

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**Writ Petition NO. 252 OF 2017**

|                                       |               |
|---------------------------------------|---------------|
| M/s. Deep Engineers                   | ...Petitioner |
| <i>Versus</i>                         |               |
| B. R. Industrial Automation Pvt. Ltd. | ...Respondent |

....  
Mr.Abhishek Bharti, Advocate for the Petitioner.  
Mr.Surel S. Shah, Advocate for the Respondent.  
....

CORAM : R. G. KETKAR, J.

DATE : 27<sup>th</sup> FEBRUARY, 2017

P.C.

1. Heard Mr.Abhishek Bharti, learned counsel for the petitioner and Mr.Surel S. Shah, learned counsel for the respondent, at length.

2. Rule. Mr.Shah waives service on behalf of the respondents. Having regard to the narrow controversy raised in this petition as also 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, hereinafter referred to as the 'defendant'

has challenged the judgment and order dated 30.9.2016 below Exhibit-20 as also the judgment and order dated 30.9.2016 below Exhibit-24 passed by the learned 8<sup>th</sup> Jt. Civil Judge, Senior Division, Pune in Special Summary Suit No.100/2015. By order dated 30.9.2016 below Exhibit-20, the learned trial Judge dismissed the application made by the defendant under Section 10 of C.P.C. for stay of Special Summary Suit No.100/2015 till decision of Civil Suit No.1561/2015. By order dated 30.9.2016 below Exhibit-24, the learned trial Judge allowed the application made by the defendant for leave to defend subject to condition of the defendant depositing or giving bank guarantee of Rs.23 Lakhs within two months and thereafter filed written statement.

4. In support of this Petition, Mr. Bharti submitted that while deciding the application Exhibit-24 for leave to defend, in paragraph-12, the learned trial Judge after considering the case put up by the defendant observed that the defendant has raised triable issue. He submitted that once the learned trial Judge has held that the defendant has raised triable issue, he ought to have granted unconditional leave to defend. In support of this proposition, he relied upon following decisions :

1. *M/s. Uma Shankar Kamal Narain and Anr. v. M/s. M.D. Overseas Ltd., AIR 2007 SC 521*
2. *M/s. Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd., AIR 1998 SC 2317*

5. On the other hand Mr.Shah relied upon the decision of Apex Court in *IDBI Trusteeship Services Ltd Vs. Hubtown Ltd, 2017(1) SCC 568* and in particular paragraph-18 thereof. He submitted that Apex Court has held that the decision in *M/s Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, (1976) 4 Supreme Court Cases 687* was on the basis of unamended provisions of C.P.C. prior to 1976. Order XXXVII was amended in 1976. After considering the amended provisions of Order XXXVII as also binding decision in *Mikhiram (India) (P) Ltd Vs Chamanlal Bros, AIR 1965 SC 1698*, in paragraph-18 Apex Court has observed thus :

“18. Accordingly, the principles stated in paragraph 8 of **Mechelec's case** will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in **Milkhiram's case**, as follows:

- a. If the Defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the Plaintiff is not entitled to leave to sign judgment, and the Defendant is entitled to unconditional leave to defend the suit;

b. if the Defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the Plaintiff is not entitled to sign judgment, and the Defendant is ordinarily entitled to unconditional leave to defend;

c. even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith;

f. if any part of the amount claimed by the Plaintiff is admitted by the Defendant to be

due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court.

6. He, therefore, submitted that even if the defendant raises triable issues, if a doubt is left with the trial Judge about the Defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security.

7. As far as order below Exhibit-20 is concerned, Mr.Bharti submitted that depending upon the outcome of the application below Exhibit-24 liberty may be reserved to the defendant to file application under Section 10 of C.P.C. In other words, he submitted that in case the defendant is granted unconditional leave to defend, then obviously the summary suit will be tried as regular suit and in that case the defendant will be in a position to file application under Section 10 of C.P.C. for stay of the suit.

8. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused

the material on record. As noted earlier, while disposing of the application Exhibit-24, the learned trial Judge has referred to the decision in *M/s.Uma Narain (supra)* and *M/s. Sunil Enterprises (supra)* in paragraph-11. In paragraph-12, the learned trial Judge has observed thus :

“12. In the case in hand, it is not disputed that defendant has filed suit against the plaintiff for recovery of the damages and loss caused due to the supply of inferior quality components by the plaintiff. The said suit has been filed prior to the present suit. It is the contention of the defendant that due to supply of inferior quality components by the defendant, they have suffered loss, damages and customers. The defendant has raised triable issue.”

9. In view of the decision of Apex Court in *IDBI Trusteeship Services Ltd* (supra) and in particular clauses (b) and (c) of paragraph-18, extracted hereinabove, it is necessary to consider whether any doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues. On this ground, the impugned order is liable to be set aside thereby restoring the application Exhibit-24 for deciding same afresh in the light of the decision in *IDBI Trusteeship Services Ltd (supra)*.

10. As far as the order below Exhibit-20 is concerned, the trial Judge relied upon the decision in (I) *Aspi Jal and Anr. v. Khushroo Rustom Dadyburjor*, 2013(4) SC 333 and (II) *Indian Bank v. Maharashtra Cooperative Marketing Federation Ltd.*, 1998 (5) 69 and held that Section 10 does not apply to suits filed under Order XXXVII of C.P.C. In view thereof, no fault can be found with the impugned order passed by the learned trial Judge below Exhibit-20.

11. The learned Counsel appearing for the parties state that the parties will appear before the trial Court on 9.3.2017 and for that purpose no fresh notice be given.

12. Hence, the Petition is disposed of in following terms :

- (i) impugned order dated 30.9.2016 below Exhibit-24 is set aside. The application Exhibit-24 is restored for deciding afresh in the light of the decision in *IDBI Trusteeship Services Ltd (supra)*.
- (ii) Impugned order dated 30.9.2016 below Exhibit-20 is upheld. However, it is clarified that in case the defendant succeeds in obtaining unconditional leave to defend, liberty is reserved to the defendant to file application under Section 10 of C.P.C. In that event all the contentions of the respondent/plaintiff are kept open.

- (iii) Both the parties shall appear before the trial Court on 9.3.2017 and for that purpose no fresh notice be given to them.
- (iv) Rule is made absolute in aforesaid terms with no order as to costs.
- (v) All parties, including the learned trial Judge, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

Deshmane (PS)