

M/S. SIFY LTD.

v.

M/S. FIRST FLIGHT COURIERS LTD.

(C.A. No. 90 of 2008)

JANUARY 8, 2008

[TARUN CHATTERJEE & DALVEER BHANDARI, JJ.]

Code of Civil Procedure, 1908 – O.37 – Summary suit under – Conditional leave to defend – Grant of – Default in payment of outstanding dues despite various demands – Recovery suit against respondent – Single Judge of High Court observed that there was no evidence of deficiency of service and granted leave to defend on condition of deposit of Rs.15 lacs – On appeal, Division Bench held that respondent was entitled to defend the suit without any condition – Held: Division Bench erred in interfering with order of Single Judge – The order of Single judge was discretionary order – Also the amount of Rs.15 lacs was already deposited by respondent – Claim regarding deficiency of services was not raised when demand was made for services rendered – Once liability is admitted, it is not open to take stand that services provided were deficient.

The respondent hired the services of the appellant engaged in the business of providing service in setting up of networks and other value added services in the field of information and technology. As the respondent committed defaults in making payments in respect of services provided, the appellant filed a summary suit under O.37 r.2 CPC for recovery of the outstanding dues. The appellant filed the summons for judgment. The respondent filed reply to the summary suit and to the summons for judgment seeking unconditional leave to defend the suit. The Single Judge of High court granted leave to defend on a condition of deposit of Rs.15 lacs. On appeal, Division Bench of High Court held the

A respondent entitled to defend the suit without any condition. Hence the instant appeal.

Partly allowing the appeal, the Court

B HELD: 1. A bare reading of Sub-rule (5) of Rule 3 of O.37 CPC would clearly indicate that leave to defend may be granted to a defendant unconditionally or upon such terms as may appear to the Court or Judge to be just, that is to say, the discretion is left to the Court to put the defendant on terms, in the facts and circumstances of a particular case, on compliance whereof the defendant shall be entitled to defend the suit. Proviso to Sub-rule (5) lays down that 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 a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. [Para 6] [344-A, B, C]

E 2.1 The order of the Single Judge imposing the condition for deposit of Rs. 15 lacs on the respondent to defend the suit cannot be, said to be an arbitrary or unreasonable order. The Division Bench of the High Court ought not have interfered with the order passed by the Single Judge as (i) the order of the Single Judge was a discretionary order and (ii) the amount of Rs. 15 lacs was already deposited by the respondent. [Para 9] [347-C, D]

F *M/s. Mechelec Engineers and Manufacturers v. M/s. Basic Equipment Corporation* (1976) 4 SCC 687; *Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd.* (1998) 5 SCC 354 – relied on.

G 2.2. It is also an admitted finding that the respondent used the services of the appellant and failed to pay the outstanding dues despite various demands. The Single Judge observed that there was no material evidence to show that there was any such deficiency of service of the H appellant in not providing services to the respondent. The

letter dated 26th of June, 2002 produced by the respondent A
claiming for the first time after 2000 that there was
deficiency of service must be, *prima facie*, found to be an
afterthought exercise on the part of the respondent. The
materials, as admitted by the respondent, would clearly B
show that the respondent was making payments towards
various invoices raised by the appellant. It is also evident
from the record that the respondent did not raise any such
claim regarding deficiency of service when the appellant
was demanding its past balance/dues for the services
rendered. Once the respondent admitted its liability to pay C
for the services rendered by the appellant, it was not open
to it to repudiate the same by taking a stand that the
services provided by the appellant were deficient. That
apart, from the available record, the respondent had not
satisfied even the Division Bench that it was entitled to D
defend its case without any condition. [Para 10] [347-E, F,
G; 348-A, B]

