

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**WRIT PETITION NO. 13684 OF 2017**

Sanjaykumar Suganchand Kasliwal,  
Age : 49 years, Occu. Business,  
R/o Plot No.13, Chintamani Colony,  
Aurangabad

**PETITIONER**  
(Ori. Defendant)

**VERSUS**

Beej Sheetal Research Pvt. Ltd.,  
A registered Company under the  
Companies Act, having its registered  
office at Beej Sheetal Corner,  
Mantha Road, Jalna,  
through its authorized Signatory  
Shri Nilesh s/o Ramesh Agrawal,  
Age : 35 years, Occu. Service,  
R/o Jalna

**RESPONDENT**  
(Orig. Plaintiff)

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Mr. A.S. Bajaj, Advocate for the petitioner  
Mr. S.B. Deshpande, Advocate for the respondent

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**CORAM : MANGESH S. PATIL, J.**

**JUDGMENT RESERVED ON : 16.09.2020**  
**JUDGMENT PRONOUNCED ON : 21.09.2020**

**JUDGMENT :**

Heard.

2. Rule. The Rule is made returnable forthwith. Learned  
Advocate Mr. S.B. Deshpande waives service for the respondent. With the

consent of both the sides, the matter is heard finally at the stage of admission.

3. The petitioner is the defendant in Summary Suit No. 3/2016 filed by the respondent in the Court of Civil Judge, Senior Division, Jalna, under Order-XXXVII of the Code of Civil Procedure (for short, "Code"). The respondent averred that it had lent money to the petitioner to the tune of rupees five crores in the year 2013 i.e. rupees two crores by R.T.G.S. and rupees three crores by way of a cheque. The petitioner had agreed to return the money with interest. It issued a post dated cheque bearing date 31.12.2015 towards repayment of the principal amount. However, at his instructions, his banker refused to honour it. Accordingly, the respondent issued a statutory notice for initiating a proceeding under Section 138 of the Negotiable Instruments Act. Simultaneously, it filed the present suit, invoking the powers of the Civil Court under Order-XXXVII of the Code and demanded the principal amount of rupees five crores together with interest at the rate of 18% per annum from the date of the suit.

4. The petitioner appeared and applied for leave to defend under the provisions of Order-XXXVII Rule 3(5) of the Code. He raised objection as to the maintainability of the suit under Order-XXXVII, which, according to him, is the clinching defence available to him. He further pointed out that the transaction was hit by the provisions of the Maharashtra Money Lending (Regulation) Act, 2014 ("Act", for short). It was in the nature of money

lending and the claim is hit by the provision of Section 13 of the Act.

5. The respondent contested the application and contended that the money was advanced against a negotiable instrument. The cheque was dishonoured and the transaction was not prohibited by the provisions of the Act and relied upon the judgment of the Division Bench of this Court in case of *Parekh Aluminex Limited Vs. Ashok Commercial Enterprises; 2015(2) ALL MR 679*.

6. After hearing both the sides, by the impugned order, the learned District Judge-1 allowed the application and granted leave to the petitioner to defend the suit, however, subject to a condition to deposit half of the principal sum in the Court within a period of six weeks from the date of the order, which was further directed to be invested in a nationalized bank for a period of two years.

7. Being aggrieved and dissatisfied with the condition imposed to deposit half of the principal sum, the petitioner is before this Court.

8. Mr. A.S. Bajaj, learned Advocate for the petitioner, submits that the petitioner has strong and genuine defences to make. Even accepting the version of the respondent it was indulging in money lending. The money was not advanced against any negotiable instrument and it is, therefore, a strong defence available to the petitioner that the suit itself is not maintainable in view of Section 10 of the Act. It is in view of such availability of a strong

defence that the case would fall under category (1) or (2) of the categories laid down by the Calcutta High Court way back in the year 1949 in case of *Smt. Kiranmoyee Dassi & Anr. Vs. Dr. J. Chatterjee; AIR 1949 Calcutta 479*, which has been reiterated by the Supreme Court with approval in case of *State Bank of Hyderabad Vs. Rabo Bank; (2015) 10 SCC 521*. The learned Advocate would, therefore, submit that since the petitioner has raised a triable issue and reasonable defence, he is entitled to an unconditional leave to defend. The defence set up cannot be said to be either illusory or sham or a moonshine so that the learned District Judge could have imposed a condition of depositing money. The learned Advocate, therefore, submits that the learned District Judge has imposed the condition without adverting to the legal position and catena of judgments delivered by the Supreme Court.

