

M/S FIXITY PACKAGING INDUSTRIES PVT. LTD. & ORS.

v.

UDYEN JAIN (HUF)

(Civil Appeal No. 5129 of 2009)

AUGUST 06, 2009

[S.B. SINHA AND DEEPAK VERMA, JJ.]

Code of Civil Procedure, 1908: Or. 37 – Summary suit – Leave to defend, conditional or unconditional – Grant of conditional leave to defend by trial court – Direction to deposit certain sum out of the total suit claim – Upheld by High Court – On appeal, held: If applicant discloses sufficient facts to entitle him to leave to defend, court may impose conditions as to time of trial or mode of trial but not as to payment into court of furnishing security – Conditions imposed should not be unduly onerous – As a result thereof, defendant would not be able to defend action for all intent and purpose – Thus, order of courts below to be quashed – Order -of High Court modified.

Respondent filed a summary suit against the appellant for recovery of certain sum. Appellant had issued a cheque in favour of respondent and the same was dishonoured on presentation to the bank. Appellant filed application for leave to defend. Application was allowed subject to deposit of Rs. 2 crores out of the total suit claim of Rs. 2,66,39,028/- within the stated period. Aggrieved, appellant filed writ petition. High Court upheld the order. Hence the present appeal.

Disposing of the appeal, the Court

HELD: The finding of the trial judge that leave should be granted by way of mercy, cannot be accepted and therefore, this Court is not in a position to interfere

A therewith as the plaintiff-respondent did not challenge that aspect of the matter before the High Court. Therefore, the ratio laid down in Sunil's case that if the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that

B at the trial he may be able to establish a defence to the plaintiff's claim the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into court of furnishing security is applicable to the facts and

C circumstances of the instant case. Ordinarily the conditions imposed for grant of leave to defend in a suit filed under Order XXXVII CPC should not be unduly onerous when leave to defend is granted. The conditions imposed thereunder unsustainably should not be

D onerous. As a result whereof, the defendant would not be able to defend the action for all intent and purpose. Each case, however, has to be considered on its own merits. Therefore, it is a fit case where while quashing order passed by the trial judge as also the High Court, in

E exercise of jurisdiction under Article 136 of the Constitution of India, the impugned order should be modified. The appellant is directed to deposit a sum of Rs. 1,10,00,000/- and a further sum of Rs. 90,00,000/- before the trial judge. [Para 12] [564-D-E; 564-F-H; 565-A-B; 565-C-D]

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Sunil Enterprises and Anr. v. SBI Commercial and International Bank Ltd. (1988) 5 SCC 354, relied on.

Case Law Reference:

G (1988) 5 SCC 354 Relied on. Paras 7 and 12

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From the Judgment & Order dated 8.5.2009 of the High Court of Judicature at Bombay in Writ Petition No. 8234 of 2008. A

P.S. Narasimha, Shwetank, Sailakawal, S. Udaya Kumar Sagar, Bina Madhavan for the Appellants. B

Shekhar Naphade, Vinay Navare, Abha R. Sharma for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA J. 1. Leave granted. C

2. Defendants in a suit for recovery for a sum of Rs. 2,66,39,028/- are before us aggrieved by and dissatisfied with a judgment and order dated 08.05.2009 passed by the High Court of Judicature at Bombay in Writ Petition No. 8234 of 2008. D

3. Respondent herein filed the aforementioned suit inter alia on the premise that the cheques issued by the appellants herein for the said amounts, when presented to the bank stood dishonoured. The suit was filed in terms of Order XXXVII of the Code of Civil Procedure. E

4. Appellants filed an application praying for leave to defend in the said suit. The learned trial judge framed the following question for its consideration. F

“Whether prima facie triable issue exists in defendant's favour for granting leave to defend? If yes, whether conditional or unconditional?”

