

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2297 OF 2018

Navnath R. Adak

An adult age : 60 yrs., Indian Inhabitant of
Mumbai. Proprietor of M/s. Vinayak Syntex,
Having address A-Wing, Flat No.12, 2nd
Floor, Plot No.70, 71, Ashwa Ghosh
Co-op. Hsg. Society, Ashok Nagar Road,
Near Datta Mandir, Bhandup (East),
Mumbai – 400 042.

...Petitioner

Versus

Rakesh Giridharilal Rungta

An Adult Indian Inhabitant of Mumbai
Aged --- years, Karta of Rakesh Rungta HUF
Proprietor of Shree Shyam Silk Mills,
carrying on business at 100, Rungta
Bhavan, Shop No.12A & Room No.35, 3rd
Floor, Sitaram Poddar Marg, (Fanaswadi),
Mumbai – 400 002.

...Respondent

Mr. Pradeep J. Thorat, for the Petitioner.

Mr. Rajendersingh Saloja, for the Respondent.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 15th JULY, 2019.

PRONOUNCED ON: 29th JULY, 2019.

JUDGMENT:-

1. Rule. Rule made returnable forthwith. With the consent of the Counsels for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India takes exception to the order in Summons for Judgemnt No.249

of 2015 in Summary Suit No.464 of 2015, dated 27th July, 2017, passed by the learned Judge, City Civil Court, Bombay, whereby the learned Judge granted leave to defend the summary suit to the petitioner – defendant on the condition of deposit of an amount of Rs.49,95,270/- within a period of two months therefrom.

3. The background facts leading to the instant petition can be stated in brief as under:

(a) The respondent – plaintiff instituted a suit under the provisions of Order XXXVII of the Code of Civil Procedure, 1908, (“Code”) bearing Summary Suit No.464 of 2015, based on 27 cheques allegedly drawn by the defendant aggregating to Rs.49,95,270/-, on NKGSB Bank, Parel Branch, payable on various dates, falling between 26th March, 2012 to 18th April, 2012, which were dishonoured on presentment to the drawee bank.

(b) It is the case of the plaintiff that the plaintiff deals in the business of manufacture and sale of textiles under name and style of Shri. Shyam Silk Mills. The defendant also deals in the business of textiles under name and style of M/s. Vinayaka Syntex. The defendant had placed orders for supply of the goods. The plaintiff had sold and delivered the goods to the

defendant under 59 bills for the aggregate price of Rs.68,71,361/-. The defendant used to pay the price of the goods by way of account payee post-dated cheques or demand draft, within a period of 30 days from delivery. It was agreed between the parties that in the event of default the defendant would pay the amount with interest at the rate of 24% from due date of the bills. The defendant did pay the price of the goods covered by first 15 bills i.e. Rs.16,98,970/-. However, the cheques drawn by the defendant towards payment of the price of the goods sold and delivered under bills, at serial nos.16 to 59, were returned unpaid on presentment to the drawee bank on account of insufficiency of the funds. The defendant addressed a statutory notice demanding the amount covered by the dishonoured cheques. As the defendant failed to pay the amount covered by the cheques, despite the service of the demand notice, the plaintiff lodged a complaint against the defendant for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("the N. I. Act") before the learned Metropolitan Magistrate, 20th Court, at Esplanade Mumbai. For enforcing the civil liability, the plaintiff also called upon the defendant to pay the amount covered by the dishonoured cheques by notice dated 27th January, 2015.

Despite the said demand, the defendant committed default in payment of amount covered by the cheques. Hence, the plaintiff instituted the suit under Order XXXVII of the Code.

(c) In the reply to the Summons for Judgment, the defendant contested the tenability of the suit on the grounds that Rakesh Rungta, the plaintiff, was not competent to institute the suit on behalf of the Rakesh Rungta, HUF and as the Proprietor of M/s. Shree Shyam Silk Mills and that the City Civil Court at Mumbai lacked the territorial jurisdiction to entertain, try and dispose of the suit. On merits, the defendant raised a bold defence that the defendant had purchased goods from the plaintiff under the first 15 bills from 21st January, 2012 to 11th December, 2012 and the defendant had not purchased any goods under bills at serial nos.16 to 59, as alleged by the plaintiff. The defendant claimed that the defendant did pay the price of the goods covered by first 15 bills. It is the case of the defendant that when the defendant had approached the plaintiff to supply the goods, the plaintiff had insisted for delivery of blank cheques by way of security. The defendant was, thus, constrained to deliver blank signed cheques. The plaintiff misused the custody of those blank signed cheques and prepared false and bogus bills to show the sale and delivery of the goods and fraudulently

filled in the contents of the cheques with dishonest intention to extract the amount from the defendant, which the defendant does not owe.