2.3. The respondent had also accepted the order of
the Single Judge and complied with the condition imposed
therein. When the respondent had duly complied with the E
conditions imposed by the Single Judge in its
discretionary order, the Division Bench was not justified
in interfering with such discretionary order. In any view
of the matter, the order of the Division Bench, granting
leave to the respondent without any condition, in the facts F
and circumstances of the case, was not justified. The order
of the Division Bench is set aside and the order of the
Single Judge by which the leave to defend the suit was
granted to the respondent on the condition of deposit of
Rs. 15 lacs in the court is restored. As the amount of Rs. G
15 lacs was withdrawn by the respondent, 2 months time
is granted to the respondent to deposit the aforesaid
amount in the High Court and in default of such deposit,
the leave granted to the respondent to defend shall stand
refused. [Paras 10-11] [349-A, B, C, D, E]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 90
of 2008.

From the final Judgment and Order dated 13.12.2005 of
the High Court of Judicature at Bombay in Appeal No. 1128/
2005.

B K.V. Mohan for the Appellant.

Ramji Srinivasan, Syed Naqvi, Smita Inna and Rajesh
Kumar for the Respondent.

C The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

D 2. This appeal is directed against the order dated 13th of
December, 2005 passed by a Division Bench of the High Court
of Judicature at Bombay in Appeal No. 1128 of 2005 whereby
the Division Bench had allowed the appeal of the respondent
thereby setting aside the order passed by a learned Single
Judge of the same High Court granting conditional leave to
defend, to the respondent on deposit of a sum of Rs. 15 lacs.

E 3. The facts giving rise to the filing of this appeal may be
briefly stated as follows.

F 4. The appellant company is engaged in the business of
providing service in setting up of Networks and other value
added services in the field of information and technology. The
respondent company is engaged in the business of providing
Courier services. The respondent hired the services of the
appellant as the service provider for the connection of its
Networks across India, which included Internet Access and
Virtual Private Network (VPN). It is the case of the appellant
that the respondent committed defaults in making payments in
respect of the services provided by the appellant to the
respondent. In view of the continued failure of the respondent to
clear the outstanding dues in respect of invoices, the appellant
filed a summary suit, being SS No. 1576 of 2004, under O. 37
R.2 of the Code of Civil Procedure (in short "the CPC") against
H the respondent seeking recovery of a sum of Rs. 25,73,793/-

along with 18 % interest p.a. in the High Court of Judicature at Bombay. The appellant, thereafter, filed the summons for judgment, being SJ No. 652 of 2004, in the afore said suit claiming Rs. 25,73,793/- and further interest at 18 % on the principle amount Rs. 23,18,797/- till payment. The respondent filed its reply to the summary suit and the summons for judgment seeking unconditional leave to defend the suit. It was the case of the respondent that there was deficiency in service provided by the appellant and that the appellant's suit was based on accounts and not on invoices. The learned Single Judge, as noted herein earlier, disposed of the application for leave to defend the suit filed by the appellant holding that the respondent shall be entitled to defend the suit on condition of deposit of Rs. 15 Lacs. The learned Single Judge, therefore, granted leave to defend the suit to the respondent on the aforesaid condition. It is an admitted position that the respondent had deposited the sum of Rs. 15 Lacs in the court within the time specified in the aforesaid order. Feeling aggrieved, the respondent preferred an appeal being Appeal No. 1128 of 2005 which, as noted herein earlier, was allowed by the Division Bench of the High Court of Judicature at Bombay holding that the respondent was entitled to defend the suit without any condition. It is this order of the Division Bench, which is challenged before us by way of a special leave petition in respect of which leave has already been granted.

5. The question that needs to be decided in this appeal is whether, in view of the pleadings in the suit as well as the application filed by the respondent for leave to defend the suit, it was entitled to an unconditional leave to defend the suit as was directed by the Division Bench of the High Court of Bombay.

