

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14465 OF 2022

Mr.Dhanaraj Meghraj Rajpal
Age-56, Indian Inhabitant of Mumbai
carrying business in the name and style
of M/s.Bombay Apparel Manufacturing
Company as its Proprietor from Pragati
Ind. Estate, 300, Lower Parel East,
N.M. Joshi Marg, Mumbai – 400 011
and Residing at 32, Dwarka, Corner of
13th /14th Road, Next to Allahabad
Bank, Near Khar Gymkhana, Khar
West, Mumbai 400 052.

Petitioner
..... (Orig. Defendant)

Versus

American Express Banking
Corporation formed under the New
York State Banking Laws, U.S.A.,
Having its Corporate Office in
Mumbia at One India Bulls Centre, 8th
Floor, Tower II, B Wing, Jupiter Mills
Compound, Senapati Bapat Marg,
Eliphistone Road, Mumbai – 400 013.
Through its Director having his office
at Cyber City, Tower “C” Bldg. No.8,
3rd Floor, Sector 25 DLF City Phase II,
Gurgaon – 122002, Haryana

..... Respondent
(Orig. Plaintiff)

.....

Dr.Abhinav Chandrachud a/w. Mr.Piyush Shah, Mr.Prashant Chande
and Mr.Jay Vora, Advocate for the Petitioner.

Mr.Ankit Lohia a/w. Mr.Sachin Kudalkar, Mr.Murari Madekar i/b.
M/s.Madekar & Co., Advocate for the Respondent.

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PRAKASH
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CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 30 NOVEMBER 2023.

PRONOUNCED ON : 05 JANUARY 2024.

JUDGMENT :

The petitioner herein is challenging the order dated 24 August 2022, passed by the Judge, City Civil Court at Bombay in Summons for Judgment No.38 of 2017, filed by the Respondent (Original Plaintiff). The Petitioner herein is the Defendant in the suit, who has been granted conditional leave to defend the suit on depositing entire principal amount of Rs.32,47,333/- (Rs. Thirty Two Lakhs Forty Seven Thousand Three Hundred and Thirty Three only), within six weeks from the date of order.

2 The brief facts of the present case can be summarised as under :

- (i) The petitioner herein is referred as “defendant” and respondent as “plaintiff” as per their origin all status for the sake of convenience and better understanding of the facts of the case. The original plaintiff is engaged in banking business in India. The Plaintiff carries on the business pursuant to the authorization given by the Reserve Bank of India (RBI) under the Payment and Settlement Systems Act, 2007, as a “Payment System Provider”. The Plaintiff enters into an arrangement with the Merchants in India. While entering into such

arrangement with the Merchant, a Card Acceptance Agreement with certain terms and conditions is entered by the Merchant. The Bank thereafter makes payment to the Merchant in accordance with the Payment Plan chosen by the Merchants. It is the case of the plaintiff that on 15 May 2013, the defendant approached the plaintiff and requested for issuance of Merchant card to enable him to accept the American Express Cards from the Credit Card members of the plaintiff. On or about 15 May 2013, the defendant submitted a duly filled and signed Merchant Acceptance Card Form to the plaintiff alongwith the declaration appended to the said Card Acceptance Form. As a result, the defendant was bound by the terms and conditions of Card Acceptance Form. The said express terms and conditions for Card Acceptance Form constitute written contract between the plaintiff and the defendant. Hence, the defendant became one of the Merchant of the plaintiff. Merchant No.FE No.9820089183 has been provided to the defendant, the plaintiff had also entered into a similar arrangement with the Bombay Dyeing and Manufacturing Company Limited with a Merchant No.9820063642. The plaintiff was also required to make payment to the said Bombay Dyeing and Manufacturing Company Limited, as and when “Future Retail Limited” company gave instructions to make payment to the said Bombay Dyeing and Manufacturing Company Limited. The

Bank used to make payment to both the companies on the instructions of Future Retail Limited.