(d) The defendant further contended that there was no proof of sale and delivery of the goods. In fact, the defendant does not carry on the business at Dadar and hence there was no question of delivery of the goods at Dadar, as falsely claimed by the plaintiff. It was contended that there was discrepancy in the amount shown to be outstanding against the defendant in the notices issued by the plaintiff on 10th July, 2012 (Rs.56,62,429/-) and 27th January, 2015 (Rs.51,72,391/-). Since the defendant had discharged the liability towards the price of the goods sold and delivered under bills at serial nos.1 to 15, and there were no further transactions between the plaintiff and defendant, there was no occasion for issuance of cheques in question. As the plaintiff allegedly misused the custody of blank signed cheques and instituted the suit on the basis of forged and fabricated documents, the defendant prayed for an unconditional leave to defend the suit.

(e) By way of an Affidavit-in-rejoinder the plaintiff controverted the allegations made by the defendant in the Affidavit-in-reply. Since the defendant had contended that there

was no evidence of sale and delivery of the goods, copies of the delivery challans were placed on record. Though, there were further pleadings by the parties by way of sur-rejoinder and reply thereto, it would be suffice to note that the defendant alleged that the delivery challans, tendered on the record of the Court along with Affidavit-in-rejoinder, were forged and fabricated.

(f) In the light of the aforesaid pleadings, the learned Judge heard the parties and upon consideration of the material on record and submissions canvassed across the bar, in the backdrop of the principles which govern the grant of leave to defend in a summary suit, the learned Judge was persuaded to hold that the core of the defence of the defendant that the blank cheques were tendered for security only was an evasive and moonshine defence. However, since there was a doubt regarding the identity of the transporter through whom the goods were delivered, the learned Judge was persuaded to grant conditional leave to defend upon deposit of the sum of Rs.49,95,217/-; covered by the dishonoured cheques. Being aggrieved by and dissatisfied with the grant of conditional leave, the defendant has invoked the writ jurisdiction of this Court.

4. In the aforesaid setting of the matter, the question which wrenches to the fore is whether, in the backdrop of the material on record, the learned Judge, City Civil Court, justifiably exercised the discretion to grant conditional leave to defend upon deposit of the amount covered by the dishonoured cheques.

5. Mr. Thorat, the learned Counsel for the Petitioner urged that the learned Judge totally misconstrued the nature of the defence put-forth by the defendant. From the tenor of the defence questioning the very sale and delivery of the goods, as claimed by the plaintiff, the defendant can be said to have raised triable issues manifesting a fair or reasonable defence, if not a substantial defence, warranting the grant of unconditional leave to defend, urged the learned Counsel for the petitioner. Laying emphasis on the alleged improvement which the plaintiff endeavoured to make, by tendering on record the copies of the delivery challans, only when the defendant raised a positive defence that there were no documents to evidence the sale and delivery of goods, it was strenuously urged on behalf of the defendant that this circumstances itself was sufficient to hold that the defendant had raised triable issues. In the circumstances, according to the learned Counsel for the

petitioner, the learned Judge committed a grave error in granting conditional leave, in the nature of deposit of the entire amount covered by the dishonoured cheques.

6. Per contra, Mr. Saloja, the learned Counsel for the respondent stoutly submitted that the grant of conditional leave by the learned Judge is impeccable. The defendant has, in fact, no defence. The claim that the defendant had delivered blank signed cheques and the plaintiff misused the custody thereof is palpably false. The material on record brings out the shallowness of the said defence. According to the learned Counsel for the respondent, the contemporaneous conduct of the defendant militates against the said defence of misuse of custody of blank signed cheques. It was further urged that having conceded the fact that the plaintiff had delivered the goods under the bills at serial nos.1 to 15 and the defendant had paid the price thereof, it does not stand to reason that the defendant would not have taken any steps after the transactions were concluded and still the plaintiff allegedly retained the custody of blank signed cheques. Thus, the learned Judge was justified in recording a finding that the defence was moonshine.

7. In the backdrop of the aforesaid rival submissions, it has to be seen whether the learned Judge exercised the discretion on the touchstone of well recognised principles for grant of leave to defend in a summary suit. If the defendant makes out a substantial defence, with an element of success therein, the defendant is entitled to an unconditional leave to defend. If the defendant discloses, *prima facie*, fair and a reasonable defence, ordinarily, the defendant is entitled to an unconditional leave. In contrast to this, if the defence raised by the defendant appears frivolous, false, or sham the leave to defend shall be refused, and the plaintiff is entitled to judgment. The controversy, however, arises in those matters where there is a doubt as to whether the defendant has raised a triable issue, and the nature of the conditions to be imposed, if the Court comes to the conclusion to grant conditional leave to defend. There is a significant development in law, especially as regards the grant of leave on the condition as to deposit of the amount in the Court.

