

Nikita

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

WRIT PETITION NO.9640 OF 2021

Federal Express Corporation (FedEx) ... Petitioner

V/s.

Cottage Industries Exposition Ltd. and
Ors. ... Respondents

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Mr. Mayur Khandeparkar a/w Mr. Zoheb Khatri i/b
India Law LLP for the Petitioner.

Mr. Surel Shah, a/w Mr. Chaitanya B. Nikte a/w Mr.
Hitanshu Jain a/w Prajit S. Sahane i/b Ms. Esha Malik
for Respondent.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 6, 2023

P.C.:

1. This writ petition is filed under Article 227 of the Constitution of India, raises challenge to the order dated 3rd March 2021, passed by the City Civil Court, Mumbai granting leave to defend under Clause 2 Order 37 of the Code of Civil Procedure, 1908, directing defendant to deposit 50% of the claimed amount.

2. The respondents who were original plaintiffs filed summary suit under Clause 2 of Order 37 of Code of Civil Procedure, 1908 alleging that the plaintiff No.1 handed over 607 pieces of silk carpets/goods packed in 241 bales to defendant on 1st June 2011 for delivery to plaintiff No.2 at United Arab Emirates. However, the

consignment of silk carpet was delivered/landed at Dubai instead of Sharjah. Resultantly, plaintiffs were required to pay customs duty amount of Rs.39,06,780/- to the Customs Authority at Dubai. It is alleged that the defendants assured repayment of customs duty however, the said amount was not paid.

3. In a reply filed, petitioners to summons for judgment the petitioner (defendant) raises following defences.

a) As per the terms of the agreement, claim for loss, damages or and or delay, needs to be notified in writing with the Federal Express Corporation within 21 days after the delivery of shipment. Failing which, no action for damages can be brought.

b) Suit as filed does not fall under any categories of Clause 2 of Order 37 of Code of Civil Procedure as the suit is essentially filed alleging deficiency in service.

c) As per Clause (m) of the agreement, plaintiff is liable to pay all the taxes, levies, and duties.

d) After Dubai customs detain the shipment, the petitioner advised plaintiff to pay duty as security deposit and wants consignments reach at Sharjah. The plaintiff claimed refund of security deposit within 7 days from the date of submission of documents which the plaintiff failed and neglected to follow.

4. The Trial Court by impugned order recorded the finding that the suit involves is triable issue and defendant has plausible

defence, however, directed defendant to deposit 50% of principal amount to curtail possibility of any relief from defendant's side.

5. Parameters for exercise of discretion to grant leave under Clause 2 of Order 37 have been laid down by the Apex Court in the Judgment in the case of **IDBI Trusteeship Services Limited vs. Hubtown Limited** reported in (2017) 1 SCC 568, the Supreme Court in paragraph Nos.17.1 to 17.6 laid down the parameters which govern the proceedings for grant of leave. The said parameters are as under:

“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.”

6. On perusal of the plaint, it appears that the cause of action of the petitioner is based on the factor that the deficiency of service by sending consignment to Dubai instead of Sharjah that the shipment was meant for Sharjah.

7. Though, the learned counsel for the plaintiff submitted that the amount of Rs.39,06,780/- amounts to debt within Clause 2 of Order 37, the said submission is not borne out of pleadings of the plaintiff. The plaintiff in paragraph Nos.5 and 10 pleaded deficiency of service to be a cause of action. In my opinion, present case is covered by the Clause 17.2 of **IDBI Trusteeship Services Limited** (supra). Therefore, the petitioner (defendant) was entitled to unconditional leave to defend. Hence following order:

- a) The impugned order dated 3rd March 2021 passed by City Civil Court, Greater Mumbai in Summary Suit No.754 of 2014 is quashed and set aside.
- b) The petitioner (defendant) is entitled to leave to defend without deposit of the amount.
- c) The petitioner is permitted to file written statement

within four weeks from today.

8. The writ petition stands disposed of. No costs.

(AMIT BORKAR, J.)