IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15518 OF 2022

Nitin Bhalchandra Tadsare
& Another ...Petitioners.

Versus

Nityanand Srinivas Prabhu. ..Respondent.

Mr. Yuvraj Narvankar for the petitioner.
Mr. Dheeraj Patil i/b Mr. Drupad S. Patil for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : July 17, 2023.

P. C. :

1. The petitioner challenges the order dated 14th September 2022 passed by the Civil Judge, Senior Division, Kolhapur in Summary Civil Suit No.47 of 2021 rejecting the petitioner's application for leave to defend thereby entitling the respondent–plaintiff to the judgment forthwith.

2. For the sake of convenience, the parties are referred to by their status before the trial Court. Summary Suit No.47 of 2021 was instituted by the plaintiff seeking a decree in the sum of Rs. 12,63,900/- along with interest. The suit was based on two cheques

issued by defendant no.1 for a sum of Rs.12 lakh and Rs.1 lakh. The case of plaintiff is that the defendants were carrying on the business of broker and holding a franchise of Religare Securities Limited. The plaintiff claims that the plaintiff was owner of certain shares and in the year 2004-05, had decided to sell his share-holding through a broker. It is stated that the plaintiff was introduced to defendant no.1 through one Ravindra Uppin and was assured by the defendants that the shares of plaintiff will be sold at profit and, as such, the plaintiff handed over his shares along with the stock holding to the defendants. It is stated that thereafter the defendant was dealing with the shares of plaintiff which were handed over and for the said purpose, yearly renewal fees was paid by the plaintiff to the defendants through the online transfer, cheques as well as in cash, till the year 2015. It is stated that upon enquiry by the plaintiff about his shares, the plaintiff was assured that the time was not right for the sale of shares and that unless shares can be sold at profit, shares will not be sold. The plaintiff has come with a case that shares of almost of Rs.8 lakh were handed over to the defendants, and in the month of May 2018 when the plaintiff was in financial need, the plainitff approached the defendants and informed him to sell the shares. It is stated that the defendants informed the plaintiff that shares have already been sold for a sum of Rs.20 lakh and the defendants are not in a position to make the payment of Rs.20 lakhs, and offerred to pay Rs.12 lakh, which was agreed by the plaintiff. It is the case of the plaintiff that defendant no.1 by DTC courier, couriered to the plaintif cheque of Rs.12 lakh bearing cheque No.000065 dated 22nd May 2018 drawn on HDFC Bank, Bhandarkar Road Branch, Pune with an assurance that the cheque will be honoured on presentation. Upon cheque being presented to the plaintiff's banker on 23rd May 2018, the same came to be returned with the intimation memo as "funds insufficient". Upon being informed about the dishonour of cheque, the defendants sought some time to make the payment of Rs.12 lakh and in the meantime offered a sum of Rs. 1 lakh. On 28th July 2018, a closed envelope by courier was received by the plaintiff from the defendants, which only contained plain paper and upon enquiry, the defendants informed the plaintiff that through inadvertence, instead of sending cheque, a plain paper was sent and the cheque would be sent soon. Subsequently, in the month of September 2018, the defendants couriered a cheque bearing No.000074, dated 31st December 2018 for a sum of Rs.12 lakh drawn on HDFC bank, Bhandarkar Road Branch, Pune and a cheque bearing No.000075 dated 5th October 2018 for a sum of Rs.1 lakh along with a declaration executed on a stamp paper of Rs.100/-, dated 7th September 2018, stating that in place of previous cheque which came to be dishonoured, the fresh cheque for a sum of Rs.12 lakh has been issued. The said document and cheques were couriered by the defendants to the plaintiff by First Flight Courier. The cheque of Rs.1 lakh when presented for encashment, came to be dishonoured for the reason “payments stopped by drawer”. It is the case of plaintiff that cheque of Rs.12 lakh was presented for encashment on 31st December 2018, which came to be dishonoured for the reason “payment stopped by the drawer”. In respect of these two dishonoured cheques, legal notice was issued and the criminal proceedings were initiated against the defendants which are pending.

