

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3814 OF 2016

DR.MR. RAMESH UDDHAV KULKARNI ...Petitioner

Versus

SHRI ASHOK NARSINGHRAO BORGAONKAR
AND OTHERS ...Respondents

....

Mr. A.B. Tajane, Advocate for the Petitioner.

Mr. M.M. Sathaye, Advocate for Respondent No.1.

Mr. Kiran N. Joshi, Advocate for Respondent No.2.

Mr. Chandrakant P. Deogirikar, Advocate for Respondent No.3.

....

CORAM : R. G. KETKAR, J.

DATE : 02nd APRIL, 2016

P.C.

1. Heard Mr. A.B. Tajane, learned Counsel for the petitioner, Mr. Milind Sathaye, learned Counsel for respondent No.1, Mr. Kiran Joshi, learned Counsel for respondent No.2 and Mr. Chandrakant Deogirikar, learned Counsel for respondent No.3, at length.

2. Rule. Learned Counsel for the respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 18.9.2012 passed by the Civil Judge, Senior Division, Nashik below Exhibits-61, 64 and 75 in Summary Civil Suit No.83/2008. By that order, the learned trial Judge granted unconditional leave to defend to the respondents, hereinafter referred to as 'defendants'.

4. The petitioner, hereinafter referred to as the 'plaintiff', has instituted Summary Suit against the defendants for recovery of Rs.27,70,000/- along with future interest @ 12 % per annum. Defendant No.1 took out application at Exhibit-61, Defendant No.2 took out application at Exhibit-64, and Defendant No.3 took out application at Exhibit-75 seeking leave to defend under Order 37 Rule 3(5) of CPC.

5. Mr. Tajane submitted that the learned trial Judge has not recorded any reasons while granting unconditional leave to defend. The learned trial Judge observed that the alleged transaction is a money lending transaction and that original documents on which the plaintiff relied are not produced on record. He submitted that while considering the application for

leave to defend, it is not necessary to produce the original documents. He submitted that the cheques are issued by defendant Nos.1 and 3 in the sum of Rs.27,40,000/-. The plaintiff instituted the proceedings under Section 138 of Negotiable Instruments Act, 1881. After passing of the impugned order, the learned Magistrate has passed an order of conviction. Aggrieved by that decision, appeal was preferred which was dismissed and the proceedings are pending in this Court.

6. On the other hand Mr. Sathaye supported the impugned order. He submitted that the learned trial Judge has considered the contentions advanced by the defendant No.3. After perusing the contentions raised by the defendants, the learned trial Judge came to the conclusion that the defendants have raised probable defences. The learned trial Judge has further observed that the agreement dated 8.2.2006 is not signed by defendant No.3 and is signed by defendant No.1 for himself and on behalf of defendant No.3 on the basis of so called power of attorney. The power of attorney is not brought on record. He, therefore, submitted that no case is made out for

interfering with the impugned order. Mr.Joshi and Mr.Deogirikar also supported the impugned order.

7. I have considered rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by the impugned order, the learned trial Judge has granted unconditional leave to defend. The only reasons to be found in the impugned order are in paragraph-5, which read thus :

“5. It is seen that, the claim of the plaintiff is to recover the crystallized dues, liquidated admitted acknowledged debts/monetary claim by summary procedure. Overall perusal of the contentions raised by the defendants while seeking the leave to defend, I find that, the defendants have raised probable defences. It is seen that, one of the agreement dt. 8/2/2006 wherein the defendants agreed to have admitted claim of the plaintiff is not signed by the defendant No.3. It is signed by defendant No.1 Ashok Borgaonkar for himself and on behalf of defendant No.3 Amitabh Borgaonkar on the basis of so-called Power of Attorney. But this document of Power of Attorney is not brought on record. Moreover, I find substance in the defence of the defendants that, the alleged transaction is a money lending transaction. Moreover, the original documents on which the plaintiff relied are not produced on the record. Considering all these facts and circumstances of the case, in my opinion, the defendants are entitled to leave to

defend the suit as sought.”

8. Perusal of the above paragraph shows that the learned trial Judge has not considered the effect of signing of cheques by defendant Nos. 1 and 3 as also the effect of signing the agreement by defendant Nos.1 and 2. The question whether the original documents are to be produced at the time of considering the application for leave to defend is also not properly considered by the learned trial Judge. Learned trial Judge only observed that the plaintiff has not produced the original document. Whether that is the requirement while considering the application for leave to defend is also not dealt with. The learned trial Judge also observed that the alleged transaction is of money lending transaction. Whether solitary transaction of advancing hand-loan requires money lending licence is also not considered by the learned trial Judge. In my opinion, the impugned order is a cryptic order. Hence is liable to be set aside thereby restoring the application Exhibit-61, 64 and 75 filed by defendant Nos.1 to 3. The learned trial Judge will deal with the contentions advanced by the parties and record reasons in support of the conclusions. Hence, the following order :

- [i] Impugned order dated 18.9.2012 is quashed and set aside and applications Exhibit-61, 64 and 75 are restored to the file of the trial Court.
- [ii] Parties agree that they will appear before the trial Court on 18.4.2016 and for that purpose no fresh notice be issued to them.
- [iii] Learned trial Judge is requested to decide the applications afresh on the basis of the material on record and in accordance with law within four weeks from the date of appearance of the parties.
- [iv] All contentions of the parties, on merits, are expressly kept open.
- [v] Rule is made absolute in aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)