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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13155 OF 2017

Suddin Dilip Talaulikar
Prop. M/s Talaulikar Associates ... Petitioner
V/s.
Polycab Wires Pvt. Ltd. And
ors ... Respondents

Mr. Aseem Naphade i/by Akash S.Acharya, for the Petitioner.
Mr. Heeralal Chaturvedi, for the Respondents Nos. 1 & 2.
Mr. A.A. Alaspurkar, AGP for respondent No.3.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 27th FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the petitioner, learned counsel for respondent Nos. 1 and 2 and learned AGP for respondent No.3.

2] By this petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 20th July, 2017, passed by City Civil Court, Mumbai, in Summons for Judgment No.105 of 2016, in Summary Suit No.1289 of 2015.

3] By the impugned order, the trial Court has granted the petitioner conditional leave to defend the suit, subject to depositing

sum of Rs.30,00,000/- in the Court within four weeks from the date of the order.

4] The submission of learned counsel for the petitioner is that as per provisions of Order 37 Rule 3 sub clause (5) second Proviso, of Code of Civil Procedure, only when part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court. In this case, it is submitted that, the petitioner has not admitted that any amount is due from him to the respondent/plaintiff. In such situation the condition imposed by the trial Court, of depositing of the amount of Rs.30 lacs is totally unwarranted. No such condition should have been imposed by the trial Court as the petitioner has also raised several triable questions of law.

5] Learned counsel for the petitioner has also taken this Court to the various defences raised by the petitioner to submit that the suit itself cannot be tenable as it is filed by respondent No.2 which is the sole proprietary firm and in view of provisions of Order 30 Rule 10 CPC, such proprietary firm cannot sue. Moreover, it is submitted that so far as plaintiff No.1 is concerned, he has admittedly received amount from respondent No.2, as a result thereof he has also withdrawn the criminal case filed under Section 138 of the Negotiable

Instruments Act for dishonour of the cheques. Therefore, as regards respondent/plaintiff No.1, no cause of action remained for him to continue with the same. As regards respondent No.2, the said suit cannot be tenable as it being filed by the proprietary firm.

6] Secondly, it is submitted that in respect of issuance of disputed cheques, the petitioner has already filed complaint to the police on 22.7.2015 stating that those cheques are not issued by him and one Mr. Manish Jain, with whom he had kept blank cheques has misused the same.

7] Thus, it is submitted that several such triable issues were raised by the petitioner and there is no clear admission of liability on the part of the petitioner. In such circumstances, the trial Court should not have imposed the condition while granting leave to defend the suit.

8] However, in my considered opinion, all the issues which are raised by the petitioner to challenge the maintainability of the suit or about whether the cheques are “issued” or “drawn” or whether cheques were misused etc. are rightly considered by the trial Court as triable issues and as petitioner has raised these triable issues including issue of limitation, the trial Court has granted him leave to defend the suit and rejected the Summons for Judgment filed by the respondents.

9] Now the only question is, “Whether the trial Court should have imposed such condition of depositing amount of Rs.30,00,000/- as a condition precedent for granting leave to the petitioner to defend the suit?” It is true that as per the Second Proviso of Order 37 Rule 3 sub clause (5) CPC, where a part of amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

10] In the present case, it may also be true that there is no express admission given by the petitioner about his liability to repay the amount, but then the fact remains that the petitioner has not disputed that he has purchased the goods from respondent No.2, who is a dealer of respondent No.1., the manufacturer of the goods.

11] Learned counsel for respondents also points out that the invoices were raised and even tax thereon was also paid. If the petitioner has not accepted the goods or returned the goods, then he would not have paid tax. If the case of petitioner is that he has paid the amount towards purchase of goods, then he should have produced receipts to that effect. No such document is produced.

12] In these premises the very fact that the petitioner has admitted transaction of purchase of goods from respondent No.2, and there is no material to show that he has paid the purchase price of

those goods, is sufficient to consider as an admission on his part, that some amount is due from him to the respondent No.2 towards purchase of those goods. Hence, no fault can be found in the impugned order passed by the trial Court in granting the leave subject to condition of deposit of the amount of Rs.30 lacs, in the Court, the impugned order, passed by the trial Court, therefore, in my considered view, does not call for any interference as such.

13] As regards various triable issues on which elaborate arguments are advanced by learned counsel for the petitioner, this Court does not want to enter into discussion on those triable issues, as it may amount to prejudging the case of the petitioner or respondents on those issues. The trial Court is bound to consider all those triable issues at the time of hearing the suit. Otherwise also in the light of these issues, Summons for Judgment taken out by respondent plaintiff was rejected and leave was granted to the petitioner to defend the suit.

14] The writ petition, therefore, being without merits, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]