- (ii) On 26 August 2014, the plaintiff erroneously and inadvertently made payment of sum of Rs.32,47,333/- to the defendant *viz.* to Merchant SE No.9820089183 in his bank account bearing No.319805040000525 with the Union Bank of India, Zaveri Bazar Branch by NEFT. Instead of making payment to Bombay Dyeing and Manufacturing Limited holding Merchant No.SE 9820063642. The defendant did not notify the plaintiff about the erroneous payment received by him. Similarly, the Plaintiff also did not detect the said error till 5 August 2015. When the said error was detected by the “Future Retail limited”, while following the UTR No.SIN 01083R8382586, for the confirmation of payment made by the plaintiff on 26 August 2014, to the Bombay Dyeing and Manufacturing Company Limited. It was noticed that the said amount has been erroneously credited to the account of defendant in the Bank account No.319805040000525.
- (iii) It is the case of the plaintiff that, the plaintiff had tried to contact the defendant on the given address but the defendant could not be traced. It was also tried on the official Email address, which was furnished by the defendant. Even the said Email returned undelivered. The Plaintiff thereafter issued notice on 7 September 2015, through his advocate calling

upon the defendant to return/repay the said amount together with interest at the rate of 24% per annum from 26 August 2014, till payment/realization. The Defendant replied the same through his Advocate on 29 September 2015, claiming that the claim of the plaintiff was false and frivolous.

- (iv) The plaintiff therefore was constrained to file the proceedings under Order XXXVII of the Civil Procedure Code (CPC). Plaintiff has filed Summary Suit No.848 of 2016. An Application for Summons for Judgment seeking decree was moved by the plaintiff contending that, the payment of amount due from defendant is clear from the documents placed on record. The Application for Summons for Judgment No.38 of 2017, was moved by the plaintiff in the proforma duly supported by an affidavit. The defendant filed reply affidavit to the Summons for Judgment, claiming that he is entitled to unconditional leave to defend, the suit for the reasons which were given in detail.
- (v) It was denied that the payment of Rs.32,47,333/- made by the plaintiff was erroneous and inadvertently made to him. It was claimed that the plaintiff has not placed complete and true facts on record. There is no contract between the plaintiff and the defendant. Disputed question of fact and law arose in the present case. Therefore, defendant is entitled to unconditional leave to defend.

- (vi) Further, certain other objections were also raised, claiming that plaintiff was not signed and verified by the person authorized to sign, declare, verify or file the plaintiff against the defendant. There is no authorization by the plaintiff or Board of Directors to file the present plaintiff/petition against the defendant. Apart from that all other averments made in the plaintiff and affidavit in support of the Summons for Judgment were denied.
- (vii) It is the case of the defendant that, the defendant was a manufacturer and wholesaler of ready-made garments and regular supplier of Future Group, which consisted of more than 20 associate companies. All of them operating from Mumbai. One of the Future Groups company, namely, Future Retail Limited, had some prior arrangement with the plaintiff. The Future Retail had practice of making payment to the suppliers through the plaintiff. The defendant became aware of this arrangement only when the Future Retail held back outstanding amount which was due for payment. Accounts official of Future Retail informed the defendant, that they have some funding tie up with the plaintiff and as per the policy of plaintiff, the defendant have to be registered with the Plaintiff as supplier of Future Retail Limited. It is only then the plaintiff will start releasing the payment to the defendant on the instructions of the Future Retail. It was explained to the defendant that on being registered with the plaintiff, Merchant

Registration number will be given and the amounts will be released without any delay and it would be hassle-free.

- (viii) On this background, the defendant had signed the blank form based on the representation made to him that, it was merely a registration form. Since huge amount was due and payable to the defendant from Future Retail, the Defendant had accepted the said terms and conditions. His attention was not drawn to any terms and conditions on the Card Acceptance Form. According to the Defendant, the payment made on 26 August 2014, in his account in the Union Bank of India, Zaveri Bazar is not an erroneous or inadvertent payment but it was a due and payable. The said amount was due and payable to the defendant from the Future Retail Limited.
- (ix) The defendant had also raised the objection in the said affidavit regarding maintainability of the Summary Suit on the ground of cause of action, jurisdiction and limitation.

3 According to the pleadings of parties the Judge has proceeded and decided the matter on its merits. The points for determination which were framed by the Court are:

- (i) Whether the defendant is entitled for leave to defend ? If yes, conditional or unconditional?

