

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

WRIT PETITION NO.36 OF 2019

**VIJAY FERTILIZERS AGENCIES THROUGH PARTNERS SUNIL
ONKARLAL AGRAWAL AND OTHERS**

VERSUS

M/S. RATHOD KRUSHI KENDRA THROUGH PROPRIETOR

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Advocate for Petitioner : Mr. Pravin N. Kalani

Advocate for Respondent : Mr. D. K. Dagadkhair

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 29th SEPTEMBER, 2022

PER COURT :

1. Petitioner is aggrieved by order dated 01/08/2018, passed by learned Joint Civil Judge, Senior Division, Parbhani below Exhibit-18 in Special Summary Suit No.01/2018, thereby allowing the application filed by respondent/defendant and granting him leave to defend.

2. Petitioner/plaintiff filed Special Summary Suit No.01/2018 for recovery of amount of Rs.10,08,527/- contending that respondent/defendant has failed to pay amount of fertilizers sold to him. On 11/04/2018, summons for judgment was issued to defendant, which was served on defendant on 21/04/2018. Defendant filed application for leave to defend on 07/06/2018 and no application for delay condonation was filed. So also, no affidavit

was filed alongwith the same. Plaintiff resisted the said application by filing detail say, contending that judgment summons was served on defendant in the month of April and defendant failed to apply for leave to defend within 10 days from the receipt of summons. Delay is not explained by the defendant. The defence of defendant is illusory, sham, frivolous and groundless. The defence of non-germination of Eagle Soybean crop and defendant was required to pay compensation to agriculturists who purchased Soybean, is taken only so as to avoid payment of Rs.10,08,527/- to the plaintiff. Plaintiff, therefore, prayed for rejection of the said application. After hearing the parties, trial Court has allowed the application. Hence, the present petition.

3. Heard learned advocate for petitioner and learned advocate for respondent.

4. Learned advocate for petitioner submits that, in absence of delay condonation application and as the defendant has failed to file application seeking leave to defend within stipulated time, trial Court has erred in granting leave to defend. By relying on the decisions of this Court and the Hon'ble Apex Court, he submits that trial Court has committed an error in giving unconditional leave to defend to the defendant. He, therefore, submits that, in view of documents placed on record by plaintiff, trial Court ought to have

rejected the application filed by defendant.

5. Leaned advocate for defendant, on the other hand, supported the impugned order. He submits that proper reasons are assigned by the trial Court while granting leave to defend to the defendant and in terms of Rule 3(7) of Order 37, trial Court has discretion to condone the delay in applying for leave to defend the suit. He, therefore, submits that there is no substance in the writ petition and the same is liable to be dismissed.

6. I have duly considered the rival submissions, perused the grounds raised in writ petition memo and documents placed on record as well as the impugned order.

7. Record indicates that after service of summons on 16/03/2018, defendant appeared and filed application for grant of time to file his say. Thereafter plaintiff filed documents in support of the suit and summons for judgment was issued to defendant thereafter. After service of summons, defendant failed to appear on the fixed date. Defendant, thereafter, filed application for taking the case on board alongwith application of permission to file say alongwith his written statement. On the said application, plaintiff's say was called. Plaintiff sought time for filing say. Plaintiff, thereafter, filed his say below Exhibit-13. When the matter was

fixed for hearing of Exhibit-13, defendant filed application Exhibit-18 and prayed for leave to defend.

8. It is not in dispute that defendant has purchased seeds from plaintiff and towards purchase of seeds, amount of Rs.10,08,527/- is due. It is the contention of defendant that some of the seeds which were purchased from plaintiff, did not germinate and the agriculturists asked defendant and Government Authorities to pay compensation. Defendant communicated this aspect to plaintiff, however, plaintiff failed to make any payment. Therefore, defendant was required to pay amount of compensation of Rs.7,90,000/- to agriculturists. Plaintiff has filed on record cheque issued by defendant, however, defendant has denied issuance of cheque. Record further reveals that, last payment was made by defendant on 14/07/2014. Plaintiff has failed to initiate any proceedings till 01/07/2016, when the cheque was issued for plaintiff. Though the said cheque was dishonoured, plaintiff did not issue any notice of dishonour to defendant. For the first time, notice was issued on 28/08/2017. It, therefore, appears that point of limitation is required to be considered in the summary suit.

9. In these facts, trial Court has come to conclusion that triable issue is there in the matter and looking at the nature of case, it would be just and proper to allow defendant to file his

defence on record. Trial Court has exercised discretion in terms of Rule 3(7) of Order 37, which in the present case, cannot be faulted with. No case is made out by the petitioner to interfere in the discretionary relief granted by the trial Court in favour of defendant.

10. In *Kuber Steel Traders Vs. Yash Enterprises, 2018 (1) Mh.L.J. 421*, the learned Single Judge of this Court has held that, an order granting unconditional right to defence is an unprecedented order and it must be based on sound reasoning and conclusions. The order must indicate that summary Court has assessed contentions of defendants before granting unconditional right of defence.

In the case in hand, the trial Court while granting unconditional right of defence has considered the contentions of the defendant.

11. In *Gaurav Singhania Vs. Matrix Agri Science Pvt. Ltd. and Others, 2011(6) Mh.L.J. 304*, the learned Single Judge of this Court has held that application filed beyond 90 days period for granting unconditional leave to defend, without application for condonation of delay, cannot be allowed. It is further held that, on merits, mere assertion that defendant had paid substantial amount without specifying amount paid, conclusion cannot be drawn that dispute between parties existed warranting unconditional leave to

defend.

In present case, since it is held that trial Court has exercised discretion under Rule 3(7) of Order 37, the said order, in the facts of present case, cannot be said to be erroneous.

12. In *M/s. V. K. Enterprises Vs. M/s. Shiva Steels, AIR 2010 SC 2885*, cheque was given towards payment by defendant to plaintiff. Defendant denied signature on the said cheque. The Hon'ble Apex Court held that, cheque in question does not show sign of interpretation and ledger book produced by plaintiff showed that transaction for which cheque was issued, is proved. Such are not the facts of present case and hence, this ruling would not help the petitioner's case.

13. In *Dongreen Resins and Chemicals Pvt. Ltd. Vs. Balaji Fiber Reinforce Pvt. Ltd., 2013(2) Mh.L.J. 201*, in summary suit for recovery of sum of money, defendant had not filed any affidavit-in-reply to summons of judgment and had taken a dishonest stand of not being liable to pay any interest to plaintiff on the amounts admittedly due and payable by defendant to plaintiff. In these facts, learned Single Judge of this Court held that, defence sought to be raised by defendant in absence of any affidavit-in-reply is baseless, untenable and mere moonshine. Facts in that case are different and the ratio in it is not applicable to the facts of present case.

14. In *Paper Products Ltd., Mumbai Vs. M/s Venkataramana Food Specialities Ltd., Thane, 2011 (6) Mh.L.J. 643*, learned Single Judge of this Court held that, in view of no objection raised by defendants after receipt of goods, defendants failed to raise substantial defence and therefore, plaintiffs have made out case for summons for judgment.

In the case in hand, since defendant has filed application which was under consideration of trial Court, this ruling would not help the petitioner.

15. In view of the aforesaid reasons, there is no merit in the challenge raised by petitioner in present petition. Trial Court has rightly exercised discretion in favour of defendant. Writ petition being devoid of merits, is dismissed. No costs.

(NITIN B. SURYAWANSHI, J.)