

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

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**WRIT PETITION 6471 OF 2022
IN
SUMMONS FOR JUDGMENT IN 62 OF 2022
IN
SUMMARY SUIT 876 OF 2019
(Commercial suit 363 of 2021)**

Mafatlal M. Mehta

... Petitioner.

Versus

Bharat B. Mehta

... Respondent.

Mr. Minil Shah, Advocate i/by Law Square for the Petitioner.
Ms. Manini Bharti, Advocate i/by Amit Mehta & Omkar Dalvi
for the Respondent.

CORAM : ROHIT B. DEO, J.

DATE : JUNE 10, 2022

P.C. :-

1. Petitioner is the Defendant in Summary Suit 876 of 2019, subsequently registered as Suit 363 of 2021 which is instituted by the Respondent-Plaintiff, seeking money decree of Rs. 40,05,813/- (Rupees Forty lakhs Five Thousand Eight Hundred and Thirteen only) together with interest at the rate of 12% per annum, *pendent lite* and future. The Defendant is assailing the order dated 11.04.2022 rendered by the Judge, City Civil Court, Greater Mumbai in Summons for Judgment 62 of 2022, whereby the Defendant is granted conditional leave to defend the suit subject to deposit of

sum of Rs.25,00,000/- (Rupees Twenty Five Lakhs only) in Court within period of 12 weeks from the date of the order. The Defendant asserts that an unconditional leave to defend is deserved inasmuch as triable issues indicate that the Defendant has a fair or reasonable defence to be raised.

2. The learned trial Judge found that the defence regarding non-receipt of loan amount is illusory and practically moonshine. However, the learned trial Judge showered indulgence and granted conditional leave to defend.

3. I have heard Mr. Minil Shah, learned counsel for the Petitioner and Ms. Manini Bharti, learned counsel for the Respondent and with their able assistance the material on record is perused.

4. Mr. Shah would submit that the material on record ought to have persuaded the learned trial Judge to arrive at the satisfaction that the Defendant has a substantial defence. Mr. Shah would submit in the alternate, that the Defendant has raised triable issues indicating fairness and reasonableness of the Defendant's defence and even if it is prima facie found that the defence is not a positively good defence, the Defendant is ordinarily entitled to unconditional leave to defend.

5. Per contra, Ms. Bharti would submit that the learned

trial Judge has rightly found that the defence is illusory and moonshine. Ms. Manini Bharti would submit that the trial Judge has, as a matter of fact, shown indulgence in granting conditional leave. Ms. Bharti would submit that the trial Court would have been well justified in refusing leave to defend and make the Summons for Judgment absolute.

6. Before I consider the rival submissions on the touchstone of the material on record, I may note that initially the suit proceeded without appearance of the Defendant. Notice of Motion 1071 of 2020 was taken out by the Defendant, seeking permission to cause appearance, which was allowed vide order dated 21.08.2021. The learned trial Judge has found material inconsistency in the stand of the Defendant in Notice of Motion 1071 of 2020 and in the affidavit-in-reply in support of leave to defend.

7. The Plaintiff claims that on 16.11.2013, he advanced loan of Rs.25,00,000/- (Rupees Twenty five lakhs only) to the Defendant which amount was credited in the account of the Defendant by RTGS. The Defendant agreed to pay interest at the rate of 12% per annum and contemporaneously executed the receipt, evidencing terms and conditions of the loan.

8. The Plaintiff claims that the Defendant paid interest till 31.03.2015 and issued account confirmation statements

for financial year 2013-14 and financial year 2014-15. The Defendant did not pay interest for the financial year 2015-16 and the interest component of Rs.3,00,000/- (Rupees Three lakhs only) was added to the principal amount and the Defendant duly issued account confirmation statement for the year 2015-2016. The Defendant did not pay interest for the financial year 2016-17 and the interest component was added to the principal amount. The Defendant executed confirmation of the account statement for the financial year 2016-17. The Plaintiff claims that after 2016-17, the Defendant neither paid interest nor did he submit the balance confirmation statements for the financial year 2017-18, 2018-19 and 2019-20.