6. We have heard the learned counsel for the parties and examined the orders passed by the Division Bench and the learned Single Judge of the High Court of Bombay, the application for grant of unconditional leave, the pleadings in the suit and the other materials on record. Before we decide the question posed before us, it would be appropriate to take into

- A consideration Order 37 Rule 3 Sub-rule (5) of the CPC, which provides for grant of leave to a defendant to defend a suit either unconditionally or upon such terms as may appear to the Court or Judge to be just. A bare reading of Sub-rule (5) of Rule 3 of Order 37 would clearly indicate that leave to defend may be
- B granted to a defendant unconditionally or upon such terms as may appear to the Court or Judge to be just, that is to say, the discretion is left to the Court to put the defendant on terms, in the facts and circumstances of a particular case, on compliance whereof the defendant shall be entitled to defend the suit.
- C Proviso to Sub-rule (5) lays down that 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 a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.
- D 7. Having noted the aforesaid provisions of the CPC under Order 37 Rule 3 Sub-rule (5), it would be expedient at this stage to enumerate the position of law as to when an unconditional leave to defend a summary suit can be granted. In *M/s. Mechelec Engineers & Manufacturers Vs. M/s. Basic*
- E *Equipment Corporation* [(1976) 4 SCC 687], this court enumerated certain propositions as to when an unconditional leave can be granted or the defendant can be put on terms. The said propositions, as enumerated by this court in the aforesaid decision, may be stated as follows: -
- F a) *If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.*
- G b) *If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.*
- H c) *If the defendant discloses such facts as may be*

deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

d) *If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.*

e) *If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."*

On the same lines is the decision of this court in *Sunil Enterprises & anr. Vs. SBI Commercial & International Bank Ltd.* [(1998) 5 SCC 354] wherein the propositions, as noted herein above, were summed up.

8. From the propositions, as noted herein above, it is clear that it is only in cases which fall in class (e) that an imposition of the condition to deposit an amount in court before proceeding further is justifiable. We, therefore, have to decide whether the case before us falls in class (e) or whether it falls in class (b) or (c). To answer this question, it is necessary to note the grounds taken by the learned Single Judge to grant conditional leave to defend to the respondent and those taken by the Division Bench to set aside the order of the learned Single Judge. While

A directing the respondent to deposit a sum of Rs. 15 Lacs thereby granting it conditional leave to defend the suit, the learned Single Judge made the following findings: -

B 1. *There is no material evidence to show that there is any deficiency of service of the Plaintiffs.*

2. *The suit is based on each of the invoices and is therefore, a fit case where leave be granted on condition.*

The Division Bench, while setting aside the order of the learned Single Judge, recorded the following findings: -

C 1. *The defence raised by the Defendant that there was deficiency of service is not after thought in as much as way back by the communication dated 26th of June, 2002, the defendant raised the dispute about the deficiency in service and communicated to the plaintiff that the VPN link was shut down without any prior intimation causing the loss of goodwill and image in the market. Grievance was also raised by the defendant that the defendant had incurred heavy loss to the tune of more than Rs. 1,00,00,000/-.*

D 2. *The contention of the plaintiff before the learned trial judge that the amount paid by the defendant is not towards the service charges but towards the installation charges which the defendant was liable to pay even though the services were not rendered at the relevant time and that the claim was not waived and that contention was contested by the defendant also raises a serious question to be tried during the trial.*

E 3. *The contention of the defendant that a close scan of the plaintiff's suit would show that it is based on accounts and not on invoices and therefore, the summary suit was not maintainable cannot be said to be frivolous.*

F 4. *The defendant has been able to raise triable issues.*

G 9. Having heard the learned counsel for the parties and

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after going through the judgment of the Division Bench as well as of the learned Single Judge in detail, we are of the view that the order passed by the learned single judge, granting conditional leave to the respondent to defend the suit, ought not to have been interfered with by the Division Bench as (i) the order of the learned Single Judge was a discretionary order and (ii) the amount of Rs. 15 Lacs was already deposited by the respondent. In view of the aforesaid admitted fact, the Division Bench of the High Court ought not to have interfered with the discretionary order of the learned Single Judge granting conditional leave to defend to the respondent when no case was made out by the respondent that the said order was either arbitrary or unreasonable. The order of the learned Single Judge imposing the condition for deposit of Rs. 15 Lacs on the respondent to defend the suit cannot be, in our view, said to be an arbitrary or unreasonable order. As noted herein earlier, it is an admitted position that in compliance with the order of the learned Single Judge, the deposit of Rs. 15 Lacs was duly made by the respondent. Therefore, it is clear that the respondent had practically complied with the order of the learned Single Judge and for this reason, it was not open to the Division Bench to interfere with the discretionary order of the learned Single Judge.

