



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

<u>WRIT PETITION NO.1225/2023</u>	
<u>PETITIONERS</u>	1) Sheikh Kadir Chhaware Aged about 57 years, Occ : Private work, R/o Mahatma Fule Ward, Ramtek, Tq. Ramtek & Dist. Nagpur. 2) Kasmiya Traders, Through It's Proprietor Sheikh Salman s/o Sheikh Kadir, Chhaware, Aged about 30 years, Occ.: Business, R/o Mahatma Fule Ward, Ramtek, Tq. Ramtek & Dist. Nagpur.
<u>...VERSUS...</u>	
<u>RESPONDENT</u>	Dattu S/o Tikaram Divtelwar Aged about 57 years, Occ. : Farmer, R/o At Nagardhan, Post. Nagardhan, Tq. Ramtek & Dist. Nagpur.
Mr. U.K. Bisen, Advocate for petitioners Mr. N.B. Kalwaghe, Advocate for respondent	

CORAM : BHARAT P. DESHPANDE, J.

DATE : 07/03/2024

ORAL JUDGMENT

1. Heard Mr. U.K. Bisen, learned counsel for the petitioners and Mr. N.B. Kalwaghe, learned counsel for the respondent. Rule. Rule made returnable forthwith. Heard learned counsel for the parties with consent for final disposal.

2. The petitioners, who are the defendants in a summary suit filed by the respondent for recovery of money, are challenging the order dated 01/04/2022 passed below Exhs.12 and 13 and the order dated 16/12/2022 passed below Exh.38 on various grounds as mentioned in the petition.

3. The respondent-plaintiff filed summary proceedings before the learned Trial Court under Order XXXVII Rule 1 (1) of the Code of Civil Procedure for the purpose of recovery of money, wherein it is claimed that the plaintiff is entitled to recover an amount of Rs.25,40,001/- from the defendants in connection with the transaction and two cheques issued by the defendant no.2 which were dishonoured. The respondent-plaintiff applied for summons for judgment as provided under the said provision of Order XXXVII of the Code of Civil Procedure and accordingly the summons was issued to the petitioners-defendants.

4. An application was filed by the petitioners for leave to defend by taking recourse to Order XXXVII Rule 3 (5) of the Code of Civil Procedure. The learned Trial Court allowed such application filed by the petitioners separately but by common order dated 01/04/2022 while granting leave to defend the suit, the learned

Trial Court directed the defendants to deposit an amount of Rs.15,00,000/- in the Court within a period of one month, failing which the suit was directed to be proceeded further.

5. It is an admitted fact that the defendants failed to deposit such amount, however, both the defendants filed another application dated 30/04/2022 for modification of the said order. The learned Trial Court after hearing the parties dismissed the application for modification vide order dated 19/07/2022 passed below Exh.19.

6. Similarly, the plaintiff and his witnesses stepped into the witness box to prove their case. However, the cross-examination on part of the defendants was closed on the ground that the Advocate for the defendants was absent. An application for permission to cross-examine the plaintiff and his witnesses was rejected by the Court vide order dated 16/12/2022 which is below Exh.38.

7. The defendants-petitioners are now challenging the order dated 01/04/2022 below Exhs.12 and 13 and the order dated 16/12/2022 below Exh.38 in the present petition.

8. The learned counsel for the petitioners would submit that first of all the suit is filed against the two defendants claiming

that they are the proprietors of the same firm. He would submit that the cheques are issued only by the defendant no.2, whereas the defendant no.1, who is the father of the defendant no.2, has no connection with such transactions and cheques. He would submit that the summary suit filed against the defendant no.1 is totally misconceived and therefore, directions to defendant no.1 to deposit amount of Rs.15,00,000/- to defend the suit requires interference.

9. The learned counsel for the petitioners would further submit that the amount mentioned in the cheque is around 21,00,000/-, however, the part amount is already paid by the defendant and therefore, the condition to deposit Rs.15,00,000/- to defend the suit is quite harsh. He would submit that the application for modification of such orders was filed, however, the learned Trial Court without considering the above submissions refused it. He would therefore submit that the condition which was imposed on the petitioners is required to be interfered with as the discretion has not been properly exercised.