While deciding the said issue, it has been observed that for deciding the Summons for Judgment, it is imperative to examine whether defendant have made out substantial defence or whether any triable issue is raised to grant leave to defend. The learned Judge has taken into account all the grounds raised by the defendant.

The suit was resisted on the ground that :

- (i) Summary Suit is not maintainable for claiming erroneous payment;
- (ii) There is no valid authorization to file present suit to Mr.Balkrishnan;
- (iii) There was huge amount due from the Future Group to the defendant, and the payment of Rs.32,47,333/- was part payment received by it from the Future Retail *via* Plaintiff;
- (iv) Non joinder of Future Retail, as necessary party.

4 The issue regarding maintainability of Summary Suit has been raised by the defendant, and disputed the very maintainability of the Summary Suit, on the ground that there is no written agreement between the parties to claim recovery of amount against the defendant. As against that, the plaintiff relied on the agreement between the parties i.e. the Merchant Card Acceptance Form. While recording the finding as regards the said issue, the learned Judge, has observed that on perusal of various provisions of Act of 2017, and more particularly Clause 4(e) of the Merchant Card Acceptance Form, there is a clear stipulation between parties about refund of

payment received by the Merchant erroneously. The very existence of the said written agreement is sufficient for the plaintiff to file the summary Suit. Therefore, the said objection raised by the defendant has been turned down.

5 As regards the issue regarding erroneous payment *vis a vis*, the amount due and payable to the defendant from Future Retail is concerned, the learned Judge has taken into account that the Merchant Card were issued to “Bombay Dyeing” as well as “Bombay Apparel Manufacturing Company Limited” i.e. the present petitioner. Due to similarity in names of the Defendant and the Bombay Dyeing, the plaintiff had erroneously made payment to the defendant instead of “Bombay Dyeing Limited”.

6 In addition to that, the Future Retail had clarified that there was no due or outstanding amount payable to the defendant. The learned Judge after taking into consideration the rival submissions has come to the conclusion that the defendant for the first time has come with the case that, he has received the amount from the plaintiff as a part payment of his outstanding due from the Future Retail Limited. Though the defendant placed on record the ledger but was unable to show anything which would reveal that he has made any claim towards the interest on delayed payment against the Future Retail before receipt of demand notice from the plaintiff. There is neither any demand notice nor invoice raised by the

defendant against the Future Retail Limited, claiming the said amount from Future Retail Limited. Therefore, the said claim that the amount received, is towards the part payment is not at all acceptable.

7 So far as objection regarding defective authorization or no authorisation to file the present suit on behalf of the plaintiff to Mr.Balkrishnan is concerned, relying on the various judgment cited by the plaintiff, the learned Judge recorded his satisfaction and observed that, it is merely a technical ground. A technical error cannot be seen as a triable issue in a Summary Suit. The power of attorney placed on the record by the plaintiff is sufficient to infer that, Mr.Balkrishnan has authority to file the suit. Therefore, the said objection has been rejected by the learned Judge.

8 The next objection regarding non joinder of Future Retail to the present suit is concerned, the learned Judge has observed that from the perusal of Merchant Acceptance Form and more specifically Clause 4 (e) it doesn't appear that the Future Retail is a necessary party at the present and it cannot be a substantial defence for a triable issue. Since the suit is filed pursuant to the express Clause in the Merchant Acceptance Form, executed by the defendant in favour of the plaintiff regarding erroneous payment. The Future Retail was not related to the said transaction.

9 The Judge, City Civil Court, Mumbai has taken into account the guiding principles laid down in the Judgment of the

Hon'ble Apex Court in the case of *IDBI Trusteeship Services Limited Vs. Hubtown Limited*¹. The said judgment deals with various situation wherein leave to defend can be granted or refused. Though the advocate for defendant had placed on record various Judgments to support his case and to permit him to defend the suit unconditionally, the learned Judge has recorded that the Judgment in *IDBI Trusteeship Services Limited (Supra)* was sufficient as it lays down certain guidelines to be considered while granting or refusing leave to defend. And the learned Judge relied on point No.17.4 of the Judgment, which reads as under:

“17.4 If the defendant raised 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.”