10. It is also an admitted finding that the respondent used the services of the appellant and failed to pay the outstanding dues despite various demands. The learned Single Judge, after noting down the contentions of the appellant that the amount paid by the respondent was not towards service charges but it was towards installation charges which they were liable to pay even though the services were not rendered at the relevant time and that there was no deficiency of service and after looking at the correspondence between the parties, found no merit in the defence put up by the respondent. The learned Single Judge also observed that there was no material evidence to show that there was any such deficiency of service of the appellant not providing services to the respondent. A close scrutiny of the record, in our view, would indicate that no material was produced

A to show that the respondent had complained about the deficiency in service prior to 26th of June, 2002. The learned Single Judge, after considering, inter alia, the contention of the appellant that the appellant had waived the service charges and not the installation charges, granted leave to defend the suit to the respondent on deposit of Rs. 15 Lacs. That apart, from the available record, we are of the view that the respondent had not satisfied even the Division Bench that it was entitled to defend its case without any condition. From the materials produced by the respondent, it would also be evident that it was liable to pay for the services provided by the appellant. The letter dated 26th of June, 2002 produced by the respondent claiming for the first time after 2000 that there was deficiency of service must be, prima facie, found to be an afterthought exercise on the part of the respondent. The materials, as admitted by the respondent, would clearly show that the respondent was making payments towards various invoices raised by the appellant. It is also evident from the record that the respondent did not raise any such claim regarding deficiency of service when the appellant was demanding its past balance/dues for the services rendered. It also appears from the record that the appellant has established that the respondent remitted certain sums against various invoices raised by it and that the respondent did not raise any question about the deficiency of service earlier. Once the respondent admitted its liability to pay for the services rendered by the appellant, it was not open to it to repudiate the same by taking a stand that the services provided by the appellant were deficient. In any view of the matter, the Division Bench granted unconditional leave to defend to the respondent without considering any of the materials produced by the parties. In view of the aforesaid findings, which, of course, are prima facie in nature, it would not be unwise for this court to hold that the condition (e), enumerated in the decision of this court in *M/s. Mechelec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation* [supra], as noted herein earlier, was satisfied in the present case and accordingly, the conditional leave granted by the learned Single Judge was a proper order,

which the Division Bench ought not to have interfered with. At the risk of repetition, we may also note that the respondent had also accepted the order of the learned Single Judge and complied with the condition imposed therein. In view of the discussions made herein above, we are, therefore, of the view that the Division Bench was not justified in interfering with the discretionary order of the learned Single Judge granting conditional leave to defend to the respondent on deposit of Rs. 15 Lacs. We, therefore, hold that when the respondent had duly complied with the conditions imposed by the learned Single Judge in its discretionary order, the Division Bench was not justified in interfering with such discretionary order. In any view of the matter, we are of the view that the order of the Division Bench, granting leave to the respondent without any condition, in the facts and circumstances of the case, was not justified.

11. For the reasons aforesaid, we set aside the order of the Division Bench and restore the order of the learned Single Judge by which the learned Single Judge had granted leave to defend the suit to the respondent on the condition of deposit of Rs. 15 Lacs in the court. As the amount of Rs. 15 Lacs has been withdrawn by the respondent, we grant 2 months time to the respondent to deposit the aforesaid amount in the High Court of Bombay and in default of such deposit, the leave granted to the respondent to defend shall stand refused. The appeal is thus allowed to the extent indicated above. There will be no order as to costs.

D.G.

Appeal partly allowed.