

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

WRIT PETITION NO.644 OF 2019

Ashok Shivbhushan Pardeshi

.. Petitioner

V/s.

Ashok Fakirchand Khivsara

.. Respondent

Mr.Niranjan Mogre I/b Mr.Mankirat Singh for the petitioner

Mr.Prasad Sarvankar I/b Mr.Chaitanya Nikate for the respondent
no.1

**CORAM: K.K. TATED, J
DATED : JANUARY 25, 2019**

P.C. :

1 Heard.

2 By this petition under Article 227 of the Constitution of India, petitioner original defendant challenges the order dated 17.08.2018 passed by 25th Joint Civil Judge, Senior Division, Pune below Exhibit 21 in Regular Summary Suit No.140 of 2015 granting conditional leave to the petitioner original defendant to defend the Summary Suit on deposit of Rs.1,50,000/-.

3 In the present proceeding, Respondent original plaintiff filed Summary Suit No.140 of 2015 before the Civil Judge, Senior Division, Pune for recovery of sum of Rs.2,58,075/-. In that Suit,

petitioner defendant applied leave to defend the Suit in terms of Order 37 Rule 5 of the Code of Civil Procedure, 1908. After hearing both the sides, Trial Court directed defendant to deposit sum of Rs.1,50,000/- within one month and file his written statement. Trial Court at the time of passing impugned order recorded in paragraph 5 that claim to the extent of Rs.1,50,000/- is based on Negotiable Instrument i.e. cheque dated 20.12.2012. Trial Court also recorded finding of fact that defendant has not denied his signature on the said cheque.

4 The learned counsel for the petitioner submits that Trial Court erred in coming to the conclusion that petitioner failed to make out a case to defend the Summary Suit unconditionally. He submits that at one point of time, Trial Court held that petitioner has made out a case for defending the Suit. In paragraph 5 Trial Court on the basis of Negotiable Instrument Act i.e. cheque dated 20.12.2012 directed petitioner to deposit sum of Rs.1,50,000/- for defending the Summary Suit. He submits that the Apex court in the matter of ***Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation***, AIR 1977 SC 577 decided the principles to be followed at the time of deciding application for leave to defend the Summary Suit. He relies on paragraph 8 of the said Judgment which reads thus:

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee 49 C.W.N. 246 , 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, shows 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.”

5 On the basis of these submissions, the learned counsel for the petitioner submits that impugned order is required to be set aside with permission to the petitioner to file written statement and defend the Suit unconditionally.

6 Heard.

7 It is to be noted that in the present proceeding, admittedly, respondent defendant filed Suit for recovery of Rs.2,58,075/- + 8% interest. In that Suit, plaintiff made averments to the extent that defendant executed Negotiable Instrument Act i.e. cheque dated 20.12.2012 to the extent of Rs.1,50,000/-.

8 Considering the cheque of Rs.1,50,000/-, Trial Court rightly held that petitioner have to deposit Rs.1,50,000/- to defend the Summary Suit and file his written statement. The authority relied by the petitioner in the matter of ***Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation*** also states that court can direct the defendant to deposit some amount if the court comes to the conclusion that some amount is liable to be paid by the defendant to plaintiff.

9 In view of these facts and as Trial Court on the basis of

cheque dated 20.12.2012 directed petitioner to deposit sum of Rs.1,50,000/- to defend the Summary Suit and file his written statement, I do not find any reason to interfere with the well reasoned order passed by the Trial Court. Hence, following order:

10 Writ Petition stands rejected.

11 No order as to costs.

(K.K. TATED, J.)