9. The Plaintiff claims to have issued notice dated 11.04.2019, asking the Defendant to pay the outstanding amount, which did not evoke any response. The Plaintiff claims that as on 19.08.2019, amount of Rs.40,058,13/- (Rupees Forty lakhs Five Thousand Eight Hundred and Thirteen only) is due and payable.

10. In response to the Summons for Judgment, the Defendant filed affidavit in support of grant of leave to defend application, denying the plaintiff's averment in toto. According to the Defendant, the Plaintiff is his Nephew and the Defendant acted as a broker for the Plaintiff. The sale amount received by the Defendants, used to be remitted to the Bank Account of the Plaintiff. In the affidavit in

response, the Defendant claims that in January, 2013, the Plaintiff directly entered into the transaction with the purchaser, who duped the Plaintiff. The Defendant claims that the Plaintiff pressurized the Defendant for recovery of the amount due and payable by the third party and since then there is no business relationship between the Plaintiff and the Defendant.

11. The Defendant denies the receipt of loan and execution of receipts, evidencing the loan. The Defendant further denies having executed receipt of any amount and issuance of account confirmation statements. The Defendant claims that the balance confirmation statements are forged.

12. The learned trial Judge considered the material on record threadbare. Learned trial Judge further considered the decisions pressed in service by the parties and after an elaborate analysis and consideration of the material on record and the submissions canvassed by the parties, concluded thus :

“26. As discussed supra, defendant claims that plaintiff has forged receipt dated 16/11/2013 and all account confirmation letters filed on record. However, plaintiff’s entire claim is not based upon these documents. As discussed supra, record prima facie, shows that plaintiff transferred Rs. 25 lacs to the account of defendant by RTGS. Record further shows that defendant by issuing three cheques

paid interest at the rate of 12% p.a. to plaintiff till 31/03/2015. Thus, defence raised by defendant regarding non-receipt of loan amount is illusory and practically moon shine. However, showing mercy to defendant, in order to enable him to prove his defence, leave to defend can be granted by imposing condition to pay principal amount of Rs. 25 lacs in the Court within 12 weeks from today. In the result, following order :

ORDER

1. Defendant shall deposit a sum of Rs. 25,00,000/- (Rupees Twenty Five Lacs only) in court within a period of 12 weeks from today. If this condition is complied with, defendant is granted leave to defend the suit and defendant shall file Written Statement within a period of 30 days from the date of deposit.

2. If aforesaid condition of the deposit is not followed by defendant within stipulated time, plaintiff shall be at liberty to apply for ex-parte decree against defendant.

3. There shall be no order as to costs.

4.S/J No.62/2022 is disposed of accordingly”

13. Mr. Shah would invite my attention to the decision of the Apex Court in **Sudin Dilip Talaulikar vs. Polycab Wires Pvt. Ltd., & Ors. (2019) 7 Supreme Court Cases 577)** in Civil Appeal 5528 of 2019; to buttress the submission that unconditional leave to defend ought to have been granted. Mr. Shah would particularly rely on the

articulation of the Apex Court in paragraph 10 of the said decision which reads thus :

“10. In a summary suit, if the defendant discloses such facts of a prima facie fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. The ultimate object of a summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.”

14. In **Sudin D. Talaulikar**, (supra), the factual matrix was that the suit was instituted for recovery of price of the goods supplied to the Defendant between 09.05.2010 to 03.06.2011. The Plaintiff, however, instituted proceedings under section 138 of the Negotiable Instruments Act on the

premise that the cheques issued by the Defendant to discharge existing liability were dishonoured. However, the prosecution was unconditionally withdrawn on 14.12.2015. The Apex Court found that the last commercial transaction *inter-se* was on 03.06.2011 and the alleged outstanding payment in respect of the transaction was by cheque dated 01.03.2014 which is an unusual practice in commercial dealings. The Apex Court held that the defence was not sham and moonshine particularly since the contention of the defendant was that defective goods were returned and the balance dues of Rs.5,00,000/- (Rupees Five lakhs only) paid to the Plaintiff was not remitted.

