

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.57 OF 2017
WITH
CIVIL APPLICATION NO.41 OF 2017

Antaryami R. Joshi through his C.A.
Krishnakumar Ramkishore Joshi ... Applicant
Vs.
Saroj Ramavtar Sharma ... Respondent

Mr. Jagdish Chomal for Applicant.
Mr. Hardik Desai i/b. Mr. D. A. Sakhalkar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 30, 2017

P.C. :

Heard Mr. Chomal, learned Counsel for applicant and Mr. Desai, learned Counsel for respondent at length. Rule. Mr. Desai waives service for respondent. Having regard to the narrow controversy raised in this Application as also at the request and by consent of the parties, Rule is made returnable forthwith and the Application is taken up for final hearing.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant', has challenged the judgment and order dated 05.10.2016 passed by the learned Ad-hoc Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai in Summons for Judgment No.105 of 2015 in Summary Suit No.206 of 2015. By that order, the learned trial Judge granted conditional leave to defend the Suit subject to the defendant depositing amount of Rs.14,80,117 in the trial Court within one month from the date of the order among other directions.

3. Mr. Chomal invited my attention to the finding recorded by the

learned trial Judge in paragraph 11. Having regard to the contentions raised by the defendant as regards confirmation certificate dated 31.03.2014, the learned trial Judge observed that prima facie statement of account does not show that amount was transferred to the defendant. Due to these facts, said transaction is required to be proved properly. For that purpose, it is necessary to give opportunity of hearing to both the parties as there is triable issue. He submitted that once the learned trial Judge has recorded a finding to the effect that there is triable issue, the learned trial Judge should have granted unconditional leave to defend.

4. On the other hand, Mr. Desai supported the impugned order. He invited my attention to paragraph 13 of the impugned order. In paragraph 13, the learned trial Judge has observed that it has not exactly come on record that defendant gave Rs.20,000/- to the plaintiff and the same is subject to proper proof. In order to prove entire loan transaction, opportunity of hearing is to be given to both the parties. Further legal points of maintainability, jurisdiction are raised. Therefore, it is proper to give leave to defend. However, it is not proper to give unconditional leave to defend because loan confirmation certificate shows the transfer of amount from account of the plaintiff.

5. The matter was heard for quite some time and was adjourned so as to enable Mr. Desai to take instructions as to whether plaintiff is agreeable for setting aside the impugned order by consent. After taking instructions from the instructing Advocate, Mr. Desai submits that by consent, the impugned order may be set aside and Summons for Judgment may be restored to the file of the learned trial Judge for deciding it afresh.

6. In view thereof, by consent of the parties, Application is disposed of in the following terms:

- a. Impugned order is set aside;
- b. Summons for Judgment No.105 of 2015 is restored to the file of the learned trial Judge;
- c. The learned trial Judge shall decide the same on the basis of material on record and in accordance with law;
- d. The parties are at liberty to request the learned trial Judge to dispose of the the Summons for Judgment in a time bound manner. If such application is made, the learned trial Judge will pass appropriate order;
- d. Rule is made absolute in the aforesaid terms with no order as to costs.

7. In view of disposal of C.R.A., Civil Application No.41 of 2017 for stay of further proceedings of Summary Suit No.206 of 2015 and Summons for Judgment pending before the trial Court does not survive and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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