

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 1381 OF 2017**

H.B. & Associates

..Petitioner.

Vs

S.B.Customer Care

.. Respondent

Mr. Uzair Kazi a/w Mohd Wasim Qureshi i/b Qureshi Mohammed Aftab, Advocates for Petitioner.

Mr. Akshay Patani i/b Mr.Chetan Alai, Advocate for Respondent no.1.

**CORAM : R.G.KETKAR,J.  
DATE : 28/02/2017**

**PC:**

1. Heard Mr.Uzair Kazi, learned counsel for the petitioner and Mr.Akashay Patani, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 16.12.2016 below Exhibit-16 as also the Judgment and order dated 16.12.2016 below Exhibit 18 in Special Summary Suit No.36 of 2015 passed by the learned 5<sup>th</sup> Jt. Civil Judge, Senior Division, Pune. By order dated 16.12.2016 below Exhibit-16, the learned trial Judge rejected the application made by defendant under Order XXXVII, Rule 3(5) of C.P.C. for leave to defend. By order dated 16.12.2016 below Exhibit-18, the learned trial Judge rejected the

application made by defendant under section 10 of C.P.C. for staying proceedings of Special Summary Suit No.36 of 2015 on the ground that the defendant has instituted Insolvency Petition No. 681 of 2013 before the Court of Civil Judge, Senior Division, Pune and the same is pending.

3. In support of this petition, Mr.Qureshi strenuously contended that the learned trial Judge was not justified in rejecting the application for leave to defend. He submitted that the respondent, hereinafter referred to as plaintiff, has advanced friendly loan of Rs. 35 lakhs in the year 2012. The defendant had instituted insolvency proceedings in Pune Court on 10.7.2013. on 3.10.2013 the plaintiff issued notice claiming Rs. 35 lakhs and interest of Rs. 4,72,500/-. The plaintiff thereafter instituted Summary Suit on or about 24.2.2015. He invited my attention to paragraph 1 of the plaint wherein the plaintiff has set out particulars of claim. He invited my attention to items (c), (d) and (e) to contend that these claims are not based upon the agreement between the parties and, therefore, summary suit under Order XXXVII is not maintainable. There is no agreement between the parties in respect of items (c), (d), and (e). He invited my attention to paragraph 1 of the application Exh.16 wherein the defendant specifically averred that the suit instituted by the plaintiff is false, frivolous and malafide and vexatious. He further submitted that as the claim of the plaintiff is also covered

in insolvency petition, he is a secured creditor and, therefore, the learned trial Judge ought to have granted leave to defend.

4. As far as the order below Exhibit-18 is concerned, he submitted that admittedly insolvency petition is filed on 10.7.2013 which is prior in time of summary suit. In view of Section 10, the learned trial judge ought to have stayed the proceedings of summary suit.

5. On the other hand, Mr. Patani supported the impugned order. He invited my attention to the writing dated 4.1.2013 given by the defendant wherein it agreed to pay interest at the rate of 2% per month. He further submitted that insolvency petition is pending and there is no adjudication order. The learned trial Judge, while rejecting the application for leave to defend, has observed that the defendant has admitted his liability to the plaintiff before the insolvency court. As the defendant has admitted the liability, the defendant cannot claim that cheques were issued as security. The learned trial Judge, therefore, held that the defendant has not raised any triable issue.

6. As far as the order below Exhibit-18 is concerned, he submitted that in the first place, the plaintiff is not a party in the insolvency petition and secondly, in view of Section 29 of the Provincial Insolvency Act, 1920, the learned trial Judge has observed that there is no adjudication order against the

defendant. The learned trial Judge, therefore, rightly rejected the application under section 10 of C.P.C.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In so far as the claims (c), (d), and (e) in paragraph 10 of particulars of claim is concerned, Mr Qureshi submitted that in respect of these items, there is no agreement between the parties. Perusal of item (c) shows that the plaintiff has claimed amount of Rs.21,000/- and 52500/- TDS was deducted by the defendant while issuing cheques for payment of interest /fixed return for the period of July 2012 to Sept., 2012. As far as item (d) is concerned the plaintiff has claimed interest at the rate of 24 % per annum from October, 2012 till filing of the suit. The claim of interest is in consonance with the writing of the defendant dated 4.1.2013. That apart, a perusal of the application Exhibit 16 does not indicate that defendant has raised this contention. In view thereof, I do not find any merit in the submission of Mr Qureshi that in respect of claims (c),(d) and (e) there is no agreement between the parties and, therefore, summary suit is not maintainable.

8. In paragraph 5 of the order below Exh.16, the learned trial Judge has noted that the defendant has admitted his liability before the Insolvency Court. As the defendant has clearly admitted his liability, it has not raised any triable issue.

9. In the case of IDBI Trusteeship Services Ltd Vs. Hubtown Ltd, 2017 (1) SCC 568, the Apex Court has observed in paragraph-18 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.”

In view thereof, I do not find that the learned trial Judge has committed any error while rejecting the application Exhibit-16 for leave to defend.

10. As far as Application Exhibit-18 is concerned, in paragraph 3 the learned trial Judge has noted that the plaintiff is not a party to the Insolvency Petition No. 381 of 2013. In paragraph 5, the learned trial Judge has referred to section 29 of the Provincial Insolvency Act, 1920 and noted that there is no order of adjudication made against the defendant. In view of Section 29, discretion is given to the Court to either stay the proceedings or proceed with the suit against debtor on the proof of adjudication. As there is no adjudication of insolvency, the provisions of stay

will not be attractive. For the reasons recorded in paragraphs 3 and 5 of the order below application Exhibit-18, I do not find that the learned trial Judge has committed any error. Hence, petition fails and the same is dismissed.

(R.G.KETKAR, J.)