

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1544 OF 2016

M/S KUBER STEEL TRADERS THROUGH ITS PARTNER JITENDRA
RAMNIWAS AGRAWAL
VERSUS
BIRLA STEEL CORNER AND OTHERS

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Advocate for the Petitioner : Shri V.C.Patil.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 11th December, 2017

Per Court:

1 The Petitioner, by this petition, seeks to challenge the order dated 28.11.2015, passed by the Trial Court below Exhibit-25 in Summary Suit No.1/2015 thereby, permitting the Defendants to defend themselves unconditionally.

2 None appears for the Respondents/ original Defendants, though two Advocates have entered their appearance after receiving the court notice.

3 The Petitioner submits that 22 cheques for an amount of Rs.2,30,60,669/- have been issued by the Respondents, drawn on the Syndicate Bank, Karve Nagar Branch, Pune in favour of the Petitioner towards partial payment of the due amount. All these cheques were

deposited with the Bank and they were dishonoured for the reason mentioned in the cheques return memo as "funds insufficient" on 01.11.2014". Thereafter, by serving certain notices on the Respondents, the Petitioner made an attempt to have the said amount recovered, but in vain. Consequentially, the Petitioner was left with no option, but to prefer the Summary Suit No.1/2015.

4 After receiving notice, the Respondents appeared as Defendants in the said suit and moved the application Exhibit-25 praying for leave to defend themselves without conditions, for the reason that the claim of the Petitioner was denied. The Defendants had purchased the goods in the course of it's business of supplying steel. As the Defendants were not in a position to make complete payment at once, the Plaintiff demanded security cheques for the sake of security and hence, the cheques were issued. Certain more cheques issued from the account of the Defendants held in the Punjab National Bank are still in the custody of the Plaintiff. The amount of Rs.2,27,18,272/- was paid by the Defendants to the Plaintiff and therefore, the amount mentioned in the blank cheques was already paid. The Plaintiff should not have deposited the said cheques.

5 It requires no debate that in summary suits under Order 37 of the Code of Civil Procedure, the Defendants have to appear in the matter. Post appearance, the Defendants can seek leave to defend themselves

either unconditionally or with some conditions. The concerned Court can even refuse leave to defend if it is convinced that the defence put forth is baseless and frivolous.

6 Order XXXVII of the Code of Civil Procedure reads as under:-

"ORDER XXXVII : SUMMARY PROCEDURE

1. *Court and classes of suits to which the Order is to apply:-*

(1) This Order shall apply to the following Courts, namely :-

(a) High Courts, City Civil Courts and Courts of Small Causes: and

(b) other Courts:

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes 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.

(iv) suit for recovery of receivables instituted

by any assignee of a receivable.

2. *Institution of summary suits:-*

(1) *A suit, to which this Order applies, may if the plaintiff proceed desires to desires hereunder, be instituted by presenting a plaint which shall contain,-*

(a) *a specific averment to the effect that the suit is filed under this Order;*

(b) *that no relief, which does not fall within the ambit of this rule; has been claimed in the plaint; and*

(c) *the following inscription, immediately below the number of the suit in the title of the suit, namely :-*

"(Under Order XXXVII of the Code of Civil Procedure, 1908)."

(2) *The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.*

(3) *The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.*

3. *Procedure for the appearance of defendant*

(1) *In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.*

(2) *Unless otherwise ordered, all summonses, notices and other judicial processes, required to be*

served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(5) The defendant may, at any time within ten days from the service of such summons for judgement, 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 vexatious:

Provided further 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.

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

(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 judgement

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 judgement forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

4. Power to set aside decree:-

After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. Power to order bill, etc., to be deposited with officer of Court:-

In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6. Recovery of cost of noting non-acceptance of dishonoured bill or note:-

The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. *Procedure in suits:-*

Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

7 It cannot be ignored that in matters involving summary trials, the Trial Court can grant the right to defence to the Defendants only after making proper assessment as regards the prima facie defence put forth by the Defendants. After making a subjective assessment and upon being convinced about the merits of the probable defence of the Defendants, the Trial Court can exercise its discretion on the basis of the prima facie appreciation as to whether, the Defendants can be permitted to defend themselves by imposing certain conditions or without conditions. Needless to state, the Trial Court has to balance the equities while passing an order.