. Hence, relying on the said observations laying down principles, the learned Judge has granted conditional leave to defend to the defendant. The summons for Judgment therefore resultantly was rejected. The conditional leave to defend subject to depositing an amount of Rs.34,47,333/- has been granted as a security before the City Civil Court within six weeks from the date of the order. The said order has been challenged by the Defendant in the present

1 2017 (1) SCC 568

Petition. It is the condition requiring deposit of principal amount has been challenged by the Defendant in the present Petition.

10 I have heard plaintiff as well as defendant. The petitioner has challenged the said order on the ground that the trial Court ought to have granted unconditional leave to the Petitioner as he is covered by *Clause No.17.2 of the Judgment of IDBI Trusteeship (Supra)*, which reads thus:

“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.”

11 The said Judgment has been delivered by the Hon’ble Apex Court whereby all the conditions governing the Order XXXVII regarding leave to defend and on what conditions it can be granted has been dealt with, laying down the guidelines for grant/refusal, of leave to defend. The guidelines accordingly have been laid down in paragraph no.17 of the judgment. Before laying down the said guidelines, it has been observed in the said judgment that, “At one End of the spectreum is unconditional leave to defend granted in all cases which present a substantial defence. At the other end of this spectrum are frivolous or vexatious defence, leading to refusal of leave to defend. In between these two extremes are various kinds of defences raised conditional leave to defend in most cases. It is thus

defences that have to be guided by broad principles which are ultimately applied by the trial Judge, so that justice is done on the facts of each given case.”

. According to the learned counsel for the petitioner, the Petitioner had raised cogent and plausible defence. Therefore, the Court ought to have granted unconditional leave. The other grounds raised by the Petitioner for challenging the grant of unconditional leave are :

- (i) That there is no written agreement;
- (ii) There are disputed question of fact which require full-fledged trial;
- (iii) There is non-joinder of necessary party i.e. Future Retail.

12 The petitioner has also taken objection to the maintainability of suit by the Bank. According to the Petitioner a Bank cannot file a suit for recovery of the amount. The respondent herein i.e. the original Plaintiff has argued that, the Defendant has signed the Merchant Card Acceptance Form. Clause 4(e) of the said form deals with the “Payment in error”. By virtue of this clause, the plaintiff can recover the amount erroneously paid by the beneficiary. The defendant being one of the beneficiary is bound by the said Clause. The said agreement being express agreement, therefore, Summary Suit is maintainable. The very existence of the said agreement is sufficient for plaintiff to file the Summary Suit.

The payment made to the defendant was erroneously made which according to the agreement the defendant should have returned.

. It has further argued that there is nothing placed on record to show that, before the demand notice from the plaintiff being issued, the defendant had ever demanded so called outstanding amount from Future Retail. No debit note is placed on record prior to date of issuance of demand notice. Therefore, the defence put forth was not a genuine and *bonafide* defence. It is also claimed that the relief claimed by the plaintiff does not go beyond the written contract.

13 As far as other grounds are concerned, the same are already raised before the trial Court and the trial Court has decided the same and passed the order granting leave to defend conditionally. While passing the said order, it is observed by the learned Judge that the observations made in this order are *prima facie* and without prejudice to the rights of the parties in trial. Therefore, in my opinion, inspite of the objection raised by the present petitioner in the defence before the trial Court in Summons for Judgment orders are passed with observations. However, they are only a *prima facie* view, which is expressed by the Court. The right of the parties in the trial is not affected by the same. The parties are free to lead evidence and establish their case.

14 On the issue of non-joinder of necessary party, the Judge has observed that at present stage, it does not appear that Future

Retail is a necessary party. However, it is only a *prima facie* view. The findings recorded by the Court are that at this stage it is not necessary party and the said findings are only *prima facie*.

