

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 3731 OF 2017**

**M/s. Essel Corporate Resources
Pvt. Ltd. & Anr.**

...Petitioners

Vs.

Harpreet Singh Thind

...Respondent

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**Mr. Rohan Sawant with Ms. Devanshi Sethi i/b. ALMT Legal for
the petitioners.**

Dr. Preeti Brahmania for the respondent.

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CORAM : MRS. MRIDULA BHATKAR, J.

DATE : JUNE 19, 2017.

P.C.:

This petition is filed against the order dated 2nd March, 2017 in Notice of Motion No.3257/2016 in Summary Suit No.3927/2010. The respondent has filed a Summary Suit against the defendants i.e. the petitioners. The defendants were though granted unconditional leave to defend, failed to file written statement. The prayers of the original defendants to file written statement and setting aside order of no written statement were

rejected and thereafter confirmed by the High Court. Thus, the trial Court kept the matter for final arguments. In between, the petitioners/defendants moved an application praying that the defendants be allowed to cross-examine. Thereafter, the plaintiff/respondent has filed affidavit-in-chief along with the documents. The defendants, thereafter, filed an application seeking permission of the trial Court to cross-examine the plaintiff. The said application was opposed by the respondent/original plaintiff and after hearing both the parties, the trial Court rejected the said notice of motion mainly on the ground that it being a summary suit, though the unconditional leave to defend was granted by the High Court in January, 2012, he failed to file written statement and his conduct is going to prejudice the original plaintiff. Hence, this Writ Petition.

2. The learned counsel for the petitioners has submitted that he will not lead any evidence as the right of defence is struck out. However, he be allowed to cross-examine in support of his submissions and leave to defend unconditionally was granted to him. He relied upon the decision of the Supreme Court in **Modula**

India v. Kamakshya Singh Deo [(1988) 4 SCC 619].

3. The learned counsel for the respondent/original plaintiff while opposing this writ petition has supported the order passed by the learned Judge. She submitted that the learned Judge has taken into account the conduct of negligence and carelessness and, therefore, the application was rightly rejected. She relied upon sub-rule (2) of Rule 5 of Order VIII of the Code of Civil Procedure. She further submitted that the petitioners have taken out number of applications, notices of motion earlier and, writ petitions to stall the proceedings. Now, the matter is fixed for arguments and, therefore, by allowing the writ petition without setting aside the said order which is not under challenge, the matter cannot be reverted back. She also relied upon the judgment in **Modula India** (supra) and submitted that three exceptions carved out in the said judgment of **Modula India** (supra) were referred to by the learned Judge of the trial Court. She further submitted that using any discretion in favour of the defendants will lead to the prejudice of the plaintiff who is litigating this suit for his rightful claim of salary since 2012.

4. I have considered the submissions and the ratio laid down in **Modula India** (supra). The three exceptions carved out by the Supreme Court are, in fact, guiding factors to the trial Court while controlling the cross when no written statement order is passed. When the cross-examination is conducted in the absence of the written statement, the trial Judge has to keep in mind all the three circumstances which are named as exceptions or safeguards as mentioned in **Modula India** (supra) and to control the cross-examination of the defendants who have failed to file written statement. In the present summary suit, unconditional leave to defend was granted to the petitioners (original defendants) and thus, though they have failed to file the written statement and considering their conduct, the said order was upheld by the High Court, the defendants can be allowed to cross-examine the witness i.e. the plaintiff to certain extent with all limitations and safeguards as mentioned in **Modula India** (supra). It is a settled position of law that when order under sub-rule (2) of Rule 5 of Order VIII of the Code of Civil Procedure is passed then the defendants cannot put forth his defence in any manner. The trial Court has to take care that there should not be any back door entry in cross-

examination by the defendants, but the cross-examination be allowed to the law point and to the extent of denials of the case of the plaintiff. Thus, trial Court has to use discretion and keep balance. Thus, the impugned order dated 2nd March 2017 is hereby set aside. Rule made absolute in terms of prayer clause (a) subject to payment of costs of Rs.40,000/- (Rupees Forty Thousand only) which is to be paid within two weeks before the trial Court to the plaintiff.

5. I am informed that the suit is fixed on 10th July, 2017. It is also informed that the plaintiff is working at Hong Kong and is not in India. Therefore, after ascertaining the convenience of the plaintiff, the learned Advocate on record before the trial Court shall intimate his date of arrival in India and his availability in writing to the trial Court for cross-examination before the trial Court and, thereafter, the trial Court to proceed with the matter and the cross-examination shall be completed within two consecutive sittings.

(MRIDULA BHATKAR, J.)