

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

WRIT PETITION (ST) NO. 5370 OF 2017

Rupji Constructions

..Petitioner.

Vs

Sharadkumar Damodar Mokashi
and Ors.

.. Respondents

Mr. Surel S. Shah, Advocate for Petitioner.

Ms. Sukruta A. Chimalkar, Advocate for Respondents.

**CORAM : R.G.KETKAR,J.
DATE : 02/03/2017**

PC:

1. Heard Mr.Surel Shah, learned counsel for the petitioner and Ms. Sukruta Chimalkar, learned counsel for the respondents 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 27.1.2017 passed by the learned Judge, City Civil Court, Greater Bombay, in Summons for Judgment No.100 of 2016 in Summary Suit No.1227 of 2015. By that order, the learned trial Judge granted conditional leave to defend subject to the defendant depositing the amount of Rs. 18,98,057/- in the Court within four weeks, among other directions.

3. Rule. Ms. Chimalkar 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 petition is taken up for final hearing.

4. In support of this petition, Mr. Shah invited my attention to the findings recorded by the learned trial Judge in paragraphs 18 and 20, vis-a-vis the findings recorded in paragraph 24. In paragraph 18, after referring to clause 4 of the agreement for allied services dated 7.11.2012, the learned trial Judge observed that the defence raised by the defendant, raised a triable issue as to whether the plaintiffs have provided service facilities to the defendant or not?. In paragraph 20, the learned trial Judge referred to the case of the parties. On one hand, the defendant claimed to have handed over possession on 15.8.2013 and on the other, the plaintiffs claimed that possession was handed over in December, 2013. The learned trial Judge observed that whether the defendant is liable to pay any further amount after 15.8.2013 as it has not used the suit premises since then, is to be decided on merits and it is a triable issue. As against this, in paragraph 24, the learned trial Judge has observed that the defendant does not deserve any conditional leave to defend the suit and defence on record is practically moonshine. He submitted that the findings recorded in paragraph 24 is inconsistent with the findings recorded in paragraphs 18 and 20. He relied upon the decision of the Apex Court in the case of IDBI

Trusteeship Services Ltd Vs. Hubtown Ltd, 2017 (1) SCC 568. 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. xxx xxxx

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;”

He, therefore, submitted that the petition requires consideration.

5. On the other hand, Ms. Chimalkar invited my attention to paragraphs 16 to 18 of the impugned order. In paragraph 16, the learned trial Judge observed that even the defendant has stated that the plaintiffs have received keys on 10.12.2013 which is evident from the letter dated 28.12.2013 by the defendant. The learned trial Judge, therefore, did not accept the case of the

defendant that it vacated the premises on 15.8.2013.

6. After arguing the petition for quite some time and upon taking instructions from the plaintiffs, Ms Chimalkar submits that by consent of the parties, impugned order may be set aside and Summons for Judgment may be restored to the file of the trial Court. Trial Court may be directed to dispose of the Summons for Judgment in the light of the Judgment of the Apex Court in the case of IDBI Trusteeship Services Ltd (supra).

7. In view thereof, by consent of the parties, impugned order is set aside. Summons for Judgment No. 100 of 2016 in Summary Suit No. 1227 of 2015 is restored to the file of the learned trial Judge.

8. Learned counsel appearing for the parties submit that the next date before the trial Court is 15.3.2017. The learned trial Judge is requested to dispose of the Summons for Judgment within two weeks from 15.3.2017 in the light of the decision of the Apex Court in the case of IDBI Trusteeship Services Ltd (supra). All contentions of the parties on merits are expressly kept open.

9. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)