8. A four Judge Bench of the Supreme Court in the case of ***Milkhiram (India) Private Ltd. and others vs. Chamanlal Bros.***¹ had an occasion to deal with the question of exercise of

1 AIR 1965 Supreme Court 1698.

discretion in granting leave to defend a suit in accordance with the provisions contained in Order XXXVII Rule 3(3), as amended by the Bombay High Court. The Supreme Court after analysis of the provisions and the earlier pronouncements enunciated the legal position in the following words:

“It is indeed not easy to say in many cases whether the defence is a genuine one or not and, therefore, it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous, or false, or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear cut way like this and the Judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to O.37, R.2 made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it, he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule of general application.”

(emphasis supplied)

9. In the case of ***M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation²***, wherein also the summary suit was instituted on the strength of a cheque drawn towards the price of the goods sold and

2 (1976) 4 SCC 687.

delivered, the Supreme Court, in the backdrop of interference by the High Court, in exercise of revisional jurisdiction, with an order of grant of unconditional leave to defend, had enunciated the legal position in the following words:

"8. In *Smt. Kiranmoyee Dassi & Anr. v. Dr. J. Chatterjee*, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 C.P.C. in the form of the following propositions (at p. 253):

(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".

9. The case before us certainly does not fall within the class (e) set out above. It is only in that class of case that an imposition of the condition to deposit an amount in Court before proceeding further is justifiable."

10. The learned Counsel for the petitioner placed reliance on a judgment of the Supreme Court in the case of ***State Bank of Hyderabad vs. RABO Bank***³, wherein, after adverting to the often quoted propositions enunciated in the case of ***Kiranmoyee Dassi v. J. Chatterjee***⁴, the Supreme Court culled out the legal position as under:

"17. An analysis of the above principles makes it clear that in cases where the defendant has raised a triable issue or a reasonable defence, the defendant is entitled to unconditional leave to defend. Leave is 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 the plaintiff's claim. Only in the cases where the defence set up is illusory or sham or practically moonshine, is the plaintiff entitled to leave to sign judgment."

11. As against this, the learned Counsel for the respondent placed a strong reliance upon a judgment of the Supreme Court in the case of ***IDBI Trusteeship Services Limited vs.***

3 (2015) 10 Supreme Court Cases 521.

4 AIR 1949 Cal. 479.

Hubtown Limited⁵. In the case of IDBI Trusteeship, the Supreme Court adverted to the question of binding efficacy of the propositions laid down in the case of **Mechelec** (supra), after the amendment of Order XXXVII of the Code in the year 1976. The Supreme Court noted that the judgment in the case of **Mechelec** (supra), in turn, adverts to the propositions expounded in **Kiranmoyee Dassi's case** (supra). The Supreme Court thereafter noticed the change in the provisions of Order XXXVII Rule 3, brought about in the year 1976, and concluded that the principles stated in paragraph 8 of the **Mechelec's** case (supra) would stand superseded in view of the amendment to Order XXXVII Rule 3 and binding decision of four Judges in **Milkhiram's** case (supra). The observations of the Court in paragraph 16, and restated propositions, formulated in paragraph 17, read as under:

“16. It is thus clear that O.37 has suffered a change in 1976, and that change has made a difference in the law laid down. First and foremost, it is important to remember that *Milkhiram* case is a direct authority on the amended O.37 provision, as the amended provision in O.37 Rule 3 is the same as the Bombay amendment which this Court was considering in the aforesaid judgment. We must hasten to add that the two provisos to sub-rule (3) were not, however, there in the Bombay amendment. These are new, and the effect to be given to them is something that we will have to decide. The position in law now is that the trial Judge is vested with a discretion which has to result in justice being done on the facts of each case. But Justice, like Equality,

5 (2017) 1 Supreme Court Cases 568.

another cardinal constitutional value, on the one hand, and arbitrariness on the other, are sworn enemies. The discretion that a Judge exercises under Order 37 to refuse leave to defend or to grant conditional or unconditional leave to defend is a discretion akin to Joseph's multi-coloured coat – a large number of baffling alternatives present themselves. The life of the law not being logic but the experience of the trial Judge, is what comes to the rescue in these cases; but at the same time informed by guidelines or principles that we propose to lay down to obviate exercise of judicial discretion in an arbitrary manner. At one end of the spectrum is unconditional leave to defend, granted in all cases which present a substantial defence. At the other end of the spectrum are frivolous or vexatious defences, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised which yield conditional leave to defend in most cases. It is these defences that have to be guided by broad principles which are ultimately applied by the trial Judge so that justice is done on the facts of each given case.

17. Accordingly, the principles stated in paragraph 8 of Mechelec's case will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four judges in Milkhiram's case, as follows:

17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with

such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.”