9. Per contra, Mr. S.B. Deshpande, learned Advocate for the respondent, submitted that the law on the point has been succinctly crystalized by the Supreme Court in case of *Milkhiram (India) Private Ltd. and others vs. Chamanlal Bros. ; AIR 1965 SC 1698*. The learned Advocate would then submit that in case of *M/s Mechelec Engineers & Manufacturers vs. M/s Basic Equipment Corporation (1976) 4 SCC 687*, the Supreme Court has followed with approval the decision in case of *Smt. Kiranmoyee Dassi & Anr.* (supra). The learned Advocate would then submit that the law governing the field has now been summarized by this Court in case of *Dimples Infra vs. Heer Mehta Landmark Developers Pvt. Ltd.;*

*MANU/MH/3473/2019*, decided on 12.12.2019. The learned Advocate would, therefore, submit that the Supreme Court, in case of *IDBI Trusteeship Services Limited Vs. Hubtown Limited; (2017) 1 SCC 568*, has considered efficacy of the propositions laid down in case of *M/s Mechelec Engineers & Manufacturers (supra)* post amendment of Order-XXXVII of the Code in the year 1976 and having noticed the change in the provisions of Rule 3, concluded that the principles laid down in paragraph 8 of *Mechelec's* case would stand superseded in view of such amendment and the binding decision of the four judges in *Milkhiram's* case.

The learned Advocate, therefore, submitted that now the situation at hand would be governed by clause 17.3 from the judgment of *IDBI Trusteeship Services Limited* (supra). When the trial judge has exercised the discretion judiciously, this Court need not invoke the writ jurisdiction to cause any interference.

10. At the outset, it is necessary to note that neither the respondent is seeking leave for signing the judgment, may be to the extent the petitioner is admitting his claim nor is the petitioner impugning the order except the condition to deposit half of the principal sum.

11. Since this Court in case of *Dimples Infra* (supra), has succinctly discussed and crystalized the law governing the field, it would be appropriate to reproduce paragraph 12 from that judgment, which reads thus:-

*“In the case of IDBI Trusteeship Services Limited vs. Hubtown Limited MANU/SC/1490/2016 : (2017) 1 Supreme Court Cases 568, 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 M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation MANU/SC/0043/1976 : (1976) 4 SCC 687, in turn, adverts to the propositions expounded in Kiranmoyee Dassi v. J. Chatterjee MANU/WB/0141/1945 : AIR 1949 Cal. 479. 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 Mechele'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, 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 buffing 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 any 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 backdrop of such trite legal position, it would be now relevant to consider the proposed defence. Nowhere in the application has the petitioner emphatically denied to have borrowed money from the respondent much less to the tune of rupees five crores. According to the respondent, the money was lent against a negotiable instrument in the form of a post dated cheque. Importantly, nowhere in the application seeking leave to defend, the petitioner has made any averment touching this allegation about issuance of the post dated cheque for repayment of money.

13. These facts indeed are very important inasmuch as, as laid down in case of ***Parekh Aluminex Limited*** (supra), the loan advanced against negotiable instruments falls under the Exception to the bar contained in

Section 10 of the Bombay Money-Lenders Act, 1946 since it would not fall in the category of loan as defined under Section 2(9) of that Act (which provisions are similar to Section 13 and Section 2(13) of the Act. Where and in what form the money was lent and whether it would fall in the category of “loan” and would be hit by the bar contained in Section 10 of the Bombay Money-Lenders Act, 1946, would indeed be the matters which may have to be gone into at the trial. However, absence of such pleadings after admitting receipt of money is a matter which would create a doubt about the bona fides of the petitioner’s defence.

14. Indeed, the learned District Judge has not adverted to the trite principles laid down by the Supreme Court from time to time touching this aspect. She has merely asked the petitioner to deposit half of the principal sum as a condition for grant of leave. On an independent scrutiny, it does appear that the matter falls in category 17.3 from the decision in case of ***IDBI Trusteeship Services Limited*** (supra), which enables a trial judge to impose a condition inter alia of making payment into the Court where the defendant raises a triable issue but a doubt is left about his good faith or genuineness of his defence.

15. The petitioner has received the money way back in the year 2013 and we are in the year 2020. The parties were before the learned District Judge in the year 2017 when the impugned condition was imposed. For whatever reason, the condition has not been obeyed till date and the present

Writ Petition has been lingering in this Court for last almost three years.

16. It is in view of such state-of-affairs, in my considered view, the nature of the defence being raised by the petitioner and its quality justifies the condition imposed by the learned District Judge in asking him to deposit half of the principal sum within a period of six weeks. The Writ Petition, therefore, is liable to be dismissed, having no substance.

17. Contemplating such a situation, learned Advocate Mr. A.S. Bajaj, for the petitioner submitted that in case this Court was not inclined to allow the Writ Petition, the petitioner may be granted a time of two months to deposit the money.

18. Having carefully considered all the happenings reproduced hereinabove, when the impugned order has been passed almost three years back, I am inclined to grant a period of only six weeks from today for depositing half of the principal sum, as directed by the impugned order.

19. In the result, the Writ Petition is dismissed and the Rule is discharged. However, the petitioner is granted six weeks time from today to obey the condition imposed by the impugned order.

**[MANGESH S. PATIL]**  
**JUDGE**