3. Upon service of summons, the application for leave to defend came to be filed under the provisions of Order-XXXVII, Rule-3(5) of the Code of Civil Procedure, 1908 by the defendants. The defence raised is that it was defendant no.2 and one Mrs. Dimple Agarwal who held the franchise of Religare Securities Limited from the year 2004 till March 2010 and subsequently, the defendants surrendered the franchise to Mr. Vishal Rapartiwal, who in turn, surrendered the franchise to Mr. Shivaji Bhosale and all clients of Religare were transferred to Mr. Shivaji Bhosale. The application for leave to defend contends that it is the policy of Religare that every client who is registered with Religare gets an intimation of transfer / shifting of

the clientele from one franchise to another. It is further contention that in July 2017, the plaintiff contacted defendant no.2 and visited the defendant's home alleging that the money was invested with Religare in 2005 through the franchise of defendant no.2 and Mrs. Dimple Agarwal. It is stated that the defendants do not remember any person by the name of plaintiff being a client of Religare. As regards the cheques which have been issued, the specific contentions of the defendants is in paragraph nos. 9, 10 and 11, which read as under :

> *"9. The Defendants says that in February 2018, there was wedding ceremony of the Defendant's daughter and the Plaintiff took an advantage to create distressing consequences and again approached the Defendants with few other unknown goons and intimidated the Defendants that if the Defendants do not pay the amount of Rs. 12,00,000/- to the Plaintiff then the Plaintiff will create a scene/ruckus in the wedding ceremony of the Defendant's daughter. The Defendants say that the Plaintiff forced to issue a cheque and threatened that if the Defendants do not give him a cheque, the Plaintiff will not allow the marriage to take place. The Defendants being, ordinary citizens, concerned about their daughter's marriage and reputation in the society, thought of postponing the demands of Plaintiff by giving a cheque for the moment. The said cheques apparently got dishonored in March, 2018 and thereafter the plaintiff again started holding the Defendants at ransom and demanded the money with threats.*
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> *10. The Defendants say that in first week of September, 2018 i.e. before Ganpati festival, the plaintiff again visited the Defendants home with other goons and threatened the daughter of the Defendants to outrage her modesty. The*

Plaintiff again held the Defendants at ransom. The Plaintiff also informed that the Plaintiff has high contacts in the police department and thus police will not touch the Plaintiff. Being pressured by the Plaintiff and the threats, the Defendants were forced to send in writing on stamp paper and cheques.

11. The Defendants say that, the Defendants were compelled by the Plaintiff to issue a cheque bearing No. 000065 drawn on HDFC Bank and was again compelled by the Plaintiff to issue a cheque of Rs. 1,00,000/-, bearing 000075, dated 5.10.2018, and also a cheque of Rs. 12,00,000/-, bearing No. 000074, dated 31.12.2018, both drawn on HDFC Bank. The Plaintiff also compelled the Defendants to write on a stamp paper of Rs. 100 that the Defendant No.1 have issued the aforesaid cheques. The Defendants have time and again requested the plaintiff not to deposit the cheques but the Plaintiff denied it. The Plaintiff has threatened that if the said cheques will get dishonored, the Plaintiff will kill Defendants and their family.

4. The defence is raised that in view of the multiple frauds committed by the plaintiffs, the defendants had approached the Commissioner of Police on 5th October 2018 and also lodged a FIR on 30th October 2018, however, no action was taken. The application for leave to defend was opposed by the plaintiff and by the impugned order, the application came to be rejected, giving rise to the present petition.

5. The trial Court has taken into consideration the decision of

the Apex Court ***B. L. Kashyap & Sons v. JMS Steels and Power Corporation [2022 DGLS (SC) 57]*** wherein the apex Court has observed that when there is substantial defence, the defendant is entitled to unconditional leave and even in case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend.

6. Upon perusal of the material which was on record, the trial Court has observed that the cheques in question were dispatched to the plaintiff by the defendants through courier and, as such, has disbelieved the defence that the same were handed over to the plaintiff in February 2018 under coercion at the wedding ceremony of defendant's daughter. Applying the decision of the Apex Court, the trial Court has come to a conclusion that no substantial defence has been raised by the defendants so as to entitle them to unconditional leave.

7. Learned counsel for the petitioner has submitted that considering that the transaction between the parties was in respect of the share broking transaction there was no occasion for the petitioner to retain any amount. He would further contend by placing reliance on the additional compilation of the documents

which is tendered across the bar that on 29th April 2010 the agency was revoked. He would further submit that trial court was also expected to test the probability of the plaintiffs case in as much as the suit was barred by law of limitation since the subject matter of transaction took place in the year 2010. He would further submit that the trial court ought to have considered that the defendants have raised triable issues and as such the conditional leave ought to have been granted particularly in view of the fact that in his say the respondent plaintiff has sought dismissal of the leave to defend or defendant should be directed to deposit 75% of the cheque amount. Learned counsel for the petitioner has tendered additional compilation of documents including the letter of revocation of agency and the complaint filed with the commissioner of police.

