

SUDIN DILIP TALAULIKAR

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v.

POLYCAP WIRES PVT. LTD. AND OTHERS

(Civil Appeal No.5528 of 2019)

JULY 15, 2019

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[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Code of Civil Procedure, 1908: Or. XXXVII, r.3(5) – Summary suit filed against appellant for recovery of Rs.64.18 lacs – Prior to filing of summary suit, the respondent had filed criminal case under s.138 of N.I. Act for the same dues which case he had unconditionally withdrawn – However, while the prosecution under the N.I. Act was pending, the respondent instituted the instant summary suit for Rs.36.13 lacs being total sum of two dishonoured instruments with an additional claim for Rs.28.05 lacs as interest – Conditional leave to defend was granted to appellant-defendant with a finding based on existence of a commercial relationship – Grievance of appellant was that under the second proviso to sub-rule 5 of r.3 of Or. XXXVII, the condition for deposit of Rs.30 lacs could not have been ordered in absence of any admissible dues and he denied any dealings with respondents after 2011 and stated that there was no occasion for him to issue a cheque in the year 2014 for any alleged dues of the year 2011 – Held: According to the plaint of the respondent, commercial dealings between the parties ended on 03.06.2011 – The respondent did not state any reason as to why outstanding payment in respect of the same was made by cheque as late as 01.03.2014 – Although respondent had option to institute a summary suit at the very inception of the dispute, but it consciously opted for a prosecution under the N.I. Act which undoubtedly was a more efficacious remedy for recovery of any specified amount of a dishonoured instrument raising a presumption against the drawer, as in a summary suit the possibility of leave to defend could not be completely ruled out, in which case the recovery gets delayed and protracted – The court, on 29.10.2015, in the prosecution instituted by the respondent under the Act, required the respondent to file certain additional documents because the appellant had denied the existence of legal liability for any sum due – It was only thereafter

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- A *that the summary suit was instituted on 24.11.2015 – The prosecution under the Act was subsequently unconditionally withdrawn on 14.12.2015 – This coupled with the specific contention of the appellant, not denied by the respondent, that it had returned defective goods and paid the balance dues of Rs.5 lacs, the conclusion to grant leave to defend was perfectly justified – But the defence raised by appellant in background was certainly not a sham much less frivolous and neither could it be called improbable – Appellant had raised a substantial defence and genuine triable issues – The fact that there may have been commercial relations between the parties was the ground for the institution of the summary suit but could not per se be the justification for grant of conditional leave sans proper consideration of the defence from the materials on record – The impugned orders granting conditional leave to defend were unsustainable and liable to be set aside – Appellant is granted unconditional leave to defend – Negotiable Instruments Act, 1881 – s.138.*
- D *Code of Civil Procedure, 1908: Or. XXXVII – Object of summary suit – Grant of unconditional leave to defend – Discretionary power of the court – In a summary suit, if the defendant discloses such facts of a prima facie fair and reasonable defence, the court may grant unconditional leave to defend – This naturally concerns the subjective satisfaction of the court on the basis of the materials that may be placed before it – However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend – In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court – Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case – The ultimate object of a summary suit is expeditious disposal of a commercial dispute – The discretion vested in the court, therefore, requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute.*
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Allowing the appeal, the Court

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HELD: Both the Civil Judge and the High Court posed unto themselves the wrong question and therefore misdirected themselves in application of the principles for discretion laid down in *Hubtown Limited* by granting conditional leave to defend without properly adverting and referring to the facts of the case and the materials on record. According to the plaint of the respondent, commercial dealings between the parties ended on 03.06.2011. At this stage, it was necessary to notice the contention of the appellant that the signatures and the contents of the cheques were in different writings. The respondent had the option to institute a summary suit at the very inception of the dispute. But it consciously opted for a prosecution under the Act which undoubtedly was a more efficacious remedy for recovery of any specified amount of a dishonoured instrument raising a presumption against the drawer, as in a summary suit the possibility of leave to defend could not be completely ruled out, in which case the recovery gets delayed and protracted. The appellant had raised a substantial defence and genuine triable issues. The failure both by the Trial Judge and the High Court to notice and consider the said issues did not justify grant of conditional leave to defend. The fact that there may have been commercial relations between the parties was the ground for the institution of the summary suit but could not *per se* be the justification for grant of conditional leave *sans* proper consideration of the defence from the materials on record. The impugned orders granting conditional leave to defend are held to be unsustainable. The appellant is granted unconditional leave to defend. [Paras 14, 16 and 17] [287-A-D, G-H; 288-A-B]

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IDBI Trusteeship Services Limited v. Hubtown Limited
(2017) 1 SCC 568 : [2016] 11 SCR 660 – referred to.

Case Law Reference

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[2016] 11 SCR 660 referred to Para 3

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A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5528
of 2019

From the Judgment and Order dated 27.02.2018 of the High Court
of Judicature at Bombay in Writ Petition No. 13155 of 2017

B Varun Singh, Gaurav Nair, Akash S. Acharya, Ms. Pranati
Bhatnagar, Advs. for the Appellant.

Ms. Sanjana Saddy, Ms. Sanyat Lodha, T. Mahipal, Advs. for the
Respondents.

The Judgment of the Court was delivered by

C NAVIN SINHA, J.

1. Leave granted.

D 2. The appellant is aggrieved by grant of conditional leave to defend
in Summary Suit No. 1289 of 2015 filed against him, by the respondent
under Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter
referred to as “the Code”) for recovery of Rs.64,18,609/-, inclusive of
interest.

