

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.802 OF 2022

[Smt. Sangeeta wd/o Narendra Gulhane .vs. Ramdeobaba Developers and Builders, Arvi and others]

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

 Shri K.J. Tople, Advocate for the petitioner,
 None for the respondents though served.

CORAM : ANIL S. KILOR, J.

DATE : 12th JULY, 2023.

The order dated 16.02.2021 passed by the 6th Joint Civil Judge, Senior Division, Wardha granting leave to defend the suit unconditionally is under challenge in the present writ petition.

2. The petitioner is a plaintiff in Summary Civil Suit for recovery of Rs.43,17,000/- towards the unpaid consideration along with interest out of the registered sale deed dated 22.12.2008.

3. According to the petitioner, after the service of suit summons, the application for permission to leave to defend under Order 37 Rule 3 of the Code of Civil Procedure was not moved within ten days and after the lapse of ten days, the application Exh.13 was moved seeking permission to leave to defend the suit under Order 37 Rule 3 of the Code of Civil Procedure.

4. It is the case of the respondent that the firm has paid entire amount of Rs.85,04,000/- to the plaintiff. It is further submitted that the deceased Narendra has agreed to sale his another land at Mouja Chandane and, therefore, towards the earnest amount, defendants were issued a cheque of Rs.28,00,000/- and on the basis of which, summary suit was filed.

5. Undisputedly, no details about such land or any document was filed on record.

6. The trial court, by allowing the application Exh.13, has categorically observed that whatever contention raised by the defendants regarding payment of dues which were outstanding against them and in regard to alleged cheque and about another transaction is not supported by documents filed on record. Despite this fact, the learned trial court has held that considering the grounds raised by the defendants and to decide the real controversy on merit, it will be just and proper to grant an opportunity to contest the matter on merit that too unconditionally.

7. The Hon'ble Supreme Court of India in the case of **Sudin Dilip Talaulikar .vs. Polycap Wires Private Limited and others (2019) 7 SCC 577**, laid down the principles which would guide exercise of such discretion under Order 37, Rule 3 of the Code of Civil Procedure, reads thus :

12. In Hubtown Limited, this court has laid down the principles which should guide exercise of such discretion 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."

8. In the above referred judgment in the case of **Sudin Dilip Talaulikar** (supra), the Hon'ble Supreme Court of India has further held that in the case of unconditional leave, subjective

satisfaction of court involved whereas in conditional leave element of discretion vests with court. This discretion is not absolute but required to be exercised judiciously tempered with what is just and proper in facts of particular case. While exercising discretion it is required to maintain delicate balance between respective rights and contentions by not passing an order which may ultimately impede speedy resolution of dispute.

9. After going through the impugned order and the findings recorded by the trial court, it leaves no element of doubt that the trial court has not at all considered the above referred well settled principles of law while deciding the application Exh.13 and allowed the application Exh.13 by passing in a cryptic order.

10. In the circumstances, I am of the considered view that the impugned order needs to be set aside and the matter is remanded back to the trial court to consider the application afresh after taking into consideration the law as laid down by the Supreme Court of India and as discussed hereinabove.

11. Accordingly, the writ petition is partly allowed. The order dated 16.02.2021 passed by the 6th Joint Civil Judge, Senior Division, Wardha is hereby quashed and set aside. Application Exh.13 is remanded back to the learned trial Court. The learned trial court is directed to decide application Exh.13 afresh after hearing both the parties.

(ANIL S. KILOR, J.)