

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5300 OF 2017

Ecom Express Private Ltd.

... Petitioner

Vs.

Balkrishen Ruplal Mehra

... Respondent

Mr. Vishal Mugalikar a/w. Mr. Nihal Shaikh, Ms. Sanchi Gupta i/b. Mr. Mustafa Motiwala, Advocate for the petitioner.

Mr. Kapil Moye a/w. Mr. Alok Patel i/b. M/s. Mahendra Patel & Associates, Advocate for the respondent.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 1st July, 2017.

P.C.:

Rule. Rule made returnable forthwith. By consent, the Writ Petition is heard finally and decided at the stage of admission, as the legal issue involved in this Petition is short.

2. In this Writ Petition, the petitioner challenges the order dated 23rd March, 2017 passed by the Ad-hoc District Judge, City Civil Court, Greater Mumbai in Summary Suit No. 306 of 2016 thereby framing issue on the point of territorial as well as pecuniary jurisdiction. The petitioner/plaintiff has filed the Summary suit for recovery of money of Rs.81 lakhs, towards security deposit in Leave and Licence Agreement, along with interest against the

respondent/defendant. In the Summary Suit, the defendant appeared after service of summons for judgment and raised issue of territorial as well as pecuniary jurisdiction. Against the said order, this Writ Petition is filed.

3. The learned counsel for the petitioner submitted that instead of framing the issue, which is a defence of the respondent/defendant, the trial Court should have heard the arguments of summons for judgment and thereafter it was appropriate on the part of the learned Judge to consider granting leave to defend but the issues raised by the defendant cannot be heard before hearing of the summons for judgment. In support of his submissions, he relied on the judgment of the Division Bench of Bombay High Court in **Sanjog Sadanand Parab vs. B.P. Gharda & Co. & Ors., reported in 2012 (Supp.1) Bom. C.R. 11**, which was delivered by the Division Bench while dealing with the similar issue under Section 9 and under Order XXXVII Rule 1 of CPC.

4. In reply, the learned counsel for the respondent has submitted that though there is a procedure laid down of the Summary Suit in Rule 7 Order XXXVII, it states that the procedure in Suit hereunder

shall be same as the procedure in suits instituted in the ordinary manner. He submitted that if there is important issue of competency of the Court on the point of territorial or pecuniary jurisdiction, then that is required to be decided first before hearing of the summons for judgment. He submitted that if the Court has no jurisdiction to try the suit and if order of conditional leave is passed by the trial Court, then it would amount to a punishment. He further submitted that there is no bar while trying the Summary suit in framing and taking up preliminary issue which goes to the root of the matter. In support of his submission, the learned counsel relied on the ratio laid down in the case of **Indian Express Newspapers (Bombay) Ltd., vs. Basumati Private Ltd., reported in AIR 1969 Bom. 40.** He submitted that in the case of **Indian Express Newspapers**, a Summary Suit No. 4 of 1966 which was filed at Bombay was stayed and the Suit No. 2270 of 1965 which was filed in Calcutta in respect of same transaction was to proceed and this order was made under section 10 of the Civil Procedure Code, as the objection was raised by the defendant before hearing of summons for judgment. The learned counsel has further submitted that same view is reiterated by the Division Bench in the case of **The Maharashtra State Cooperative Marketing Federation Ltd. vs. Indian Bank, reported**

in 1997(1) Bom. C.R. 524. In the said judgment, a Summary Suit was stayed under section 10 of the Code of Civil Procedure and subsequent suit filed under Order XXXVII Rule 3 was stayed. Thus, the learned counsel argued that if such point was raised under section 10 of Code of Civil Procedure, it was considered before the hearing of summons for judgment and same ratio is to be applied when the issue of territorial and pecuniary jurisdiction was raised by the defendant before hearing of the summons for judgment in the present Summary Suit. He supported the order of framing the issues by the learned trial Judge. The learned counsel for the respondent/original defendant has submitted that by way of defence, in his reply, he has made out a case for counter claim of Rs. 2 crores which ousts the jurisdiction of City Civil Court.

5. In reply, the learned counsel for the petitioner has submitted that these two judgments are in respect of Section 10 of Code of Civil Procedure and they are not pertaining to Section 9A or preliminary issue. The learned counsel for the petitioner on the point of counter claim has relied on the decision of the Single Judge of Delhi High Court in the case of **Deutsche Ranco Gmbh vs. Shri Mohan Murti, reported in 1993 (28) DRJ.** On the point of Rule 7 Order XXXVII of

CPC, the learned counsel relied on the judgment of the Single Judge of this Court in the case of **Velji Shivaji & Bros. & Ors. vs. M/s. Mathuradas Narandas & Sons & Ors.**, reported in 2000(1) Bom. C.R. 50 where the Court has refused to entertain third party application in the Summary suit at least till the summons for judgment is heard and decided.

6. Heard the learned counsel for both the sides and considered their submissions.

7. In the case of **Sanjog Sadanand Parab** (*supra*), a Summary suit was filed for recovery of security deposit by landlord, wherein the issue raised was – Whether the recovery of licence fee or charges or rent will fall within Section 41(1) of Presidency Small Causes Courts Act. The Division Bench of this Court has held that first the Court has to consider the summons for judgment and then the Court will decide to grant leave to defend or not but raising of such issue before or at the hearing of summons for judgment is premature. It further held that -

“When the Court is hearing Summons for judgment question that the Court is considering whether on the basis of the defence that is put up by the defendants, the

defendant is entitled to either unconditional leave to defend or conditional leave to defend or the defendants is not entitled to any leave to defend. No issues are to be decided by the Court because no issue arise at this stage. The issues in the suit arise only after written statement is filed by the defendants. When the Court is considering the Summons for judgment what the Court is really considering is whether the defendants is to be permitted to file written statement or not?