15 In support of the contention that Future Retail is a necessary party, the learned counsel has relied on the judgment of *Moreshwar Yadavrao Mahajan Vs. Vyankatesh Sitaram Bhedi and Ors*². So far as the said issue is concerned, on going through the Merchant Acceptance Form specifically Clause 4(e). The contention of plaintiff sounds reasonable and acceptable. Therefore, at this stage the Future Retail does not appear to be a necessary party; so also it cannot be said to be a substantial defence or a triable issue. Therefore, the objection of the petitioner herein at this stage is rejected, the petitioner is at liberty to raise the issue at an appropriate stage during the trial.

16 As far as the present stage of the suit is concerned, the trial Court would scrutinize only whether the said defence is a substantial or a triable issue. Therefore, I do not find any error in the orders passed by the learned Judge of the trial Court.

17 The learned counsel for the petitioner while making his submissions has questioned the maintainability of institution of suit by a Bank in view of Section 72 of the Contract Act.

Section 72 of the Contract Act reads thus:

2. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

According to the learned counsel for the petitioner, the money parted with by the Petitioner is not the money of the petitioner, but the said money belongs to Future Retail Limited. Therefore, the Future Retail Limited can alone file the suit for recovery for return of the same. As against this, the learned counsel for the respondent–plaintiff submitted that the Bank is very much entitled to file suit for the recovery of the amount which is paid by mistake owing to the agreement executed by the petitioner, wherein he undertakes to return the said amount, if it is made by mistake. Therefore, the suit is very much maintainable even in view of Section 72 of the Contract Act. Though both the parties have placed reliance on Section 72 of the Contract Act and have argued, the same can be agitated in the trial before the Court below as the order passed by the City Civil Court makes it clear that all the issues have been kept open and the observations made are only *prima facie*.

18 The learned counsel for the Petitioner has placed reliance on the Judgment delivered by the Apex Court in the case of *Jammu and Kashmir Bank Limited Vs. Attar-Ul-Nissa and Ors.*³ In the said matter, there was an arrangement between three parties,

3 (1967) 1 SCR 792

the Bank, the Government and the Ilaqadar of Kathai Sultan Mohammad for repayment of loan taken by Sultan Mohammad. When the matter was taken to the Hon'ble Supreme Court, the Hon'ble Supreme Court has observed that this section would apply only while dealing with the case when there are two parties one paying, the other receiving. Section 72 would have no application to a case where money is paid by one party to a bank with instruction that it should be deposited in the account of third party.

19 The issue in the said matter was whether on the double payment, due to mistake on the part of the Government, it was open to the Bank to reverse the entries, without reference to the person to whom it was paid. In the said case, the Hon'ble Court has observed that in case if the payment is made by mistake, the party receiving the money must return it, and Section 72 has no application to a case where money is paid of a third party, who is constituent of the Bank. The facts of case and the case in hand being totally different. The said case law would not be applicable to the present case.

20 Reliance is also placed on the Judgment of *Metro Exporters Private Limited and Anr. Vs. State Bank of India and Ors.*⁴. In the said Judgment the issue was different from the issue in the present case. In the said matter, the question was whether the Bank is justified in marking a "lien" on the Appellant's account thereby realising the amount paid. Therefore, the said Judgment would not have application in the present case.

4 (2014) 11 SCC 161

21 The advocate for the respondent/plaintiff has also placed reliance on Judgment in *Jammu and Kashmir Bank Limited Vs. Attar-Ul-Nissa and Ors. (Supra)* and the observations made therein by the Hon'ble Supreme Court, wherein it has been observed that while dealing with the case of two parties, one paying the money and the other receiving on behalf of parties paying, if payment is made by mistake, the party receiving the money must return it and when two parties are involved Section 72 of the Contract Act is attracted.

. The learned advocate for the respondent/plaintiff has also relied on the Judgment in *Central Bank of India Vs. Manipur Vasant Kini (Supra)*, in order to support his contention that provisions or Order XXXVII, Rule 2 of CPC is attracted in the present case and the Summary Suit is maintainable. The learned counsel has relied on the observation in paragraph no.7 wherein the facts identical to the present case exists and it has been observed in paragraph No.10 that the suit based on use of Credit Card is maintainable as a Summary Suit.

