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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 10244 OF 2019**

Messrs. Ami Zarna Oil Division

.....Petitioner

V/s.

Messrs. Deepak Bhawanji and Co. and others

.....Respondents

Mr. Harish Pandya i/b Mr. Kalpesh Nansi for the Petitioner

Mr. Bholaprasad S. Shukla for respondent no. 2

Mr. V. R. Tripathi for respondent no. 3

CORAM : NITIN W. SAMBRE, J.**DATE : OCTOBER 14, 2019.****P.C.**

Heard respective counsel.

2 In Summary Suit No. 8808 of 1994 vide impugned order dated 26/03/2019, the learned Court below granted unconditional leave to defend pursuant to provisions of Order XXXVII Rule 5 of Code of Civil Procedure, 1908 (Hereinafter referred to as 'the Code' for the sake of brevity). As such, this petition.

3 Learned counsel for the petitioner-original plaintiff would invite attention of this Court to the cheque dated 30/04/1994, cheque return memo dated 30/05/1994 so as to claim that under the Negotiable Instruments Act, there is presumption in favour of the petitioner that the cheque is being issued in its favour for admitted debt. Relying on 2nd proviso to Sub-Rule (5) of Rule 3 of Order XXXVII of the Code he would urge that same amounts to admitting liability and that being so, respondent-defendant should have been put to condition of depositing of amount for which decree was sought. In addition, the learned counsel would urge that the cheque in question was issued by a partnership firm. The dissolution of such firm, closing of account are the facts which are not within the knowledge of the petitioner and such facts are being twisted so as to frustrate the claim of the petitioner-plaintiff for grant of money decree or for grant of conditional leave to defend. As such, according to him, respondent-defendant are required to put to condition that they shall deposit entire amount of claim for which decree is sought.

4 Learned counsel for the respondent-defendant would support

the order impugned.

5 Perused the order impugned and other documents which are placed on record. This Court is required to take judicial note of the fact that Suit in question was initiated in 1994, same was dismissed in default as the petitioner-plaintiff failed to appear and same was of late restored. As such, Suit in question remained pending for almost last 25 years.

6 Apart from above, the learned Court below while granting unconditional leave to defend was sensitive to the fact that current account against which cheque in question was issued was closed on 17/09/1993 as against the cheque issued on 30/04/1994. The defence which is sought to be put forth that due to internal conflict in the partnership firm, cheque is being sought to be misused by one of the partner in-conivance with petitioner-plaintiff.

7 All these facts prevailed before the learned Court below while granting unconditional leave to defend.

8 One of the contention which was raised by the learned counsel for the petitioner that liability arising out of the cheque in question and the issuance of the cheque is not categorically denied and that being so, in view of 2nd proviso to Sub-Rule (5) of Rule 3 of Order XXXVII of the Code, it has to be termed to be an admitted debt. That being so, respondent-defendant should be put to condition of depositing entire amount for which decree is sought. Said contentions are also liable to be rejected as it is brought to the notice of the Court below so also this Court as regards issuance of cheque after closure of account and liability after dissolution of the firm. It is informed that the firm itself was dissolved on 11/11/2009 whereas cheque which is found to be basis for money decree claimed to have been issued on 30/04/1994 i.e. almost after period of two years.

9 In the aforesaid background, the unconditional leave to defend ordered by the learned Civil Court does not warrant any interference as same is in accordance with law. That being so, petition lacks

merit, stands dismissed.

10 Considering the fact that Suit is pending for last 25 years and learned counsel for the petitioner has assured that he shall not seek any adjournment on whatsoever count in the aforesaid Suit. The Trial Court is directed the decide the Suit expeditiously.

[NITIN W. SAMBRE, J.]