

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2315 OF 2021.

Uttam Thanmal Bansali

..Petitioner

v/s.

Ayub Mohammed Rafique Shaikh

..Respondent

Ms. Neeta Jain i/b. Alochan Naik for the Petitioner/s.

Mr. Javeed Hussain i/b. Mubashir Hussain i/b. Hussain & Co. for
the Respondent.

CORAM : ANUJA PRABHUDESSAI, J.

DATED : JUNE 30, 2021.

P.C.

1. The Petitioner herein challenges the order dated 17.03.2021 whereby learned Judge, City Civil Court, Gr. Mumbai has granted conditional leave to defend the suit, the condition being to deposit an amount of Rs.17,50,000/- within a period of four weeks.

2. Heard learned Counsel for the Petitioner and the Respondent.

3. Before adverting to the facts, it would be advantageous to refer to the decision of the Apex Court in *IDBI Trusteeship Services Ltd. vs. Hubtown Ltd., (2017) 1 SCC 568*, wherein the Apex Court

has reviewed the case law pertaining to Summary Suit and has held thus:

“18. Accordingly, the principles stated in paragraph 8 of Mechelec’s case will now stand superseded, given the amendment of O. XXXVII R.3, and the binding decision of four judges in Milkhiram’s case shall apply. Hence the following principles shall be observed while considering whether to grant leave to defend a summary suit:

(i) 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.

(ii) 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.

(iii) The question whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavit of parties and it is not open to it to call for evidence at that stage.

(iv) 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.

(v) If the defendant raises a defence which is a 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.

(vi) 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;

(vii) 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.”

4. Coming to the facts of the present case, the Petitioner had filed a suit for recovery of money under Order 37 of CPC. The case of the Respondent -Plaintiff was that he had advanced to the Petitioner herein a friendly loan of Rs.35,00,000/- and that the Petitioner had issued three post dated cheques and had agreed that he would refund the loan amount on receipt of 15 days oral notice. The Respondent Plaintiff claimed that the Petitioner failed to return the money despite notice and hence filed a Suit under Section 37 based upon a promissory note.

5. The Petitioner Defendant filed an affidavit as required under Sub Rule 3 of Rule 3 of Order 37 purporting to disclose facts sufficient to entitle them to defend the suit. Upon perusal of the Plaint and the affidavit, the learned Judge granted conditional leave to defend the suit, the condition being to deposit Rs.17,50,000/- within four weeks from the date of the order.

6. The Petitioner Defendant has challenged the order mainly on the ground that the Petitioner has not admitted having received

the loan amount. The document relied upon is not a promissory note. It is alleged that the said document pertains to the proposed business venture between the parties and that the Petitioner had issued blank cheques for the same purpose.

7. The Promissory note, on which the Respondent Plaintiff had based the suit indicates that the Respondent Plaintiff has advanced to the Petitioner friendly loan of Rs.35,00,000/-. The Petitioner had agreed to share with the Respondent Plaintiff, the profit in the business and had further issued cheques for Rs.35,00,000/- as security, with an undertaking that he would return Rs.35,00,000/- within 15 days from the date of oral notice. The suit is essentially for recovery of the loan amount which is quantified in the promissory note and not for recovery of any amount derived from the profit in the business. The Promissory Note acknowledges receipt of money and a promise to return the same within specified time. The said promissory note is not only signed by the Petitioner, but is also signed by his son as a witness. The Petitioner had also issued cheques which are duly signed by him. The contention of the Petitioner that the Respondent Plaintiff had obtained his signature on blank cheques also cannot be prima facie

accepted since a perusal of one of the cheques indicates that there was an error in writing the name of the Respondent Plaintiff, and that the said error was corrected by the Petitioner by putting his initials against the correction. The records further reveal that the Respondent Plaintiff had issued a notice to the Petitioner demanding return of the said loan amount. It is not in dispute that the Petitioner had not replied to the said notice and had not disputed his liability to pay the money on any of the grounds raised in the petition. All these facts raise a doubt about the genuineness of the triable issues raised by the Petitioner. Hence as it has been held by the Apex Court in IDBI (*supra*), even if the Defendant raises triable issue, if doubt is raised by the trial court about the defendants good faith, or the genuineness of the triable issues, the trial judge can impose conditions both as to time or mode of trial, as well as payment into court or furnishing security.

8. Under the circumstances, in my considered view, the trial court has not committed any error in granting conditional leave. The Petition therefore has no merits and is dismissed.

9. At this stage, learned Counsel for the Petitioner seeks extension of time to deposit the amount. Considering the facts

and circumstances of the case, with consent, the Petitioner is directed to deposit an amount of Rs.17,50,000/- in two installments. 50% of the said amount shall be deposited within 6 weeks from the date of this order and the balance 50% shall be deposited within 6 weeks thereafter. Time to file written statement is extended by six weeks.

(ANUJA PRABHUDESSAI, J.)