IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4482 OF 2022

Shree Tatyasaheb Kore Warana Sahakari Sakhar Karkhana Ltd. ….. Petitioner
Vs.
Sandip Tube Cleaning Equipment ….. Respondent

Mr. Nitin Gaware Patil for the Petitioner.
Mr. Dormaan J. Dalal i/b Mr. Abhishek Srinivasan for Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 5th JULY 2023.

P. C.

1. Heard.

2. The challenge in the petition is to the order dated 20/10/2021 passed in Summary Suit No.109/2019 granting conditional leave to the petitioner to defend the suit by depositing amount of Rs.19,73,855/- within a period of 30 days from the date of the order.

3. The Special Summary Suit No.109/2019 was

instituted by the plaintiff under the provisions of Order 37 of the Code of Civil Procedure for recovery of sum of Rs.19,73,855/-. The case of the plaintiff was that the defendant had ordered certain material required for his sugar factory in respect of which the plaintiff had raised tax invoices and supplied material to the defendant mentioned in the tax invoices. Plaintiff claim that the dues payable by reason of supply of material was Rs.16,69,492/- along with interest thereon.

4. In the proceedings, summons for judgment was taken out by the plaintiff to which an application for leave to defend was filed by the defendant. In the application for leave to defend the defence taken was that the suit as filed was not maintainable under the provisions of Order 37 Rule 1 (2) of CPC as there was no written contract between the parties. The defence was also taken that the tax invoices pertain to the year 2014-2015 and the suit is barred by limitation as also lorry receipts which apart from showing that delivery of material was for the year 2014-25 do not contain any acknowledgment of delivery. Based on these grounds unconditional leave to defend was sought. In the reply to the say to

the leave to defend, the contentions raised by the defendant were denied. Pertinently, even in the say to leave to defend, the specific pleading is there that there is a written contract by and between the parties and therefore unconditional leave to defend cannot be granted.

5. The trial Court by the impugned order accepted the contentions of the defendant that in the present suit the invoices filed by the plaintiff does not contain terms and conditions and as such the suit is not maintainable under Order 37 of CPC. As regards the limitation and jurisdiction, the trial court held in favour of the plaintiff. The trial Court accepted the defence of the defendant that there was no acknowledgment of receipt of goods which would show any liability on the part of the defendant. Having accepted that the suit was not maintainable under Order 37 being based on tax invoice which do not contain any terms and conditions as also that there is no endorsement as regards delivery of goods, the trial Court imposed the condition of deposit of the amount by relying upon the account statement which shows outstanding dues.

6. Heard Mr. Nitin Gaware Patil for the petitioner and Mr. Dormaan Dalal for Respondent.

7. Learned counsel for the petitioner submits that once the trial court has come to a finding that triable issues are raised unconditional leave ought to have been granted. He has invited attention of this Court to the documents annexed to the plaint and pointed out from the tax invoices that the same are raised only for the purpose of central excise and there are no terms and conditions mentioned in the invoices so as to constitute a written contract. He would further submit that lorry receipts sought to be relied upon by the plaintiff does not contain any acknowledgment. Considering that the trial Court has arrived at categorical finding that there are number of triable issues involved in the matter, unconditional leave be granted. In support thereof he placed reliance on the decision in the case of ***Mechelec Engineers & Manufacturers v. Basic Equipment Corporation, (1976) 4 Supreme Court Cases 687.***

8. *Per contra* learned counsel appearing for the plaintiff had invited attention of this Court to Order 37 (2)(b) of CPC and would point out that apart from the written contract a summary

suit is also maintainable on an enactment where sum sought to be recovered is fixed or in the nature of debt other than penalty. He would further submit that the tax invoices clearly show that what is sought to be recovered is a fixed sum of money which is in the nature of debt and as such the suit itself is maintainable. He has further invited attention of the Court to the communication which is annexed at page No.63 to 65 and would contend that pursuant to the communication by the plaintiff as regards clearance of the outstanding dues on 23/11/2017, the defendant had made payment of Rs.2 Lakhs and as such the admitted liability is now Rs.16,79, 492/-. He has also invited attention of this Court to the ledger account of the Defendant-company which shows closing balance as regards the plaintiffs at Rs.18,79,491.75/- . He would submit that the decision relied upon by the learned counsel for the plaintiff is overruled by the Apex Court in the case of ***IDBI Trusteeship Services Limited vs. Hubtown Limited (2017) 1 Supreme Court cases 568.***

9. Considered the submission of the parties.

10. Before adverting to the facts it would be beneficial to

refer to sub Rule (2) of Rule (1) of Order 37 of C.P.C.:

> *"(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-*
>
> *(a) suits upon bills of exchange, hundies and Promissory notes:*
>
> (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-
>
> (i) on a written contract, or
>
> (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
>
> (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.
>
> *Rule 5 Order XXXVII of Code of Civil Procedure 1908 "Power to order bill, etc., to be deposited with officer of Court"*
>
> *In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof."*

11. Perusal of the provisions of Order 37 of CPC indicate that the same provides for summary procedure in respect of certain suits. For a suit to be maintainable under the provisions of Order 37 of CPC the suit is to be based on a written contract or

enactment or on guarantee.

12. If we peruse the plaint and in particular paragraph No.3 thereof, the pleading is that the suit is based on the tax invoices which the plaintiff contends to be a written contract between the parties. Having come with the case that there was written contract between the parties based on the tax invoices raised by the plaintiff, in my opinion it is now not possible for the plaintiff shift stands and contend that in fact the suit is based upon an enactment where sum sought is fixed sum of money. It is for the plaintiff to come with a specific case as to the basis of the summary suit, which in the present case is claim of written contract, which claim is also reiterated in the say to leave to defend. As observed by the trial Court in the impugned order, the suit can be filed on the basis of invoices containing terms and conditions of the contract. However, in the present case invoices which are filed by the plaintiff are tax invoices which does not contain any terms and conditions and therefore it appears that the contention of the defendant that there was no written contract and as such suit itself is not maintainable goes to the root of the matter. Even if it is

accepted that the point of limitation as well as jurisdiction is against the defendant, considering that maintainability of the suit is in question, in my opinion defendant has raised *bonafide* and fair defence. Reliance placed by the learned counsel for respondent - defendant on the acknowledgment of the liability does not assist his case inasmuch as it is necessary for the plaintiff to first show that the suit was upon the written contract so as to enable him to claim the debt or seek deposit by way of conditional leave from the defendant. In the present case, considering that maintainability of the suit is in question, the defendant was entitled to unconditional leave to defend. Even if it is accepted that there is admission of the liability, the plaintiff is free to pursue his remedy by way of ordinary suit. After having observed that the suit is not filed on the written contract and is based upon tax invoices which do not contain terms and conditions merely, because the plaintiff has filed number of invoices and account statement, the trial Court came to a finding that there was outstanding amount and as such directed the defendant to deposit the amount due. In my opinion, the discretion which was vested in the trial Court was not exercised judicially and as such require interference under Article 227 of the

Constitution of India.

13. In light of the above, the impugned order of the trial Court directing the defendant to deposit the sum of Rs.19,73,855/- is hereby quashed and set aside and unconditional leave to defend is granted to the defendant.

14. The writ petition stands allowed.

SHARMILA U. DESHMUKH, J.