10. Learned counsel for the petitioners would then submit that the application was filed by the petitioners for grant of further time to deposit the said amount, which was again rejected and on

the same day, the cross-examination of the plaintiff and his witnesses was closed. The application for recalling of witnesses to cross-examine was also rejected with a cryptic order.

11. The learned counsel for the petitioners would further submit that when permission was granted to defend the suit, the petitioners are entitled to cross-examine the plaintiff and his witnesses and only because their Advocate was absent and both the witnesses were put in the witness box, an opportunity is required to be given to them to cross-examine the witnesses. In the alternative, the learned counsel for the petitioners would submit that the amount which is directed to be deposited by the Trial Court could be reduced and further time be granted to the petitioners to deposit the amount and thereafter to defend the proceedings as the defendant no.1 is not at all connected with the said proceedings.

12. Per contra, the learned counsel appearing for the respondent would submit that the order passed on 01/04/2022 was a reasoned order and that the said order merged in the order dated 19/07/2022. The petitioners are not challenging the order dated 19/07/2022 passed below Exh.19 i.e. application for modification. He would therefore submit that the earlier order dated

01/04/2022 merged in the order dated 19/07/2022 and in absence of any challenge raised to the order dated 19/07/2022, the petitioners cannot be allowed to challenge the order dated 01/04/2022.

13. The learned counsel for the respondent would further submit that the suit was filed with a specific prayer to issue summons for passing a judgment and accordingly, the condition as contemplated under Order XXXVII Rule 6 (b) of the Code of Civil Procedure would apply when there is no defence or that where the defendant failed to comply with the condition imposed for permission to defend. He would further submit that the suit ought to have been decreed when the defendants failed to comply with the condition and filed the written statement and therefore, there was even no need for the plaintiff to produce the evidence.

14. The learned counsel for the respondent would further submit that when the application for grant of further time was filed by the defendants to comply with the order dated 01/04/2022, it clearly shows that the defendants accepted the said order and therefore it cannot be allowed to challenge it in a writ. The learned counsel for the respondent then would submit that the plaintiff and

his witnesses stepped into the witness box and since the defendants were absent, the cross-examination was closed and rightly so because the matter is a summary proceeding and cannot be adjourned only because the counsel was absent. Besides, the application for recall of such order and allow the defendants to cross-examine the plaintiff and his witnesses was rightly rejected on the ground that the defendants failed to comply with the condition imposed vide order dated 01/04/2022. He placed reliance upon the judgment in the case of ***A B and U Communication Pvt. Ltd. Mumbai Vs. Jitu Shah 2009 (3) Mh.L.J. 579.***

15. The respondent-plaintiff filed a suit for recovery of money under Order XXXVII of the Code of Civil Procedure disclosing that he is entitled to recover an amount of Rs.25,40,001/- from the defendants. A specific prayer in the prayer clause is incorporated wherein the relief is sought for recovery of money under the provisions of Rule 2 (b) of Order XXXVII of the Code of Civil Procedure.

16. The summons to the defendants was issued on 17/09/2021 on an application (Exh.8) filed by the plaintiff which is based on Order XXXVII Rule 3 (4) of the Code of Civil Procedure i.e.

issuance of summons of judgment to the defendants. The said provision clearly provides that the Court is empowered to issue summons for passing judgment and on appearance of the defendant, if an application is filed for permission to defend, the Court is empowered to decide such application with conditions.

17. Order XXXVII Rule 3 (6) of the Code of Civil Procedure is material in the present proceedings, which reads thus :

“Rule 3 (6). At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.”

18. In the present matter, the defendants applied for leave to defend the suit and accordingly the learned Trial Court passed a detailed order on 01/04/2022 below Exh.12 and 13. The Trial Court allowed the defendants to defend the suit but with a condition to deposit an amount of Rs.15,00,000/- in the Court within a period of one month and on failure to proceed further with the suit.

19. It is an admitted fact that the defendants failed to deposit the said amount even till date. However, on 30/04/2022 they filed an application for modification of the order dated 01/04/2022. This application was opposed by the plaintiff and after hearing learned counsel for the respective parties, the learned Trial Court passed a detailed order on 19/07/2022, thereby rejecting such application. It is further admitted fact that during pendency of this application, the defendants failed to comply even partly or fully of the order dated 01/04/2022. No amount was deposited with the Trial Court so as to show the *bona fides* of the defendants to defend their suit.