8 In Gaurav Singhania vs. Matrix Agri Science Pvt. Ltd. and others, 2012 (1) ALL MR 129, this Court has noted in paragraphs 5 to 8 as under:-

"5. *The gist of the reasoning of the trial Court was that since it was the case of the respondents that they had paid substantial amount, there was a dispute between the parties and hence unconditional leave ought to be granted. In so far as the filing of the application, which was admittedly not within the time prescribed, the trial Court observed that a liberal view ought to be taken in such matters.*

6. *Heard the learned counsel for the parties. In my view, the impugned order granting unconditional leave cannot be sustained in terms of Order 37 Rule 3 (5)*

of the Civil Procedure Code. It is well settled that Order 37 of the Civil Procedure Code is a self contained code, in so far as the prosecution of the summary suits are concerned. In terms of Order 37 Rule 3 (5) of the Civil Procedure Code, a time limit is prescribed for seeking leave to defend or otherwise the applicant is obliged to file an application for condonation of delay citing the reasons for the delay. In the instant case none of the kind has been done though admittedly the application for leave to defend has been filed almost after 90 days of the summons being served upon the respondents. The said 1207wp1346.11.odt 5/6 aspect of delay has been totally glossed over by the trial Court on the ground that in such matters a liberal view has to be taken. The reasoning of the trial Court cannot be sustained more so in view of the fact that the issue before the trial Court was grant of unconditional leave in the said summary suit.

- 7. In so far as the merits of the matter are concerned, it is significant to note that in clause (ii) the respondents have merely made a bald assertion that the respondents have paid substantial amount without specifying what amounts paid and when the said amounts were paid and without this material in support thereof, etc., the trial Court blissfully accepted the said statement and arrived at a conclusion that since there is a dispute between the parties unconditional leave is merited. It is further pertinent to note that though the correspondence between the Advocates was on record wherein as indicated above, the Advocate of the respondents has accepted the liability of the respondents to the extent of Rs.6,70,140/-. The trial Court has also glossed over the said material on record whilst considering the application for unconditional leave. The said order, therefore, cannot be sustained in the teeth of the provisions of Order 37 Rule 3 (5) of the Civil Procedure Code."*

concluded that *"issues raised by the Defendants are considerable one in respect of transaction, issue of promissory note and whether, there is misuse of cheque. In my view, these issues are required for fair trial for the adjudication of justice. It will be also decided on merits that, whether these cheques were issued as a security long back in the year 2012 against the bills raised by the Plaintiff, where as the Plaintiff not returned the said security cheques after the completion of the transaction taken place in the year 2012."*

These observations are found in paragraph 29 of the impugned order.

10 I find that the Trial Court has reproduced the contentions of the respective sides in the impugned order. The most important aspect that the Trial Court should have looked into is that a categorical statement was made by the Defendants that the amount of Rs.2,27,18,272/- was paid by them to the Plaintiff. If such payment was made, the Trial Court should have assessed, whether, such payment was made through a bank transaction or in cash or by any other mode. If the payment is made for such huge amount, obviously the Defendants must have entered into a proper transaction with the Plaintiff and the documents evidencing such payments must have been executed/ preserved.

11 It appears to me that the concerned learned Civil Judge, Senior Division, Jalna has not only failed to apply his mind while passing the impugned order dated 28.11.2015, but the said order has been passed

casually. It could not have missed the attention of the learned Judge that the defence of the Defendants was that, practically, the entire amount was paid to the Plaintiff and there appears to be no evidence before the Trial Court with regard to such payment. Exercising jurisdiction merely on an averment in the defence without considering the effect of Order 37 of the Code of Civil Procedure, leads to the conclusion that the Trial Court has casually passed the impugned order.

12 Considering the above, this Writ Petition is allowed. The impugned order dated 28.11.2015 passed by the Trial Court below Exhibit-25 is quashed and set aside and Exhibit 25 is restored to the file in Summary Suit No.1/2015. The Trial Court shall rehear the Plaintiff and the Defendants on the said application and shall pass a reasoned order by applying its mind, keeping in view the law applicable and the basic ingredients that are required to be looked into within the parameters of Order 37 of the Code of Civil Procedure. It is expected that the learned Judge would be very cautious while dealing with such cases.