

Mr. Saurabh D. Butala for Petitioner.
Mr. Deepak Dhingra i/b. Mr. S. C. Wakankar for Respondents.

P.C. :

Heard Mr. Butala, learned Counsel for petitioner and Mr. Dhingra, learned Counsel for respondents at length. Rule. Mr. Wakankar waives service for respondents. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 29.02.2016 passed by the learned 9th Joint Civil Judge Senior Division, Pune below exhibit-88 in Special Summary Suit No.25 of 2015. By that order, the learned trial Judge allowed made by the respondents, hereinafter referred to as defendants, and permitted defendants' Advocate to only cross-examine plaintiff's witness on law points and not on facts.

3. Mr. Butala submitted that defendants Advocate was granted unconditional leave to defend subject to furnishing Bank Guarantee in a sum of Rupees One Crore. As the defendant did not comply that condition, the Suit was posted for passing final decree. At that stage, defendants filed application exhibit-88 seeking liberty to cross-examine

the witness of the plaintiff on law points. By the impugned order, the learned trial Judge allowed the application. He submitted that in view of the provisions of Order XXXVII, Rule 3(6)(a) and (b), defendants are not entitled to cross-examine plaintiff's witness and the judgment must follow forthwith.

4. On the other hand, Mr. Dhingra submitted that even if defendants are not permitted to cross-examine plaintiff's witness, nonetheless, defendants may be permitted to agitate the issue that the Suit instituted by the plaintiff under Order XXXVII is not maintainable.

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

“3. Procedure for the appearance of defendant-

(1) to (5) ...

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.”

6. Somewhat similar question fell for consideration of this Court in the case of *A B & U Communication P. Ltd. Vs. Jitu*, 2009 (3) Mh.L.J. 579. After considering the provisions of Order XXXVII, Rule 3(6)(b), this Court observed that keeping in view the terminology “plaintiff shall be entitled to judgment forthwith, the stand taken by the defendants, as recorded in paragraph 10, was rejected. In view thereof, the impugned order cannot be sustained and such is liable to be set aside. It is made

clear that while deciding the matter, the learned trial Judge will keep in mind the ratio laid down by this Court in **A B & U Communications P. Ltd.** (*supra*). Rule is made absolute accordingly with no order as to cost.

(R. G. KETKAR, J.)

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