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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2467 of 2017

Mr Annand Sarnaaik & Anr ..Petitioners.

Vs.

M/s Glodyne Technoserve Limited & Anr ..Respondents

Mr. Amrut Joshi a/with Radha Kapadia i/by M/s Thakore
Jariwala & Associates for the petitioners.

Ms. Rekha Shukla for Respondent No.1.

CORAM : RAJESH G. KETKAR, J.

DATE : 16th March, 2017.

P.C.

1. Heard Mr. Amrut Joshi, learned Counsel for the petitioners and Ms. Rekha Shukla, learned Counsel for respondent No.1 at length.

2. Mr. Amrut Joshi seeks leave to delete respondent No.2 on the ground that the said Company is wound up. On the motion made by Mr. Joshi leave to delete respondent No.2 is granted. Amendment shall be carried out forthwith.

3. Rule. Ms. Shukla, learned Counsel for respondent No.1 waives service. Having regard to the narrow controversy raised in this petition, as also, at the request and by consent of

parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No. 2 and 3', have challenged the judgment and order dated 23.11.2016 passed by the learned Ad hoc Judge, City Civil Court, Greater Mumbai in Summons for Judgment No. 108 of 2016 in Summary Suit No. 965 of 2015. By that order, the learned trial Judge granted leave to defend the suit, subject to the defendants depositing sum of Rs.80,00,000/- in the Trial Court, within eight weeks from the date of order i.e. 23.11.2016, amongst other directions.

5. Mr. Amrut Joshi has invited my attention to the findings recorded by the learned Trial Judge in Paragraph 18 of the impugned order. The learned Trial Judge observed in Paragraph 18 that there are triable issues involved in the case. The defence raised by the defendants cannot be said to be moon shine defence. After recording the findings, the learned Trial Judge ought to have granted unconditional leave to defend.

6. On the other hand, Ms. Shukla supported the impugned order and submitted that the defence raised by the defendants is moon shine defence and there are no triable issues involved in the case.

7. After arguing the petition for sometime, she consents for setting aside the impugned order, thereby restoring the Summons for Judgment No. 108 of 2016 for deciding the same afresh in the light of the decision of the Apex Court in **IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd. 2017 (1) SCC 568.**

8. In the case of IDBI Trusteeship Services Ltd (supra), the Apex Court has observed in paragraph 18 (b) and (c) 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. xx xx xx

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;

Hence, by consent of the parties, Petition is disposed of in the following terms:

- (i) Impugned order is set aside. Summons for Judgment No.108 of 2016 is restored to the file of the learned trial Judge;
- (ii) The learned trial Judge will decide the Summons for Judgment in the light of the Judgment of the Apex Court in the case of Trusteeship Services Ltd (supra). The learned trial Judge is requested to dispose of the Summons for Judgment within four weeks from production of the authenticated copy of this order. All contentions of the parties on merits are expressly kept open;
- (iii) Rule is made absolute accordingly with no order as to costs.

(R.G. KETKAR,J)