

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

WRIT PETITION (ST.) NO.23577 OF 2018

Santosh Babasaheb Kitture

.. Petitioner

Vs.

Mahalaxmi Agency through Proprietor

Shankar Hiralal Kalika

.. Respondent

Mr.Nitin B. Patil for the petitioner.

Mr.Anand S. Patil for the respondent no.1.

CORAM : R.D. DHANUKA, J.

DATE : 9th October 2018

P.C.:

. By this petition filed under Article 227 of the Constitution of India, the petitioner (original defendant) has impugned the order dated 4th July 2018 passed by the Civil Judge, Senior Division, Ichalkarnaji below Exhibit-25 in the Special Summary Suit No.1 of 2016 filed by the respondent (original plaintiff) inter alia praying for recovery of sum of about Rs.13 lakhs.

2. In the said special summary suit, the defendant had filed an application for leave to defend the suit. Learned trial Judge has passed an order dated 4th July 2018 allowing the said application however on the condition that the defendant shall furnish bank guarantee of 50% claim amount on or before the next date. The said order dated 4th July 2018 passed by the learned trial Judge has been impugned by the original defendant on the ground that the learned trial Judge having rendered a prima facie finding that the defendant had good, triable case and has raised reasonable and probable defence, no condition could be imposed

while allowing the application for defending the said suit. He invited my attention to the prima facie observation made by the learned trial Judge in paragraphs 7 and 8 in the impugned order dated 4th July 2018.

3. Learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***State Bank of Hyderabad Vs. Rabo Bank 2015 (7) Mh.L.J. 370*** and in particular paragraphs 15 to 24 thereof in support of the submission that if the trial Court comes to the conclusion that a triable issue is raised, the defendant is entitled to unconditional leave to defend.

4. Learned counsel for the respondent, on the other hand however, submits that the defendant had not disputed the invoices issued by the plaintiff. He also invited my attention to some of the invoices and other documents tendered across the bar and the statement made before the police in the police complaint filed by the plaintiff. He submits that the order passed by the learned trial Judge imposing the condition was a discretionary order and cannot be interfered with by this Court in this petition. Learned counsel for the plaintiff made an attempt to distinguish the judgment of the Hon'ble Supreme Court in the case of ***State Bank of Hyderabad (supra)*** on the ground that in this case, the defendant had made only an application for leave to defend the suit. He placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Sify Ltd. Vs. First Flight Couriers Ltd., (2008) 4 SCC 246*** and in particular paragraphs 8 to 11 thereof in support of the submission that discretionary powers exercised by the Court while considering an application to leave to defend cannot be interfered with by higher Court.

5. A perusal of the order passed by the learned trial Judge while allowing the application (exhibit-25) filed by the original defendant indicates that the learned trial Judge has observed that the defendant had pointed out that on behalf of the plaintiff, a complaint was lodged with Police Station Shivajinagar. The broker Avinash Patil had accepted in the name of the defendant the goods and for the repayment of the amount issued the cheque in favour of the plaintiff. He also accepted that goods were not delivered to the defendant. After recording these observations, the learned trial Judge held that it appeared that the defendant had good, triable case and had raised reasonable and probable defence and an opportunity needs to be granted to contest the suit by filing his written statement.

6. The learned trial Judge, after recording a prima facie finding that the triable case is made out, has recorded that if the defendant is directed to furnish bank guarantee of 50% of claim amount, then no prejudice would be caused to any party. In my view, once the learned trial Judge has recorded a prima facie finding that the triable issues are raised by the defendant and he had good triable case and has reasonable and probable defence, the learned trial Judge could not have imposed any condition while granting leave to defend the suit. The Hon'ble Supreme Court in the case of ***State Bank of Hyderabad (supra)*** has considered this issue at great detail and has held that if the defendant raised a triable issue indicating that he has a fair or bone fide or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend. The principles of law laid down by the

Hon'ble Supreme Court in the case of ***State Bank of Hyderabad (supra)*** squarely applies to the facts of this case. I am respectfully bound by the said judgment.

7. In so far as the judgment of the Hon'ble Supreme Court in the case of ***Sify Ltd. (supra)*** relied upon by the learned counsel for the plaintiff is concerned, the Hon'ble Supreme Court in the said judgment has dealt with Order XXXVII Rule 3(5) of the Code of Civil Procedure, 1908 and proviso thereto which provides that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

8. In the facts of this case, the learned trial Judge himself has rendered a prima facie finding that the defence raised by the defendant are triable defence and has good, triable case and has raised reasonable and probable defence. There is no dispute about the propositions of law laid down by the Hon'ble Supreme Court in both the judgments relied upon by the learned counsel for the parties. However, those principles will squarely support the case of the defendant and not the plaintiff. In my view, the conclusion drawn by the learned trial Judge imposing the condition of 50% claim amount is contrary to the prima facie finding rendered in paragraphs 7 and 8 of the impugned order dated 4th July 2018 and thus the condition imposed deserves to be set aside.

9. I therefore pass the following order :-

- (i) Paragraph 2 of the impugned order dated 4th July 2018 imposing condition to furnish bank guarantee of 50% of claim amount is quashed and set aside.
- (ii) The defendant is granted unconditional leave to defend the suit.
- (iii) The defendant is directed to file written statement within four weeks from today and shall serve a copy thereof upon the plaintiff's advocate simultaneously.
- (iv) Hearing of the suit is expedited.
- (v) Writ petition is allowed in aforesaid terms.
- (vi) There shall be no order as to costs.

R.D. DHANUKA, J.