In our opinion, therefore, the learned Single Judge should have approached the matter from that point of view and considered on the basis of the record before him whether the defendants was entitled to leave to defend or not? The learned Single Judge ought not to have raised the issue at this stage. Raising of such issue at the hearing of the Summons for judgment in our opinion is pre-mature.”

8. In the case of **Velji Shivaji & Bros.** (*supra*), the Single Judge of this Court was dealing with the permissibility of the third party intervention in the Summary Suit under Rule 7 Order XXXVII. The Single Judge of this Court has held that Order XXXVII provides a special procedure in so far as Summary suits are concerned. It held that -

“Save as provided by this order in suits hereunder shall be by the same as the procedure on suits instituted the ordinary manner.

In other words, what this Rule 7 provides is that after apart from the procedure under Order XXXVII what is saved is the other procedure applicable in respect of regular suit will also be applicable. For example, provisions of Order 9, Order 17 etc. will also be applicable so far as suit is concerned.”

9. In the case of **Deutsche Ranco Gmbh** (*supra*), the Single Judge of Delhi High Court has held that the leave to defend cannot be granted to the defendant on the basis of alleged counter claim considering the provisions of Order XXXVII of the Code which does not contemplate entertaining of any counter claim from the defendant. If the defendant has filed counter claim against the plaintiff, he could bring separate suit in that respect.

10. Thus, in the present suit, it was argued that in the reply, the defendant has raised his counter claim of Rs.2 crores and therefore the City Civil Court has no pecuniary jurisdiction to try and entertain the said Summary Suit. The averments made in the plaint are to be considered in the Summary Suit to decide the pecuniary jurisdiction of the Court. The petitioner/plaintiff has restricted his claim to Rs.81 lakhs and hence, there is no question of pecuniary jurisdiction at this stage. There may be a defence raised by the defendant in respect of his counter claim and adjustment of money, however, it is a defence and cannot be framed as a preliminary issue before hearing the summons for judgment.

11. In the case of **Indian Express Newspapers** (*supra*), a

Summary Suit No. 6 of 1966 was filed at Original Side of Bombay High Court for recovery of amount in respect of price of the machinery, however, in December 1965 the defendants have filed Suit No. 2270 of 1965 in the High Court of Calcutta. Therefore, the defendants took out Notice of Motion on 11th February, 1996 for stay of trial of plaintiff's Summary Suit till the disposal of defendants' Suit at Calcutta. The Division Bench Observed that Ordinarily the defendants would have on such summons for judgment by affidavit in reply shown cause and indicated their defence to the suit and applied for leave to defend the suit. However, they earlier moved the Notice of Motion and obtain interim injunction and so the plaintiffs were prevented from taking out the summons for judgment. So, the question was whether the defendants were entitled to take out Notice of Motion before obtaining leave to defend. The Division Bench held that "it is also clear that when ordering a suit to be stayed under the provisions of Section 10, the questions that the Court decides are not those of merits of claim and defence between the parties. The Court has to ascertain if a previously instituted suit is pending in a Court of competent jurisdiction and whether the matter in issue in the subsequently instituted suit is directly and substantially in issue in the previously instituted suit".

12. In the case of **The Maharashtra State Cooperative Marketing Federation Ltd.** (*supra*), while taking the same view, the Division Bench of Bombay High Court in the year 1997 relied on the case of **Indian Express Newspapers** (*supra*). In the case of **Indian Express Newspapers**, there was no question of framing of preliminary issue but relief was asked by taking out Notice of Motion under section 10 of CPC which is altogether different provision in the Code of Civil Procedure. The object of section 10 is that no conflicting decisions is to be passed by the Court leading chaos and therefore, the earlier suit to proceed and later one be stayed. It is made applicable to the Summary Suit which was filed later.

13. Rule 7 of Order XXXVII though allow the use of civil procedure in summary suits, as if instituted in the ordinary manner, it saves the procedure under the said order. The procedure laid down in Order XXXVII should not be violated or cannot be sidetracked by adopting regular Civil Procedure Code. Rule 7 cannot be read excluding saving clause. Thus, while entertaining any such Application or Notice of Motion made by the defendant, it should not be his defence but it should be on any other point dehors his defence. Under Order XXXVII, he is permitted to take defence only after obtaining leave to

defend. Thus, unless and until leave to defend either conditional or unconditional is granted by the Court, the defendants hands are tied. Thus, by way of back-door entry, the defendants cannot be permitted to move the Application or Notice of Motion to raise his defence. Thus, challenge to a pecuniary or territorial jurisdiction is after all defence of the defendants, which they can very well raise by filing affidavit-in-reply to Chamber Summons and may argue the case at the time of hearing of Chamber Summons while seeking leave to defend and on the basis of that, he may be granted leave to defend on the point of jurisdiction or pecuniary jurisdiction of the Court as triable issues. Thus, the procedure laid down in the Summary suit is very specific and peculiar and considering the object of the giving speedy justice to the plaintiff, this procedure is required to be adopted strictly.

14. Rule made absolute in terms of prayer clause (a) of the Petition.

15. Writ Petition is allowed.

(MRIDULA BHATKAR, J.)