(emphasis supplied)

12. In the light of the aforesaid exposition of law, the defence set up in the case at hand needs to be appreciated so as to determine in which of the aforesaid categories the defence set up by the petitioner falls. Recourse to the impugned order, at this stage, may be apposite. The learned Judge found that the defence of the defendant that he had delivered blank signed cheques is a sham and moonshine defence for the following reasons:

- (i) The bill number found mention overleaf each of the dishonoured cheques so as to indicate the liability towards which it was drawn.
- (ii) The defence of delivery of unsigned blank cheques does not allure confidence as in the body of two of the cheques there were signatures of the drawer in token of the corrections in the contents of those cheques.

(iii) The defendant did not place on record the copies of the delivery challans in respect of the admitted transactions, represented by bills at serial nos.1 to 15, so as to indicate the place where the delivery of goods thereunder was made, and compare and contrast them with the disputed delivery challans, which were stated to be forged and fabricated.

As indicated above, the learned Judge, was however persuaded to grant the conditional leave as there was a doubt regarding the identity of the transporter and discrepancy regarding the outstanding amount claimed in two notices issued by the plaintiff to the defendant.

13. The aforesaid approach of the learned Judge does not appear to be unjustifiable. The defence set up by the defendant is required to be appreciated in the backdrop of the fact that there is no qualm over the fact that there were transactions of sale and delivery of the goods between the plaintiff and defendant. It is indisputable that the plaintiff delivered the goods and defendant paid for the price of the bills at serial nos.1 to 15. Thus, the quality of defence of misuse of blank signed cheques needs to be evaluated on the anvil of the contemporaneous record and conduct of the defendant.

14. Indisputably, the plaintiff had addressed statutory notices demanding the amount covered by the dishonoured cheques, before lodging complaints for the offence punishable under Section 138 of the N. I. Act. The defendant issued a reply to the said demand notice on 4th October, 2012. It is pertinent to note that the defence set up by the defendant that the transactions between the parties were limited to the bills at serial nos.1 to 15 and despite the payment of the price covered by those bills the plaintiff misused the custody of the cheques delivered by way of security, is conspicuous by its absence in the said reply dated 4th October, 2012. On the other hand, it was flatly denied that the plaintiff ever supplied any goods to the defendant. An endeavour was made in the said reply to demonstrate that the plaintiff never supplied any goods to the defendant and thus there was no question of payment of the price thereof by issuing the dishonoured cheques.

15. Undoubtedly the plaintiff placed on record the delivery challans after the defendant alleged that there were no documents to evidence the sale and delivery of the goods. However, this fact itself is not sufficient to jettison away the claim of the plaintiff. The fact that the suit was instituted on the basis of the dishonoured cheques cannot be lost sight of. The

plaintiff may adduce evidence in proof of underlying transaction of sale and delivery of goods. However, in view of the presumption of law incorporated in Section 118 of the N. I. Act, the Court is enjoined to presume that the cheques were drawn for consideration. From this standpoint, the reasons assigned by the learned Judge, namely, the bill number finds mention overleaf each of the cheques, there are few cheques on which drawer has put signatures in token of the corrections of the contents of the cheques and that the defendant did not place on record the delivery challans in respect of undisputed transactions, appear cogent and justifiable.

16. At this stage, sans evidence, it is neither permissible nor possible to record a categorical opinion, on the veracity of the defence, yet, *prima facie*, if the transactions between the plaintiff and defendant were restricted to admitted bills, at serial nos.1 to 15, it does not appeal to human credulity that the defendant would have maintained stoic silence till the plaintiff issued demand notice under Section 138 of the N. I. Act. The failure of the defendant to join the issue at the first possible opportunity by raising the contention that there were no transactions, beyond the admitted transactions between the plaintiff and defendant, *prima facie*, indicates that the

defendant does not have a substantial defence or that the defendant has raised a fair and reasonable defence or triable issues.

17. The defence raised by the defendant thus fall in the category of a defence which is plausible but improbable, as indicated in paragraph 17.4 of the judgment in the case of **IDBI Trusteeship Services** (supra). The learned Judge was thus within his rights in imposing the condition of deposit of the amount covered by the dishonoured cheques. Resultantly, I am persuaded to hold that the learned Judge rightly exercised the discretion to grant conditional leave upon deposit of the amount covered by the dishonoured cheques.

18. The conspectus of the aforesaid consideration is that no interference is warranted in the impugned order in exercise of extra-ordinary jurisdiction under Article 227 of the Constitution of India. Resultantly, the petition deserves to be dismissed.

19. It is however made clear that this Court has examined the matter from the point of view of justifiability of grant of conditional leave to defend and it may not be understood to have expressed any opinion on the merits of the matter and the learned Judge, City Civil Court, shall not be influenced by any of the observations made hereinabove, at the trial of the suit.

20. The petition, thus, stands dismissed. In the circumstances, there shall be no order as to costs.

21. Rule stands discharged.

[N. J. JAMADAR, J.]