IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2917 OF 2018

JAY BAJARANG JINNIG AND PRESSING PVT LTD JALGAON
AND OTHERS
VERSUS
PRALHAD MUKUND MAHAJAN
...
Advocate for the Petitioners : Shri V. R. Jain (Kamboj)
Advocate for the Respondent - sole : Shri V. Y. Patil
...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 06th MARCH, 2019.
...

PER COURT :

1. The petitioner is aggrieved by the order dated 22/12/2017, by which, the Trial Court, in Summary Suit No. 1/2017, considered application Exhibit 17 filed by the petitioner as regards leave to defend and passed an order concluding that the petitioner should furnish a security in the form of a bank guarantee of Rs. 11,75,000/- within one month from the date of the order, failing which the defence of the petitioners would be struck off.

2. The contention of the petitioners is that petitioner Nos. 2 to 4 are associated with petitioner No.1, which is a private

limited company. The respondent claims to have given a hand loan of Rs. 11,75,000/- to Mulchand Ramlal Gil, who was the director of the petitioner company. Contention of the petitioners is that during the life time of Mulchand, the respondent did not put forth any claim. It is only after Mulchand passed away that the respondent is raising a claim.

3. The petitioners further submit that though it is alleged by the respondent that three cheques were issued on behalf of the petitioner company for an amount of Rs. 11,75,000/-, such cheques were never issued. It is contended that they have no knowledge about the said cheques. It is further contended that they also do not have any knowledge about Mulchand taking a hand loan from the respondent.

4. The learned Advocate for the respondent plaintiff has opposed this petition. It is contended that the hand loan amount was given to Mulchand on 01/11/2014 (Rs. Two Lakhs), on 31/01/2015 (Rs. Eight Lakhs) and on 02/05/2015 (Rs. One Lakh Seventy Five Thousand only). Mulchand has also executed a receipt on 11/05/2015 acknowledging such

payments.

5. It is then pointed out that deceased Mulchand, being the director of the Company, issued cheques for different amounts on 14/10/2015, 11/11/2015 and 31/01/2016. Since all these three cheques were dishonoured, that the plaintiff realized that he was defrauded and, therefore, he preferred a summary suit under Order 37 of the Code of Civil Procedure.

6. It is settled law that, when in a summary suit, the defendant moves an application praying for leave to defend, the Court has to *prima facie* appreciate as to whether any grounds for defence have been made out. If there are no grounds, the Court can refuse to grant such a leave. If the Court realizes that a triable case is made out, then an opportunity to defend must be given. The Court can exercise its discretion and depending upon its *prima facie* appreciation, can impose specific conditions on the defendants.

7. I find from the application Exhibit 77 that these petitioners have pleaded ignorance about everything. They

have gone to the extent of stating that they do not know whether their father Mulchand has issued the cheques to the plaintiff or not.

8. It requires no debate that when cheques have been issued and the same have been dishonoured, a legal presumption would arise against the person who has issued the cheques. It, therefore, has to be seen as to whether petitioner Nos. 2 to 4 would actually be liable for the cheques issued by the Director of the Company, they being associated with the Company or whether they can establish that they are completely unconnected with the cause of action.

9. In the above premises, the judgment delivered by the Honourable Apex Court in the matter of ***Mechalec Engineers and Manufacturers Vs. Basic Equipment Corporation AIR 1977 Supreme Court 577*** would be helpful in which the Honourable Apex Court has culled out certain principles which the summary Court has to consider while passing an order on the application praying for leave to defend.

Such principles are as under :-

> *(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*
>
> *(b) If the defendant raises a triable issue indicating that he has a fair or bona 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.*
>
> *(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.*
>
> *(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.*

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

10. In the light of the above, though this issue has neither been pleaded nor canvassed by the petitioners, I find that as the cheques were issued by Mulchand, it will have to be considered whether the cheques were issued by him in his personal capacity or on behalf of the Company. For the said purpose, the right to defend should be granted to these petitioners. While doing so, it needs to be assessed *prima facie* as to whether these petitioners have a good defence, whether they make out a triable case and whether their defence is sham or bogus.

11. In the above fact situation, I find that the impugned order passed by the summary Court is a bit harsh. As the

entire amount mentioned in the cheques has been directed to be deposited, I find that an order of directing the petitioners to deposit an amount of Rupees Four Lakhs in the Court and tender a bank guarantee of Rupees Four Lakhs until the suit is decided, would be an equitable order.

12. In view of the above, this petition is partly allowed. The impugned order passed by the Trial Court dated 22/12/2017 is modified as under :

> "These petitioners shall jointly and severally, deposit an amount of Rs. Four Lakhs in the Trial Court on or before 05/04/2019. Similarly, they shall tender a bank guarantee of Rs. Four Lakhs of a nationalized bank, on or before 05/04/2019 and the said bank guarantee shall continue until the decision in the said suit and would not expire and will not be released until the disposal of the said suit".

13. Needless to state, if these directions are not complied with on or before 05/04/2019, the defence of these petitioners would stand struck off without reference to the Court on

06/04/2019. Depending upon the pendency before the learned Court at Bhusawal, Summary Suit No. 1/2017 shall be decided expeditiously.

(RAVINDRA V. GHUGE, J.)

shp/-