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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9161 OF 2018**

S.S. Buildcons through

1. Shri Tanaji Ganpat Lohar and Anr. Petitioners.

V/s

Shri Dhananjay Vasantrao Mahajan Respondent.

Mr. Vaibhav R. Gaikwad for the Petitioners.

Mr. Ganesh N. Kumkar i/b Rajaram V. Bansode for Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: MAY 02, 2022

P.C.:-

1] The order impugned is passed in exercise of powers under Order 37 Rule 3 sub-Rule 5, whereby Court below has considered the order of attachment passed below Exhibit-5 on 17th September, 2016 as sufficient condition to grant unconditional leave to defend. The suit in question is based on agreement dated 1st August, 2015 for recovery of an amount of Rs 37,43,800/-.

2] According to Mr. Gaikwad, learned Counsel for the Petitioners/Plaintiffs, it can be inferred from the available material that aforesaid liability came to be impliedly admitted by the Respondent. In addition, his contentions are, once such liability is admitted based on judgment of the Apex Court in the matter of *IDBI Trustees Services Limited vs. Hubtown Limited* reported in (2017)

SCC 568, para 17, Trial Court was duty bound to put the Respondent/Defendant to condition of depositing amount claimed in the suit, if defendant demonstrates that there is triable issue. Mr. Gaikwad would further add that Respondent has not satisfied the requirement under clause 17 of the Judgment in IDBI, cited supra and that being so, Court below committed an error in passing the order impugned, thereby not directing the Respondent/Defendant to deposit the amount.

3] Mr. Kumkar, Counsel for Respondent would support the order impugned. According to him, sub-Rule (5) of Rule 3 of Order 37 of CPC speaks of providing security which can be in the form of attachment of the property.

4] Considered rival submissions.

5] It appears that Application-Exhibit-5 was preferred by the Petitioners wherein prayer is made for an order of attachment before judgment as contemplated under Order 38, Rule 5. Accordingly, below Exhibit-5, an order of attachment of the suit property came to be passed upon failure of Respondent/Defendant to furnish security of Rs 37,43,800/-.

6] As far as aforesaid order of attachment is concerned, admittedly, Respondent/Defendant has not challenged the same.

7] By way of order impugned, Court trying the summary suit has

directed grant of leave to defend based on aforesaid order dated 17th September, 2016 passed below Exhibit-5.

8] I have perused the Application-Exhibit-19 so also agreement which is found to be the basis for initiation of suit claim. Fact remains that from the pleadings, it cannot be inferred that the Respondent/Defendant has admitted liability. From record also, it cannot be inferred that there is admission of liability by the Defendant. Provisions of Rule 3 of Order 37 particularly sub-Rule (5) contemplates security to be ordered in case of leave to defend to be granted or considered if triable issue is raised.

9] In the backdrop of aforesaid provisions of law, Court below was justified in granting unconditional leave to defend viz by ordering attachment of the suit property under Order 38 Rule 5. There is sufficient compliance as regards provisions of Order 37 Rule 3 sub-Rule (5).

10] That being so, no illegality could be noticed, particularly as has been canvassed based on the judgment in the case of IDBI cited supra. In this background, no case for interference is made out. Petition as such fails and same stands dismissed.

(NITIN W. SAMBRE, J.)