Branch, were deceptively and stealthily taken away and/or removed by the plaintiff from the defendant's shop. The old cheque book of the closed account of Bank of Maharashtra, Grant Road Branch was lying with the defendant with few cheques already signed by the defendant and the same used to be in one corner of a glass show-case of the defendant and which show-case always used to

remain open. He submitted that as the suit is essentially based on five cheques issued by the defendant and not on the loan advanced, the learned trial Judge was fully justified in passing the impugned order. He further submitted that summary suit based on cheques being bill of exchange, is perfectly maintainable. He further submitted that there is a distinction between suit based on loan advanced and the suit based on dishonour of cheques. In support of this proposition, he relied upon following decisions:

(1) Rajesh Laxmichand Udeshi Vs Pravin Hiralal Shah, 2014 (1) ALL MR 784 and in particular paragraphs 9, 11 and 12. thereof;

(2) Pradip Badshiv Pavgi Vs R.S.Luth Education Trust, 2008(1) Bom C.R. 677 and in particular paragraph 11 thereof.

9. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Perusal of paragraph 8 of the plaint shows that the plaintiff has instituted suit on the basis of the cheques given by the defendant to the plaintiff in discharge of lawful liability. In other words, he has not instituted suit for recovery of a loan which was advanced by him to the defendant. The suit is based upon recovery of money on a cheque drawn in favour of the plaintiff by the defendant. In the case of Pradeep Badashiv Pavgi (supra), the learned Single Judge of this Court, after considering Section 6 of the Act, has observed that a cheque is a

bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and, therefore, the contention that cheque is not a bill of exchange has no basis. The learned Single Judge relied upon Full Bench decision of this Court in the case of Jyotsna K Valia Vs. T.S.Parekh and Company, 2007(4) Mh.L. J 517. In paragraph 26, Full Bench observed as under :

> “It is true that a cheque is a bill of exchange, a special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the defendant, which is dishonoured.
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> In such a case, the suit must be for recovery of money on a cheque drawn in favour of or endorsed to the plaintiff. A suit, however for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit.”

After considering these observations, the learned Single Judge noted that these observations only indicate that the suit cannot be based on the honoured cheque, which means that if the payment is made by the party by cheque and that cheque has been honoured, summary suit is not tenable on the basis of that cheque. However, summary suit is tenable on the basis of the cheque issued by the defendant for the payment of debt if the cheque is dishonoured. As noted earlier, in the present case, suit is based upon the cheques given by the defendant to the plaintiff and the said cheques were dishonoured.

10. In the case of Rajesh Laxmichand Udeshi (supra), Division Bench of this Court considered provisions of Order 37 Rule 1. In paragraph 9, it was observed that it is clear that the suit which is based on the cheques given by the appellant which were dishonoured, can be tried by way of summary procedure. In paragraph 10, the Division Bench considered various judgment and thereafter observed in paragraph 11 that there can be no two views about the tests laid down as to in which cases leave to defend is to be granted and in which cases it is to be refused. Weightage to be given to a defence that is raised will depend on the facts of each case. Once the plaintiff has placed the documentary material on record showing that the plaintiff has a case in law, merely because the defendant indicates that he has certain defence, leave is not to be granted automatically, but the court is required to find out whether such defence even at its face value has come credibility. The defendant must produce on record some material in furtherance of his defence, so as to enable the Court to judge the credibility of the defence, albeit, prima facie. In paragraph 13, the Division Bench considered Section 118(a) and 139 of the Act and observed that under section 139 there is statutory presumption as regards existence

of a debt or liability. In paragraph 15, it was observed that when a summary suit instituted is based on a chque which is dishonoured, effect of Sections 138 and 139 of the Act raising statutory presumption that the cheque was issued in discharge of a liability, is a relevant consideration to be kept in mind. The said Sections cast a burden upon the defendant to rebut the presumption. Summary suits instituted on cheques which are dishonoured will, therefore, stand on a higher footing than summary suits instituted on the basis of other documents.

11. I have considered the defence set up by the defendant. In particular, the defendant has denied advancing loan by the plaintiff to him. It is further contended that the cheques were given by the defendant to the plaintiff as the plaintiff was in a financial difficulty and for obtaining loan from financiers and/or money lenders. The explanation given in paragraph 6 of reply dated 7.7.2005 about the plaintiff having custody of five cheques, to say the least, is an unacceptable. Even the defence raised by the defendant that the cheques were given so as to enable the plaintiff to secure loan from other financiers is also unacceptable.

12. While passing the impugned order, the learned trial Judge has recorded in paragraph 14 that the defence raised by the defendant is illusory and absolute moonshine. However, only as a

matter of mercy the defendant is entitled for leave to defend subject to condition of depositing the entire amount within a period of two months.

13. In the case of M/s Mechelec Engineers and Manufacturers (supra), the Apex Court has approved the principles laid down in the case of Smt Kiranmoyee Dassi Vs Dr. J Chatterjee AIR 1949 which read as under.

> "(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.
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> (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.
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> (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 infer- ence 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 judg- ment 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 orfurnishing security.
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> (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.
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> (e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plain- tiff 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 se- cured and give leave to the Defendant onsuch condition, and thereby show mercy to the Defendant by enabling him to try to. prove a defence".

14. Mr. Kanade submitted that the case clearly falls in clause (b), extracted herein above. I do not find any merit in the submission. On the other hand, after considering the defence set up by the defendant as also the findings recorded by the trial Court in paragraph 14, I am of the opinion that the case falls in clause (e) extracted herein above. The decisions relied by Mr Tamboli apply on all fours to the facts of the present case. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order, more so when the learned trial Judge has directed the defendant to deposit Rs. 2,22,000/- in the trial Court. Hence Petition fails and the same is dismissed.

15. At this stage, Mr Vivek Rana submits that the petitioner was directed to deposit the amount within a period of two months from 7.10.2015. The said period expires on 7.12.2015. He seeks four weeks extension for depositing the said amount and further eight weeks extension for filing Written Statement and assures that he will not seek further extension of time.

16. In view thereof, notwithstanding dismissal of the petition,

time to deposit the amount of Rs.2,22,000/- in the trial Court is extended for a period of four weeks from today. Time to file Written Statement is extended for a period of eight weeks from today with express understanding that no further extension will be sought.

(R.G.KETKAR, J.)