5. In a very detailed judgment, it was opined that for all intent and purpose the defendants-appellants have no defence. The learned trial judge rejected a contention raised on behalf of the defendants even with regard to maintainability of account as a summary suit. It was opined:- G

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A “Further more apart from the cheques in question
 there are statements of accounts and the document of
 balance confirmation in the form of acknowledgement of
 indebtedness followed by categorical admissions in the
 notice reply Exh-3/20. If at all these facts are cumulatively
 B taken into consideration in all its seriousness, there
 appears not even a little scope to find out any sort of such
 questions which would be required to be decided on the
 strength of evidence. On the contrary all the aforesaid
 documents undoubtedly point out towards categorical
 C admissions on defendant's part for which no inference
 prevails in a fashion of availability of plausible, good or
 reasonable defence. It is in such a situation the case in
 hand is squarely covered by a situation of total absence
 of any plausible defence and the contentions claiming
 D availability of defence are nothing but sham and illusory
 pretending that whatever questions in concern with
 maintainability of summary suit, misjoinder of parties, locus
 standi of plaintiff, want of cause of action and no forms a
 triable issues in the matter. Being so, the conclusion
 E emerges only in a fashion of non entitlement of leave to
 defend the suit.”

6. Despite arriving at the aforementioned finding, it was
 held:

F “But considering the facts that series of transactions
 had taken place in between parties to suit and that
 defendant No. 1 on various occasions had also made
 repayment of the loan amount, transferred his individual
 liability in the loan account of defendant No. 1 company,
 G the contentions in concern with helplessness of defendants
 to make repayment because of financial crunch and so on,
 there appears reason to give an opportunity to defend out
 of mercy so that they may attempt to prove and establish
 their respective contentions. But at the same time as the
 H transaction has its nexus with advancement of loan amount

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and as the plaintiff has been deprived of the money blocked in the hands of defendants, who must have derived undue advantage of the situation in the form of unjust enrichment, plaintiff's rights need to be adequately protected, while showing such mercy, by granting leave to defend. Hence, the point is replied accordingly with the order to follow:

ORDER

(1) Application is allowed subject to condition of depositing an amount of Rs. 2,00,00,000/- (Two crores) out of total suit claim of Rs. 2,66,39,028/- (Two crores sixty six lacs thirty nine thousand and twenty eight) in this proceeding within a period of two months, failing in which order granting liberty to defend shall stand automatically revoked, and plaintiff shall be entitled to sign the judgment.

(2) Defendants are further directed to furnish on record written statement within the aforesaid period.

(3) In the event of compliance of the order Asstt. Superintendent would invest the said amount in a fixed deposit in any Nationalised bank for a period of one year."

7. On the aforementioned premise, it was directed the appellants to deposit a sum of Rs. 2,00,00,000/- (two crores) out of a total suit claim of Rs. 2,66,39,028/- in the proceeding within a period of two months from the date of passing of the said order. A writ petition was filed by the appellants questioning the legality and/or validity of the said order. The High Court noticed all the contentions raised on behalf of the appellants. It, furthermore, also noticed a decision of this Court in *Sunil Enterprises & Anr. v. SBI Commercial & International Bank Ltd.* reported in (1998) 5 SCC 354 where the law has been laid down in the following terms:-

A “(a) If the defendant satisfies the court that he has a good defence to the claim on merit, the defendant is entitled to unconditional leave to defend.

B (b) If the defendant raises a tribal issue indicating that he has fair and bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

C (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff’s claim, the court may impose conditions at the time of granting leave to defend – the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

D (d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.”

E 8. Holding that the learned trial judge has granted conditional leave having regard to the facts and circumstances of this case as the same was voluntary not reasonable or fair defence. The High Court opined that the learned trial judge has not committed any error in passing the said condition or order.

F 9. Mr. P.S. Narasimha, the learned senior counsel appearing on behalf of the appellants would contend that assailing it is a case where conditions were required to be reposed for granting leave to defend in terms of Order XXXVII Rule 3(v) of the Code of Civil Procedure, the conditions imposed being wholly unreasonable, this Court should interfere therewith. Our attention, furthermore, has been drawn to the fact that at least two other parties namely Mrs. Dolly Tehmuras Mistri and Mr. Kaikhusru Jehangirji Daruwala have filed two complaint petitions before the Judicial Magistrate First Class, Court No. VII, Pune under Section 138 of the Negotiable Instruments Act

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claiming that the cheques issued in their favour for a sum of Rs. 40,00,000/- (Rupees forty lacs only) and Rs. 50,00,000/- (Rupees fifty lacs only) respectively had bounced.

