

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5650 OF 2016

M/S Kuber Steel Traders

A partnership firm registered
under the Indian Partnership
Act, 1932, having its registered
office at C-31, Addl. MIDC Area
Aurangabad Jalna Road,
Jalna 431203

Through its Partner
Mr. Jitendra Ramniwas
Agrawal (Garg), Age 36 years,
Occ. Business, R/o 1-13-358,
Swami Dayanand Road,
Jalna.

..Petitioner

Versus

M/s Yash Enterprises
(A proprietorship firm through
its proprietor Mr. Faquddin
Hatimbhai Rangwala,
Age major, Occ.Business
Having its office at :

1. S.No. 4/26/A, Ambegaon Bk.
Tq. Haveli, District Pune.

2. Yash Steel and Cement
Kudle Patil Corner,
Sinhgad Road,
Wadgaon Dhayari,
Near Hotel Abhiruchi,
Pune 411041.

3. Mr. Faquddin Hatimbhai
Rangwala, General Constructions,
Shri Sidhivinayak Manasvi
Hill View, Ralicon Society
S.No.39/11-B-12,

Ambegaon Budruk,
Datta Nagar,
Ambegaon Road,
Tq. Haveli, District Pune.

And residing at :

4. Mr. Faqraddin Hatimbhai
Rangwala, Flat No.407,
Orchid "B", Raheja Park,
Wanwadi, Pune. 411 040.

..Respondents

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Advocate for Petitioner : Shri S.S.Patil
Advocate for Respondents 1 to 4 : Shri M.G.Deokate

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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 03, 2017

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ORAL JUDGMENT :-

1. Heard learned Advocates for the respective parties.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. The petitioner is aggrieved by the order dated 29.2.2016, passed by the trial Court in Summary Suit No. 5 of 2015, by which, application Exhibit 21, filed by the defendants has been allowed unconditionally.

5. There is no dispute that in Summary Suits under Order XXXVII of the Civil Procedure Code (“CPC”) a procedure for appearance of the defendants is prescribed. For the sake of brevity, Order XXXVII Rules 3 to 5 of the CPC are reproduced herein below:-

“ORDER XXXVII : SUMMARY PROCEDURE.

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

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 judgment 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 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 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 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.

(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. It is, therefore, obvious from the provisions of law that the defendants have to disclose such facts before the Summary Court, by which, they can convince the Court for granting leave to defend unconditionally. Leave to defend can also be refused by the Summary Court if it finds that the factors set out by the defendants do not disclose any substantial defence and the defence that is put forth appears to be frivolous and vexatious.

7. In my view, in matters of summary trials, while granting the right of defence to the defendants, the trial Court has to

make a conscious assessment, by which, it needs to be convinced that the defence put forth is entertainable and then has to arrive at the quantum of the recovery amount, which the defendants are directed to deposit. This needs to be a subjective assessment, though of a prima facie nature, as the law expects the summary Court to compute the percentage of the amount that the defendants are to deposit in such suits. In short, an equitable order is to be passed and which cannot be based on bald assertions of the defendants.

8. In the matter of Gaurav Singhania Vs. Matrix Agri Science Pvt. Ltd. and others [2012 (1) All M.R. 129], this Court has observed in paragraph Nos.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 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.”

9. It is apparent from the said judgment that the aspect of delay is also to be considered by the Summary Court and which cannot be brushed away lightly or ignored. So also, the Summary Court has to arrive at a conclusion as regards whether the defendants plea consists of such merits that it can decide the amount which such defendants are to deposit in the Court.

10. In the impugned order, the trial Court has considered that 28 cheques of Rs.1,00,000/- each and one cheque for Rs.27,87,479/- were issued by the defendants in favour of the plaintiff. The defendants have specifically taken a stand that all the amounts set out in the cheques were already paid to the plaintiff and in fact an excess amount of Rs.2,02,665/- has been paid by the defendants. This mere assertion of the defendants has been accepted by the summary Court. The impugned order, does not in any way indicate as to whether the documents and vouchers by which the defendants claim to have made the payments, have been gone into by the Court. The Summary Court should not have relied upon the mere statement of the

defendants or the reply dated 25.4.2013, tendered by the defendants to the legal notice issued by the plaintiff. An order granting an unconditional right to defence is an unprecedented order and which must be based on sound reasoning and conclusions. The order must indicate that the Summary Court has assessed the contentions of the defendants before granting an unconditional right to defence.

11. In the light of the above, this petition is partly allowed. The impugned order dated 29.2.2016 is quashed and set aside and Exhibit 21 is restored to the file of the Summary Court in Summary Suit No.5 of 2015. Needless to state, the Summary Court shall consider Exhibit 21 in the light of the above observations and keeping in view the law laid down by this Court in Gaurav Singhania (supra). So also the issue of delay also deserves to be gone into by the Summary Court while deciding Exhibit 21.

12. Considering the request of the petitioner and the fact that a Summary Case is at issue, the Summary Court shall decide Exhibit 21 as expeditiously as possible and preferably on/or before 15.9.2017.

13. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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