

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

WRIT PETITION 9025 OF 2022

Vipul Chaganlal Karia and Anr.	...	Petitioners
<i>Versus</i>		
Alok Joitnder Sanghavi	...	Respondent

Mr. Maulik Tanna i/by A. V. Jain and Associates for the Petitioners.
Ms. Kalpana P. Trivedi a/w Shreenath Trivedi for the Respondent.

CORAM: ROHIT B. DEO, J.
DATE : 27th JULY, 2022

P.C. :-

1. The issue involved is whether the petitioner, against whom the respondent has instituted summary suit invoking the provisions of Order XXXVII, Rule 2 of Code of Civil Procedure, 1908 (for short 'Code') is entitled to unconditional leave to defend.

2. While granting leave, by order dated 22nd April, 2022 which is impugned herein, the learned Trial Judge has directed the petitioner – defendant to deposit amount of Rs. 7,42,134/- (Rupees Seven Lakhs Forty Two Thousand One Hundred and Thirty Four Only).

3. The suit is filed for recovery of the price of goods allegedly supplied by the plaintiff to the defendant.

4. The plaintiff relied on certain invoices and transport receipts. The learned Trial Judge noted the submission of the learned counsel for the defendant that the invoices are not signed either by the plaintiff or by the defendant and found substance in the said submission. Considering the transport receipts, the learned Trial Judge appears to have agreed with the submission of the learned counsel for the

defendant that the transport receipts led to no inference that the goods are as a fact supplied to the defendant. The learned Trial Judge did not find anything in the transport receipts as would indicate the quantum or the nature or the value of the goods.

5. Be that as it may, what has weighed with the learned Trial Judge in imposing the condition which he did, was that two cheques were issued by the defendant in favour of the plaintiff which were dishonoured. The other circumstance noted is that the defendant did not respond to the legal notice and the defence has not come on record at the first available opportunity. The learned Trial Judge noted the contention of the defendant that the two cheques were issued prior to the delivery. The learned Trial Judge reasons that if such were to be the position, the defendant was expected to take steps to either enforce the purchase order and/or to recover the custody of the two cheques. The learned Trial Judge made the aforesaid observations in the context of the admitted position that the defendant did to place the purchase order.

6. While the learned Trial Court does appear to believe that there are triable issues as regards to certain material aspects, the defence is branded as moonshine for reasons which I have noted supra. The learned counsel for the petitioner-defendant invites my attention to the decision in ***IDBI Trusteeship Services Ltd. v/s. Hubtown Ltd., (2017) 1 SCC 568*** and in particular to the principles set out in paragraph 17 to buttress the submission that having found the existence of triable issues, ordinarily the defendant ought to have been granted unconditional leave to defend and at any rate, the amount which the

defendant is directed to deposit is onerous and may possibly rendered the leave illusory. The learned counsel for the defendant has a counter narrative. She would argue that even if triable issue does exist, if there is doubt which the Court entertains *qua* the defence or there is material to suggest that the defence is not bonafide, the plaintiff will have to be protected by putting the defendant to terms. I need not delve deeper in the rival submissions. Learned Trial Judge has found the existence of triable issues atleast as regards certain material aspects of the matter. The learned Trial Judge is right in referring to the provisions of the Negotiable Instruments Act, 1881 particularly Sections 118 and 139 thereof to hold that having issued the cheques, the burden to show absence of consideration or legally enforceable debt shall be that of the defendant. The issue therefore is whether the equities can be balanced by reducing the amount which the learned Trial Judge has asked the defendant to deposit. The order impugned directs deposit of amount which corresponds to the 100% of the value of the alleged sale. In my considered view, since atleast part of version in the plaint is found to be highly contentious, it would be appropriate, if the leave is made conditional upon the defendant depositing Rs.3,61,067/- (Rupees Three Lakhs Sixty One Thousand and Sixty Seven Only) in the Trial Court within the next fifteen days.

7. Upon depositing of the amount, the defendant shall file the written statement within fifteen days thereafter.

8. The petition is disposed of in the aforestated terms.

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[ROHIT B. DEO, J.]