20. As rightly pointed out by the learned counsel for the respondent the order dated 01/04/2022 merges in the order dated 19/07/2022 since while passing such order the learned Trial Court has considered and appreciated all contentions raised by the parties once again while issuing such directions to deposit an amount of Rs.15,00,000/-. Therefore, by not challenging the order dated 19/07/2022, the petitioners cannot be permitted to challenge the order dated 01/04/2022, which, in fact merged in the order dated 19/07/2022.

21. Even otherwise, such order passed by the Trial Court is within the powers as provided under Order XXXVII Rule 3 (5) of the Code of Civil Procedure. The suit as filed by the plaintiff-respondent is for recovery of Rs.25,40,001/- and therefore, the direction to deposit Rs.15,00,000/- cannot be faulted with.

22. A record further shows that after the order was passed on 19/07/2022, the petitioners-defendants applied for extension of time to deposit such amount. This application was also considered by the learned Trial Court and the same was rejected on 16/12/2022.

23. Since there was no defence raised by the defendants for non-compliance of the conditions imposed, the plaintiff was entitled for a judgment, as observed by this Court in the case of ***A B and U Communication Pvt. Ltd.*** (supra) as found in paragraph 9 and 10, which are quoted below :

“9. It is required to be noted that when the Summons for Judgment is decided on merits and when the defendant is directed to deposit certain amount of money as a condition precedent and is ordered to file written statement subject to compliance of those directions, the Court wants that the defendant should comply with those terms and conditions and then only, he would be able to raise the aforesaid contentions. The provisions of Order 37 if considered in totality, it is clear that if the defendant fails to comply with the order passed in Summons for Judgment, it will be treated that the defendant has no defence and that situation will have to be equated with a situation where the averments in the plaint are deemed to have been admitted. In substance, if the defendant does not comply

with the order passed at the stage of disposal of Summons for Judgment in Order 37 of Civil Procedure Code, it will be deemed that the defendant has no defence and that the case of the plaintiff is required to be decided on merits as a whole and no further proof as expected under the Evidence Act is required to be placed by the plaintiff in order to prove his case.

10. The stand taken by the learned counsel for the defendants, that the rights of the defendants to cross-examine the plaintiffs' witnesses is permissible in a case where the defendants file written statement and the suit is to be taken up for disposal as a normal suit. The procedure suggested by Counsel for defendants is not to be followed when the defendant has not complied with the order passed at the stage of disposal of Summons for Judgment. The next contention of the learned counsel for the defendants is that certain statements of accounts were not made available to the defendants and inspection has not been given. This stand could have been raised at the time of disposal of the Summons for Judgment. The summons for Judgment was heard and disposed of on merits. In my view, whether the statement of accounts were furnished to the defendants or not prior to taking out the Summons for Judgment or even thereafter, cannot be a subject matter of discussion at a stage when the defendants have not complied with the order of deposit of money. In substance, the stand taken by the defendants that the plaintiffs should be directed to put their witness in the box, permit the defendants to cross-examine them and then arrive at a final conclusion, cannot be accepted. In my view, once the defendants fail to comply with the terms to which they were put, the plaintiffs case will have to be decided on the basis of the plaint and the original documents by following the provisions of Order 37 Rule (3) (6) (b), keeping in view the terminology "Plaintiff shall be entitled to judgment forthwith". It is in the circumstances, the stand taken by the defendants is required to be rejected."

24. The next contention with regard to closure of cross-examination of the plaintiff and his witness, is concerned, the

contention of the learned counsel for the petitioners that both the witnesses were put in the witness box on the same day and the cross-examination of both the witnesses were closed, cannot be faulted with as the learned Trial Court has clearly found that when the witness stepped in the witness box, the learned counsel for the defendants was absent. Since the defendants failed to comply with the condition imposed for raising the defence, there was no question of allowing them to cross-examine the witnesses for the simple reason that there is no defence at all. Thus, the submission of the learned counsel for the petitioners in this regard is devoid of merit. Since a plea is raised by the defendant no.1 that he is not signatory to the instruments, he is not liable to pay any amount to the plaintiff, could be addressed by the said defendant at the time of final hearing of the said matter and the learned Trial Court may consider it in accordance with law. Accordingly, the writ petition deserves to be rejected. The writ petition is dismissed. Rule stands discharged. No order as to costs.

(BHARAT P. DESHPANDE, J.)