22 So far as the present case is concerned, the learned Judge has relied on paragraph 17.4 of the Judgment of the *IDBI Trusteeship Services Ltd. (Supra)*, whereby if defendant raises plausible but improbable defence, the Judge may impose conditions. In such cases, the discretion is granted to the trial Judge to impose conditions.

. The learned counsel for the petitioner also relies on the same judgment, however, according to him paragraph 17.2 ought to have been applied in case of the petitioner. Though the petitioner has raised certain grounds in his defence, however the learned Judge has exercised his discretion and passed an order of grant of conditional defence. The said order being discretion exercised by the concerned Judge and the order being passed after recording his satisfaction, I do not find any ground for interfering with the same.

. The learned Judge while recording his finding has categorically held that though the defendant had tried to point out various defects in the plaintiff's case, those defects being technical, cannot amount to substantial defences. Though the defence raised by respondent regarding amount due from the Future Retail is a plausible defence, however, he has recorded that the same is not sufficient enough to grant unconditional leave to defend. Hence, the said order.

The object of granting conditional leave to the defendant is to wipe out the possibility of frivolous and baseless pleas so that the object of providing Summary procedure is not hampered.

23 Though various judgment have been cited, however, the only issue which the Court is restricted to decide will be whether the order passed by the learned Judge City Civil Court, Mumbai needs to

be interfered with. The limited issue before this Court is whether the order of conditional defence granted by the learned Judge needs to be interfered with. It is the settled position of law that unless an order is erroneous, beyond the powers of the Court or without jurisdiction, the same needs no interference. In the present matter, the relying on Clause No.17.4 of the Judgment in *IDBI Trusteeship Services Limited Vs. Hubtown Limited (Supra)*, the learned Judge has passed the orders.

24 The amount which has been deposited in the account of the defendant is not denied by the defendant. The plaintiff claims that the said amount is deposited erroneously, as against that the defendant claims that it was not erroneously deposited, but it has been deposited correctly and properly, which was due and payable to him. The depositing of amount is not at all disputed. Therefore, considering that the issue is regarding payment of money i.e. a money claim and the defence raised by the defendant according to the learned Judge is plausible, but improbable which is not sufficient enough to grant unconditional leave to defend. The learned Judge in clear terms has observed that, though the defendant has made out a case, but same is not such, which would inspire confidence in Judge to grant unconditional defence. The learned Judge has judiciously applied his mind and has passed the order in exercise of discretion vested in him by law.

Following important aspects are required to be considered :

- (i) The receipt of amount is not denied;
- (ii) Amount is disbursed from the third party;
- (iii) Prior to filing of such suit by the plaintiff, the said amount, which is claimed as an amount due from third party was never demanded from that party.

Considering these factual aspects, I do not find any perversity in the order. Therefore, I do not find that there is any case for interference at this stage in the present matter. The view taken by the learned Judge is appropriate and as per the guidelines laid-down by the Hon'ble Apex Court in the case of *IDBI Trusteeship Services Limited Vs. Hubtown Limited (Supra)* followed by the Hon'ble Supreme Court in Civil Appeal No..... of 2022 arising out of SLP No.19413 of 2018 in B.L. Kashyap and Sons Ltd. Vs. M/s.JMS Steels and Power Corporation and Anr dated 18 January 2022. It is also within the parameters laid down by order XXXVII Rule 3(5) of CPC.

. On going through the contents of the Writ Petition and the annexures thereto and also after hearing both the parties, I do not find any case for interference in the order dated 24 August 2022 passed by the Judge City Civil Court, Mumbai in Summons For Judgment No.38 of 2017.

25 The challenge in the Writ Petition fails. The Writ Petition is dismissed. As a result the interim relief granted stands vacated. No order as to costs.

(MANJUSHA DESHPANDE, J.)

26 The judgment is pronounced today in Chamber. On pronouncement of judgment, a request is made by the Petitioner to expedite the proceedings pending before the City Civil Court, Mumbai. The said request is accepted. The learned Judge, City Civil Court, Mumbai is directed to expedite the proceedings pending before it, and, decide it preferably within a period of four months from the date of receipt of this order.

(MANJUSHA DESHPANDE, J.)