15. In that factual matrix, the Apex Court held that the Defendant was entitled to unconditional leave to defend.

16. In **IDBI Trusteeship Services Ltd., vs. Hubtown Ltd., (2017) 1 Supreme Court Cases 568**), Civil Appeal 10860 of 2016, the Apex Court considered the seminal questions whether the test laid down in **Mechelec Engineering & Manufacturers vs. Basic Equipment Corporation** (1976) 4 SCC 687) is no longer a good law after the amendment to the provisions of the Order XXXVII of CPC. The Apex Court formulated such question in view of the submission of the Plaintiff that the amended provision makes a sea change in the law; as a result of which it is open to the Court, even if it thinks that the triable issue is

made out, to secure the Plaintiff in monetary terms as a condition for leave to defend the suit.

The Apex Court held that in view of the amendment to Rule 3 of Order XXXVII, the principles stated in Mechelec's case stand superseded.

17. In **Hubtown Ltd.**, after articulating that the principles stated in Mechelec's case stood superseded after amendment to Rule 3 of Order XXXVII and the decision in **Milkhiram's** case. The Apex Court enunciated the principles, governing exercise of jurisdiction under Order XXXVII, Rule 3 thus :

"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.

18. As observed supra, having found that the defence of the Defendant is illusory and moonshine, the learned trial Judge ought to have refused leave to defend in view of the

principles set out in paragraphs 17.5 and 17.6 in **Hubtown Ltd.**, supra. However, since the Plaintiff has accepted the order impugned and there is no challenge to the order to the extent leave to defend is granted subject to the condition, the said aspect need not be considered further.

19. The issue involved is whether the Defendant has made out a case, as would attract the principles set out in paragraphs 17(1) and 17(2) in the case of **Hubtown Ltd.**, supra, as would entitle him to unconditional leave to defend the suit and the answer must be emphatically in the negative.

20. In Notice of Motion 1071 of 2020, taken out by the Defendant, seeking permission to cause appearance in the summary suit, the averments on oath are thus :

“(c) I say that I have had no business relations with the plaintiff & was really surprised to hear about the filing of the said suit. The monies that have been changed hands amongst us for accommodation, have been repaid and I hope receipts executed for the same.”

In the affidavit in support of the Application, seeking leave to defend, the Defendant has claimed that he was engaged by the Plaintiff as a broker, which stand is clearly inconsistent with the assertion of the Plaintiff in Notice of

Motion No.1071 of 2020, which is reproduced supra.

21. The Plaintiff asserts that the amount of loan was transferred to the Defendant by RTGS on 16.11.2013 from Dena Bank, Branch at Mumbai and the receipt is duly acknowledged by the Defendant. The learned trial Judge has rightly observed that there is no specific denial in the Affidavit in response that the amount of Rs.25,00,000/- (Rs. Twentyfive lakhs only) is not transferred by the RTGS in the account of the Defendant till 31st March, 2016. It is discernible from the affidavit in response that the Defendant has not met the case of the Plaintiff head on and has rested with the submission that the receipt dated 16.11.2013 is loaded with doubts and suspicion and the receipts will have to be proved by the Plaintiff.

22. Learned trial Judge has noted the submission of the Defendant in the written notes of arguments that the amount of Rs. 25,00,000/- (Rs. Twenty-five lakhs only) might have been transferred to Mafatlal Mishra, since the entry in the bank pass-book refers to the transfer of Rs. 25,00,000/- (Rs. Twenty-five lakhs only) in the account "Mafatlal Mishr". The learned trial Judge noted that full name of Defendant is Mafatlal Mishrilal Mehta and that the amount of Rs. 25,00,000/- (Rs. Twenty-five lakhs only) is in fact transferred to the account of the Defendant and the entry in the pass-book refers / records the name of the Defendant and the

first five letters from the name of the Defendant's father i.e. Mishrilal.