8. Before adverting to the facts of this case, it would be necessary to take a look at the provisions of Order-XXXVII of CPC, which contemplate a summary procedure and applies to certain class of suits, which are enumerated in sub-rule (2) of Rule 1 of Order-XXXVII. The procedure contemplated under Order-XXXVII is that the plaintiff shall together with the summons, serve on the defendant a copy of plaint and thereafter within 10 days of such service, the defendant is required to enter an appearance and after the

defendant enters the appearance, the plaintiff shall serve on the defendant summons for judgment returnable not less than 10 days from the date of service of summons supported by the affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. Upon being served with the summons for judgment, defendant may at any time within 10 days from the date of service of summons for judgment, apply for leave to defend, which may be granted by the Court conditionally or unconditionally upon such terms as may appear to be just provided that the leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

9. Perusal of the provisions of Order-XXXVII indicates that if the Court comes to a conclusion that defence disclosed by the defendant is not substantial or *bonafide* defence or is frivolous or vexatious, the application for leave to defend shall be refused and the plaintiff shall be entitled to the judgment forthwith.

10. Considering the procedure which has been contemplated under Order-XXXVII of the CPC is a summary procedure, it is

necessary for the defendant to raise a *bonafide* defence in order to seek leave to defend either conditionally or unconditionally. It is only in case where the defence is clearly moonshine or frivolous, the plaintiff is entitled to judgment forthwith. In this context, useful reference can be made to the decision of the apex Court in the case of ***IDBI Trusteeship Services Ltd v. Hubtown Ltd [(2017) 1 SCC 568]***, wherein the Apex Court has held that the following principles shall be observed while considering whether to grant leave to defend a summary suit :

> (i) 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;
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> (ii) 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;
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> (iii) The question whether the defence raises a triable issue or not has to be ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage.
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> (iv) 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;

(v) 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.

(vi) 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;

(vii) 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."

11. In the light of principles which have been laid down by the Apex Court in ***IDBI v. Hubtown (supra)***, the facts of the present case will have to be considered. The plaintiff has come with the case that the shares were handed over to the defendants for the purpose of selling, they being broker of Religare Securities Limited. It is also not in dispute that cheques of Rs.12 lakh and Rs.1 lakh had been issued in favour of the plaintiff. As regards the issuance of cheques, it is the

contention of defendants that in the month of February 2018, there was wedding ceremony of defendants' daughter and taking advantage of the said fact, the plaintiff forced the defendants to issue the cheque and the same came to be issued through coercion. However, the documents on record indicate that the cheques in question had been sent through courier to the residence of plaintiff. As such it cannot be said that as the plaintiff intimidated the defendants on the occasion of wedding ceremony of their daughter, the cheque was given under coercion. Further after the first cheque got dishonoured in March, 2018, fresh cheque was issued in September 2018. Till October 2018, no complaint was filed with the police against the plaintiff.

12. The question that arises is if the shares of the plaintiff were not sold by the defendants and in fact transferred back to Religare or other franchise, there is no reason for the defendants to issue the cheques in question. The defence sought to be put forward that the same had been issued under coercion is clearly a false defence considering that the cheques in question had been sent by courier and apart from the cheques, an undertaking was also given whereby earlier cheque of Rs.12 lakh which was dishonoured was replaced by the new cheque. The defence which has been raised by the defendant

is that it is not defendant no.1 but defendant no.2 and Mrs. Dimple Agarwal who had held the franchise of Religare Securities Limited. In the teeth of such defence, there is no explanation forthcoming as to why the cheques in question were issued by defendant no.1 who was not a broker of Religare. Pertinently, to the application for leave to defend, no document is annexed by the defendants to show there was revocation of agency or that the shares in question of the plaintiff were transferred to the subsequent franchise-holder upon revocation of agency. There is also no complaint which has been lodged by the defendants against the subsequent franchise-holder, i.e., Mr. Shivaji Bhosale, to whom according to the defendant all the clients of Religare were transferred.

13. The defence of the defendants is that they do not remember any person by the plaintiff being a client of Religare Securities Limited. If such was the situation, it is incomprehensible as to why the two cheques amounting to Rs.13 lakh were sent by courier to the plaintiff for the purpose of reimbursing the amount of shares which was sold by the defendants. It is worthwhile to note that after the dishonour of first cheque of Rs.12 lakh, the defendant issued a fresh cheque for a sum of Rs.12 lakh and one more cheque for Rs.1 lakh along with writing on a stamp paper of Rs.100/-. On the other hand,

the plaintiff has produced on record the courier documents showing that the cheques have been sent by courier and a specific averment to that effect is also made which has not been denied by the defendants in their application for leave to defend.

14. Considering the discussion above, I do not find any reason to interfere with the order of trial Court in exercise of jurisdiction of this Court under Article 227 of the Constitution of India. The writ petition stands dismissed.

15. At this stage, learned counsel for the petitioner seeks stay of three weeks. Considering that the stay was operating in favour of the petitioners since 16th December 2022, this Court is inclined to extend the stay for a period of three weeks from today. Accordingly, stay is extended for a period of three weeks from today.

[Sharmila U. Deshmukh, J.]