10. Mr. Shekhar Naphade, the learned senior counsel appearing on behalf of the respondent, however, urged that the learned trial judge for our intent and purpose has found that appellants have no defence at all in the suit proceedings:-

- (1) issuance of cheque in favour of the respondents is not in dispute;
- (2) the balance amount payable by the appellants to the respondent mentioned in a statement has also not been disputed; and
- (3) they have not raised any defence in reply to the notice of demand served upon them.

11. It was submitted that from a perusal of the judgment of the learned trial judge it would be evident that the appellants have no defence in the suit at all. The learned trial judge in his judgment, as indicated hereinbefore has taken into consideration the entire fact of the matter. It referred to the two cheques being Exhibit 3/9 and Exhibit 3/10 dated 15.10.2006 and 1.1.2006 respectively which are said to be the subject matter of the aforementioned complaint petitions filed by Mrs. Dolly Tehmuras Mistri and Mr. Kaikhusru Jehangirji Daruwala opined that if there had been no transaction by and between the parties, there was no reason as to why the said cheques have been issued. The individual loan transaction between the plaintiff and defendant No. 1 with regard to the residual amount of Rs. 4,00,000/- parted by him in his individual capacity having been transferred to the loan account of defendant No. 1-company has already been taken into consideration whereunder not gone into the details of the matter inasmuch as it has also been found that the other cheques issued by the appellant had bounced. The learned trial judge was also at

A pains to reject the contention raised on behalf of the appellants that only because a criminal proceeding under Section 138 of the Negotiable Instruments Act had been issued the same would come in the way of filing of the civil suit:-

B "It has been contended on behalf of defendants that plaintiff had already availed a remedy under Section 138 of Negotiable Instruments Act for which he is entitled to get unconditional leave to defend the suit. In fact there is no rule that merely because of initiating criminal action, individual is entitled to unconditional leave. But what is to
C be seen as to whether there is available any plausible defence, which appears not any way available, particularly when documents Exh-3/8 to 3/13 and 3/20 are taken into consideration."

D 12. We, therefore, with respect, are not in a position to agree with the finding of the learned trial judge that leave should be granted by way of mercy, and are, therefore, not in a position to interfere therewith as the plaintiff-respondent did not challenge that aspect of the matter before the High Court. We
E are, therefore, of the opinion that clause (c) of paragraph 4 in *Sunil's* case (supra) which reads as under:

F "(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff's claim the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into court of furnishing security."

G is applicable to the facts and circumstances of this case. We are not oblivious of the fact that ordinarily the conditions imposed for grant of leave to defend in a suit filed under Order XXXVII of the Code of Civil Procedure should not be unduly onerous when leave to defend is granted. The conditions
H imposed thereunder unsustainably should not be onerous. As

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a result whereof, the defendant would not be able to defend the action for all intent and purpose. Each case, however, has to be considered on its own merits. We, therefore, are of the opinion that it is a fit case where while quashing order passed by the learned trial judge as also the High Court, We, in exercise of our jurisdiction under Article 136 of the Constitution of India, should modify the impugned order in the following terms: -

(i) The appellant shall deposit a sum of Rs. 1,10,00,000/- (Rupees One Crore ten lakhs only) before the learned trial judge within a period of two months from today.

(ii) Within the aforementioned period, the appellant should deposit a further sum of Rs. 90,00,000/- (Rupees ninety lacs only) which shall be deposited before the trial judge who shall in turn invest the same in a fixed deposit so as to enable the successful party i.e. the plaintiff- respondents or the complainants in the other two cases referred to us hereinbefore to be compensated from the said option, in the event, either the suit or the said complaint petition are decided in their favour.

13. The appeal is disposed of in the aforesaid terms with no order as to costs.

N.J.

Appeal disposed of.