

SA Pathan

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

WRIT PETITION NO.13467 OF 2023

Nagbhushan H. K. Son of H. K.
Krushnamurthy

... Petitioner

V/s.

Usha Mahadev Chaughule

... Respondent

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Mr. S. R. Ganbavale a/w Mr. R. D. Shirale i/by Mr.
Kalpesh U. Patil, for Petitioner.

Mr. Nanso V. Gaikwad, for Respondent.

CORAM : AMIT BORKAR, J.

DATED : NOVEMBER 2, 2023

PC.:

1. By this writ petition under Article 227 of the Constitution of India, the petitioner/original defendant in Summary Suit No.29 of 2021 is challenging the impugned order dated 5 October 2023 granting conditional leave subject to payment of Rs.71 lakh. The respondent/original plaintiff filed a Summary Suit for recovery of amount of Rs.1,95,00,000/- along with interest @15% from the date of filing of suit till its realization.

2. According to petitioner, in March 2015, he had initially paid amount of Rs.1,33,00,000/- to the defendant as hand loan to be repaid within six months. The amount was transferred by way of RTGS. Corresponding agreement is based on emails exchanged

between plaintiff's son and the defendant wherein the defendant accepted receipt of amount by RTGS. Thereafter, in July 2016, additional amount of Rs.58 lakh was paid. On payment of interest @15% per annum towards repayment of the amount received, the defendant repaid Rs.1,20,00,000/-.

3. According to plaintiff, the total amount payable as on July 2020 was Rs.3,25,55,000/- which includes principal amount of Rs.1,91,00,000/- and interest of Rs.1,34,00,556/-. According to him, as per settlement between the plaintiff and defendant the defendant agreed to repay Rs.1,95,00,000/- towards full and final settlement of the dues. In recognition such dues, defendant issued cheque dated 26 August 2020 for amount of Rs.35,00,000/- and cheque dated 12 October 2020 for amount of Rs.1,60,00,000/-. The cheques were dishonored. Therefore, the petitioner initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 and filed summary suit for recovery of Rs.1,91,00,000/-.

4. The petitioner filed an application for leave to defend under Order 37, Rule 3 of the Code of Civil Procedure, 1908. The petitioner denied agreement to pay the interest @ 15%. In paragraph 5 of application for leave to defend, the defendant stated that he paid Rs.1,20,00,000/- to the plaintiff and if, interest clause is excluded, total dues by the defendant to the plaintiff is only Rs.71 lakh and not Rs.1,95,00,000/-. However, by hand written portion, the petitioner disputed dues of Rs.71 lakh. Moreover, objection disputing territorial jurisdiction of the court was raised. The defence of limitation was also raised.

5. The Trial Court relying on admission in paragraph 5 of application for leave to defend recorded a finding that the defendant has admitted dues of plaintiff to be Rs.71 lakh and, therefore, granted conditional leave to the petitioner on deposit of Rs.71 lakh.

6. Learned Advocate for the petitioner submitted that the suit is not maintainable as it is based on dishonored of cheques and unsubstantial agreement. The cheques in question were never issued towards repayment of loan but were issued for security purpose against the different transaction between the plaintiff and defendant. According to him, in absence agreement to pay interest, the Trial Court could not have included interest amount in the suit claim. According to him, two different transactions between the plaintiff and defendant were not disclosed by the petitioner. According to him, in the absence of territorial jurisdiction, the Trial Court ought to have granted unconditional leave to the petitioner. In support of his contention, he relied on the judgment in the case of **B.L. Kashyap and Sons Ltd. Versus M/S JMS Steels and Power Corporation and Another**, reported in (2022) 3 SCC 294.

7. *Per contra*, learned Advocate for the plaintiff invited my attention to the application for leave to defend, emails exchanged between the parties and averments in the plaint which indicate admitted claim by the defendant which entitles him to file summary suit. According to him, in furtherance of cheques dated 26 August 2020 and 12 October 2020, the defendant has made part payment and, therefore, there is no dispute regarding

payment of Rs.1,95,00,000/-.

