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

WRIT PETITION NO.13976 OF 2017

M/s Ajinkya Investments
and anr

... Petitioners

V/s.

Indigo Hotel Private Ltd
and ors

... Respondents

Mr. Jaydeep Deo, for the Petitioners.

Ms. Pinaz C. Contractor, for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 23rd APRIL, 2018.

P.C. :

1] Heard learned counsel for the petitioners and respondents.

2] By this writ petition filed under Article 227 of the Constitution of India, the petitioners are challenging the order dated 14.7.2017, passed by the 7th Joint Civil Judge Senior Division, Pune, below Application Exh.31 in Special Summary Suit No.106 of 2009.

3] The application at Exh.31 was filed by the present petitioners who are the original defendants before the trial Court, for leave to defend the suit as contemplated under Order XXXVII Rule 3(5) of the Code of Civil Procedure.

4] The submission of learned for the petitioners is that the suit of respondent company is based on the Indemnity Bond executed by petitioner Nos. 1 and 2. However, according to him no summary suit can be tenable on the basis of the Indemnity Bond. Unless and until the Mr. Vikas Shah has been compelled by the respondent to transfer “B” Class shares, indemnity bond cannot come into action and in such circumstances the suit itself was not tenable, as such, at least in the form of summary suit. The trial Court, has therefore, committed an error in imposing a condition of depositing an amount of Rs.25,00,000/- and subject to that condition granted leave. According to learned counsel for the petitioners when the triable issues are raised, leave should have been unconditional.

5] Per contra, learned counsel for respondent, in support of the impugned order, has submitted that the suit is not merely for execution of the indemnity bond, but the suit is also for transfer of “B” Class shares and hence as it is a suit simplicitor for recovery of money in view of Memorandum of Understanding dated 6.10.2004, which was executed between respondent company and Vikas Shah and for having not complied with the said obligation, therefore, the petitioners approached respondent company to acquire the property and accordingly fresh Memorandum of Understanding dated 24.09.2009, was executed between the petitioners and respondent.

The Petitioners had executed therefore, indemnity bond of Rs.25,00,000/- in favour of respondent company for dues of Vikas Shah. Respondent company has issued a cheque of Rs.25,00,000/- to the petitioners. The petitioners failed to transfer “B” class equity shares in the name of respondent company and failed to pay the said amount after several requests and therefore, it is urged that the impugned order passed by the trial Court granting conditional leave to the petitioners to defend the suit, which is based on reasons, need not be disturbed by this Court.

6] It is true that the trial Court has given reasons as to why it was necessary to grant leave to defend the suit, subject to condition of depositing an amount of Rs.25,00,000/- in the Court. However, the perusal of the plaint makes it clear that it is not only based on Memorandum of Understanding executed between the petitioners and respondent company, but it is also based upon the indemnity bond. The law laid down by the Apex Court in the case of *State Bank of Saurashtra -vs- Ashit Shipping Services (P) Ltd and anr, [(2002) 4 SCC 736]*, makes it clear that the summary procedure in respect of suits for recovery of the debt or liquidated demand in money payable by defendant is not applicable to the claim based on the indemnity bonds, as in such claims, the loss has to be proved.

7] In paragraph No.14 of the judgment, the Apex Court has

clearly laid down that “Order XXXVII C.P.C. does not provide for a claim based on an indemnity bond. The reason is obvious. In cases of claims on indemnity bonds the loss would first have to be proved. Thus a summary procedure cannot be adopted in such cases”.

8] Secondly, even assuming that the suit is also based on Memorandum of Understanding and there are triable issues, in that case also the Apex Court has in the case of *State Bank of Hyderabad -vs- Rabo Bank [(2015) 10 SCC 521]*, laid down that whenever the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave needs to be granted to defend even in cases where the defendant, upon disclosing a fact, though lacks the defence but makes a positive impression that at the trial the defence would be established to plaintiff's claim.

9] Here in the case, it cannot be said that the defence raised by the petitioners is sham or bogus and therefore, triable issue was raised as to maintainability of the suit in the present form. Hence, the trial Court should have granted unconditional leave to defend the suit.

10] The impugned order, therefore, passed by the trial Court, imposing condition of depositing an amount of Rs.25,000/- which is the suit claim in its entirety, needs to be quashed and set aside.

11] Accordingly, the writ petition is allowed.

12] The impugned order passed by the trial Court, imposing condition of depositing an amount of Rs.25,000/- is quashed and set aside.

13] The petitioners are granted unconditional leave to defend the suit.

[DR.SHALINI PHANSALKAR-JOSHI, J.]