

Anand

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

WRIT PETITION 3374 OF 2022

Ravindra Raghu Bobade & anr. .Petitioners

Vs.

Parshvanath Construction Co. & anr. .Respondents

Mr. D. S. Mhaispurkar a/w Mr. S. M. Mangaonkar, Advocate,
for the Petitioners

Mr. S. A. Kumbhakoni, Advocate, for the Respondents

CORAM : ROHIT B. DEO, J.

DATE : 20.07.2022

P. C.

. The challenge is to the order dated 26.10.2021 rendered by the learned Civil Judge, Senior Division, Barshi (The trial Judge) in Special Summary Suit 1 of 2021, whereby while granting leave to defend the suit, the Petitioner – Defendant is directed to deposit 50% of the suit claim. It would suffice if the substratum of the suit plaint and the Application preferred seeking leave to defend as is culled out in the order impugned is noted. The Plaintiff is a Contractor, who claims to have constructed a building on land owned by the Defendant, in accordance with the terms

of the Agreement dated 25.07.2018. The suit is filed to recover an amount of Rs. 16,72,298/- which according to the Plaintiff is receivable from the Defendants.

2. While granting conditional leave, the learned trial Judge observes that triable issues are raised. The learned trial Judge illustratively refers to the condition 15 in the suit agreement in which the word “18% GST” is written in hand. Considering the agreement produced by the Plaintiff, in Juxtaposition with the agreement produced by the Defendant, the learned trial Judge notes that the words “18% GST” are conspicuously absent in the agreement produced by the Defendant. The learned trial Judge then notes the defence that the Plaintiff has not completed the construction within the agreed time frame, that the Plaintiff has as a fact not completed the construction in accordance with the alleged agreement and that the Defendant has already paid the Plaintiff more amount than what is due and payable. The learned trial Judge, after noting the defence broadly, was pleased to grant leave to defend on the premise that the issues are triable and opportunity shall have to be

given to the Defendants to prove the defence.

3. Having so observed the learned trial Judge made the leave conditional upon the Defendant's depositing 50% of the suit claim in the Court.

4. In *IDBI Trusteeship Services Limited Vs. Hubtown Limited*, reported in (2017) 1 Supreme Court Cases 568, the Apex Court has set out the principles governing grant of leave, post the amendment of O. XXXVII, Rule 3 of the Code of Civil Procedure, 1908 (for short 'CPC').

The relevant observations read thus :-

"17. Accordingly, the principles stated in para 8 of Mechelec case reported in Mechelec Engineers & Manufacturers v. Basic Equipment Corpn., (1976) 4 SCC 687 will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case reported in Milkhiram(India) (P) Ltd. v. Chamanlal Bros., AIR 1965 SC 1698 : (1966) 68 Bom LR 36, as follows :

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.”

5. While the learned counsel for the Defendants would submit in the context of the observations and prima facie findings recorded, the principle set out in paragraph 17.2 is attracted, the learned counsel for the Plaintiff would argue that it is paragraph 17.3 which would be relevant.

6. The learned trial Judge has recorded a finding that triable issues are raised. The learned trial Judge has further observed that opportunity to adduce the evidence will have to be given to the Defendant. The learned trial Judge has not recorded a finding that there is a doubt about the Defendant's good faith or the genuineness of the triable issues.

7. In this view of the matter, the submission of the learned counsel for the Defendants that the principles set out in paragraph 17.2 in *IDBI Trusteeship Services Limited Vs. Hubtown Limited* is attracted, will have to be accepted.

8. The order impugned is set aside to the extent that while granting leave, condition of deposit of 50% of the suit claim is imposed. The Defendant shall be entitled to unconditional leave to the Defendants.

9. The Written Statement shall be filed within two weeks.

10. The trial Court is requested to expedite the hearing of the suit.

11. The Petition is disposed of in the aforesaid terms.

(ROHIT B. DEO, J.)