8. Having considered the submissions on behalf of parties, it appears that the defendant in paragraph 5 has pleaded as under:

5) It is the statement of Plaintiff itself that he has paid firstly Rs.1,33,00,000/- to the defendant in March 2015 & then paid 58,00,000/- in July 2016. Thus in all Plaintiff has paid Rs.1,91,00,000/- to the defendant. It is the case of Plaintiff that Rs.1,20,00,000/- are been refunded by the defendant to Plaintiff that thus if the interest clause is excluded then the amount due by the defendant to Plaintiff is only Rs.71,00,000/- and not Rs.1,95,00,000/- as claimed in the suit, thus if the defendant is granted leave to defend then the defendant would be able to show to the court that no interest was agreed to be paid amongst Plaintiff & the defendant. The defendant disputes even Rs.71,00,000/- is due.

9. On perusal of the averments in application for leave to defend, in my opinion, in the later part of paragraph 5, the petitioner has raised a positive defence that out of Rs.1,91,00,000/- defendant has refunded Rs.1,20,00,000/- and, if, interest clause is excluded then the total amount due by the defendant to the plaintiff is Rs.71 lakh. Thereafter, the defendant has stated that the defendant disputes that even Rs.71 lakh is due. In my opinion, at this stage the admission made in paragraph 5, is sufficient to direct the defendant to deposit the amount admitted in the application for leave to defend.

10. In so far as the contention raised by the petitioner that the suit has filed by the plaintiff is maintainable is concerned, the material on record and paragraph 5 of application for leave to defend, in my opinion, indicate that there is no serious dispute about either issuance of cheques by the petitioner or the receipt of amount; therefore, for the ingredients of Order 37, Rule 1 & 2 of the Code of Civil Procedure, 1908 are satisfied in the facts of the case.

11. In so far as, the territorial jurisdiction of the Court is concerned, such question being mixed question of law and fact, the Trial Court will have to decide the issue after granting opportunity to the parties to lead their oral evidence. Considering the averments made in the plaint in paragraph 18, *prima facie*, in my opinion, the Court had territorial jurisdiction to decide the suit. However, the Trial Court shall conclusively decide said issue in the suit after giving opportunity of hearing and leading oral evidence to the parties.

12. The submission regarding different transaction between the plaintiff and defendant, defendant has not pleaded such plea in the application to seek leave to defend and, therefore, at this stage, it is not necessary to consider this submission.

13. In relation to concluded agreement to pay interest is concerned, it appears that since the plaintiff has *prima facie* proved issuance of cheques, part payment by the defendant in furtherance of issuance of such cheques and in the context of admission in paragraph 5 of the application for leave to defend, in

my opinion, *prima facie* the claim of Rs.1,95,00,000/- being evidenced by issuance of cheques, the Trial Court will have to decide existence of agreement to pay interest at the stage of trial based on emails and material placed on record. *Prima facie*, it appears that there was an agreement to pay the interest based on emails exchanged between parties.

14. In so far as judgment in the case of **B.L. Kashyap** (supra) there cannot be dispute about legal proposition laid down by the Apex Court. In my opinion, the defence raised by the petitioner cannot be termed as substantial defence based on which he is likely to succeed in the suit.

15. Based on material produced by the plaintiff, admission of the defendant in paragraph 5 of application to leave to defend, part payment made by the petitioner in furtherance of issuance of cheque, in my opinion, does not entitle the petitioner unconditional leave to defend, therefore, the Trial Court has rightly directed the petitioner to deposit Rs.71 lakh before he is permitted to written statement. There is no error of jurisdiction. Hence, the writ petition stands disposed of. No costs.

16. It is made clear that observations made in the order are only for the purpose of grant of leave to defend and shall not influenced while deciding the suit in its merit.

17. Period to deposit the amount is extended by six weeks from today.

(AMIT BORKAR, J.)