23. The case of the Plaintiff that the Defendant paid interest from 16.11.2013 to 31.03.2015 vide cheque 180127, interest from 01.04.2014 to 30.09.2014 vide cheque 697725 and interest for the period from 01.10.2014 to 31.03.2015 vide cheque 945111 is substantiated by the bank's pay-in-slips and the record of original pass-book. The pay-in-slip dated 29.03.2014 further records the full name of Defendant i.e. Mafatlal Mishrilal Mehta. In the affidavit in support of the Application, seeking leave to defend there is no specific denial of the case of Plaintiff that the Defendant paid the interest vide cheques referred to above. The Defendant rested with the submission that the receipt of the interest is not believable and needs to be independently proved since the amount received by Plaintiff is inconsistent with the actual receivables. While the Defendant claims that the interest amount works out to Rs. 16,14,860/- (Rs. Sixteen lakhs fourteen thousand and eight hundred and sixty only), the Plaintiffs claims to have received Rs. 15,05,813/- (Rs. Fifteen lakhs five thousand and eight hundred thirteen only) which is a matter of investigation. The Defendant has not denied the assertion of the Plaintiff of having received the amount from the Defendant by cheque payment towards interest.

24. Defendant has baldly denied the balance confirmation statements sheets and claims that the confirmation statements are forged. However, the confirmation statements which according to the Defendant are forged, are prima facie, credible and believable since the bank's statement and cheques deposit slips on record reflect the amount mentioned in balance confirmation as interest payment. The amount of interest and the dates of payments mentioned in the bank's statement and cheque deposit slips are consistent with the recitals in the confirmation statements and the defence that the confirmation statements are forged does not appear to raise a triable issue.

25. The Plaintiff claims that he issued notice through counsel calling upon the Defendant to pay the dues, which notice was received by Defendant but the Defendant did not respond. The Plaintiff has placed on record the acknowledgment of service received from the department of Posts. In the affidavit-in-response to the Summons for Judgment, while there is no specific denial of the receipt of the legal notice, the Defendant asserts that the correspondence produced by the Plaintiff is planted and manufactured evidence and that the correspondence was issued on premises which was locked and closed. The purported acknowledgment of the receipt of the communication is not signed by the Defendant. The learned trial Judge is justified in dismissing the said defence, as

absolutely improbable particularly since the postal acknowledgment is delivered to the Plaintiff by the Department of Posts and the defence that signature of the Defendant on the acknowledgment is forged, is illusory.

26. In my considered view, the learned Judge would have been well and truly justified in refusing leave to defend particularly since the learned trial Judge found that the defence is illusory and moonshine. Nonetheless, conditional leave is granted and the Plaintiff is apparently satisfied with the condition imposed. Even if it is assumed *arguendo* there are triable issues, the genuineness of triable issues is in serious doubt. Indeed, even if every latitude is granted to the Defendant, the defence that each and every document is forged, is clearly improbable and the principle set out in paragraph 17.04. in **Hubtown Ltd.**, (supra) will be the test governing the entitlement of the Defendant to seek leave to defend.

27. Viewed from any angle, I see no reason to interfere with the order impugned either in writ or in supervisory jurisdiction.

28. Learned counsel for the Defendant would submit that the order impugned may be stayed for a reasonable period to enable the Defendant to take recourse to further remedy, if so advised. The learned trial Judge has granted

the Defendant 12 weeks to deposit the amount of Rs. 25,00,000/- (Rs. Twenty-five lakhs only), which period expires on 11.07.2022. The said period is extended by four weeks.

29. Petition is dismissed.

(ROHIT B. DEO, J.)

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