E 3. Learned counsel for the appellant submitted that under the
Second Proviso to sub-Rule 5 of Rule 3 of Order XXXVII of the Code,
the condition for deposit of Rs.30,00,000/- could not have been ordered
in absence of any admissible dues. The fact that there may have been a
commercial transaction between the parties in the past, cannot *ipso
facto* be construed as an admission of debt merely because the
respondent may have so claimed in the suit. The respondent had
unconditionally withdrawn the prosecution instituted by him earlier under
F Section 138 of Negotiable Instruments Act (hereinafter referred to as
“the Act”), for the same dues. All legitimate dues have been paid. The
defective goods were returned, the balance of five lacs was also paid,
and the accounts cleared, after which no further transactions had taken
place between the parties. Reliance was placed on **IDBI Trusteeship
Services Limited vs. Hubtown Limited**, 2017(1) SCC 568.

G 4. Learned counsel for the respondent submitted that the summary
suit had been instituted for recovery of outstanding dues with regard to
goods supplied to the appellant. It was for the appellant to demonstrate
that he had paid for goods. The impugned orders notice that the appellant
had placed no documentary evidence in his reply. The reference to the
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admitted commercial transaction between the parties has been made in that context. The withdrawal of the criminal prosecution was irrelevant. It was no bar to the maintainability of the summary suit. It is for the appellant to prove during the trial of the suit that he had in fact paid for the goods as claimed. The impugned orders are based on sound exercise of discretion in the facts of the case and merit no interference.

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5. A brief recapitulation of facts would bring the matter in proper perspective for appreciation of issues involved. The respondent supplied electrical cables and wires to the appellant between 09.05.2010 to 03.06.2011. Acknowledging some payments they claimed outstanding dues of Rs.34,24,633/- . Likewise, for supplies between 01.04.2010 to 10.03.2011 they claimed dues of Rs.1,88,377/- . A notice was given to the appellant under Section 138(b) of the Act after the cheques dated 01.03.2014 and 01.03.2014 were dishonored, as the account was blocked. The respondent then instituted a prosecution under Section 138 read with Section 142 of the Act lodged for Rs.34,24,633/- on 30.04.2014 with regard to the former instrument and on 01.08.2014 with regard to the latter instrument. Different dates have been mentioned in different documents placed before us.

6. While the prosecution under the Act was pending, the respondent instituted the present summary suit on 24.11.2015 for a cumulative sum of Rs.36,13,410/- , being the total amount of two dishonored instruments, with an additional claim for Rs.28,05,199/- as interest at the rate of 18% per annum amounting to a total of Rs.64,18,609/- . The Suit expressly referred to the pendency of the prosecution under the Act.

7. In Summons for Judgment No. 105 of 2016 dated 16.03.2016, in the summary suit the respondent relied upon the extracts of accounts of the appellant to support its claim for unpaid dues. The prosecutions under the Act were withdrawn on 14.12.2015. The order withdrawing the prosecution under the Act is unconditional in nature and is a *suo-moto* action.

8. The appellant in its defence to the summons for judgment relied upon the institution of the prosecution under the Act prior to the suit and its unconditional withdrawal to contend that there were in fact no dues payable. The appellant further relied upon an order dated 29.10.2015 passed in the prosecution under the Act requiring the respondent to produce certain original documents materials to the complaint and only

- A subsequent to which, without producing the said documents the prosecution under the Act was unconditionally withdrawn. Denying any dealings with the respondents after 2011, the appellant questioned that there was no occasion for it to issue a cheque in the year 2014 for any alleged dues of the year 2011. It was further contended that different inks had been used in the instruments for the signatures and its contents.
- B Defective goods on the consignment had been returned and the balance of Rs.5,00,000/- paid, facts which were not disputed by the respondent.

9. The Civil Judge by order dated 20.07.2017 recorded the satisfaction of a triable defence but granted conditional leave to defend with an unreasoned finding based on the existence of a commercial relationship between the parties. The High Court acknowledged that there was no admission by appellant about its liability to repay any amount, but because the appellant had not disputed a commercial relationship and purchase of goods from the respondent, and in absence of any material to show sufficient payment, the order for conditional leave to defend required no interference.

10. Order XXXVII, Rule 3 of the Code dealing with the procedure for summary suit, in the relevant extract provides as follows:

“3. Procedure for the appearance of defendant

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(4) if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgement in Form No. 4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

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(5) The defendant may, at any time within ten days from the service of such summons for judgement, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

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Provided 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 vexatious: A

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court. B

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11. In a summary suit, if the defendant discloses such facts of a *prima facie* fair and reasonable defence, the court may grant unconditional leave to defend. This naturally concerns the subjective satisfaction of the court on basis of the materials that may be placed before it. However, in an appropriate case, if the court is satisfied of a plausible or probable defence and which defence is not considered a sham or moonshine, but yet leaving certain doubts in the mind of the court, it may grant conditional leave to defend. In contradistinction to the earlier subjective satisfaction of the court, in the latter case there is an element of discretion vested in the court. Such discretion is not absolute but has to be judiciously exercised tempered with what is just and proper in the facts of a particular case. The ultimate object of a summary suit is expeditious disposal of a commercial dispute. The discretion vested in the court therefore requires it to maintain the delicate balance between the respective rights and contentions by not passing an order which may ultimately end up impeding the speedy resolution of the dispute. C

12. The controversy in the facts of the present case is therefore not with regard to any dues admitted by the appellant or not, and the requirement to deposit the same. The issue for adjudication is whether on basis of the materials on record, whether their has been just and proper exercise of the discretion to grant conditional leave to defend by deposit of Rs.30,00,000/- after consideration of all material and relevant factors. F

13. In ***Hubtown Limited (supra)***, this court has laid down the principles which should guide exercise of such discretion as follows : G

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- A “...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.*
- B *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.*
- C *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.*
- D *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.*
- E *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.*
- F *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.”*
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14. In our opinion, both the Civil Judge and the High Court have posed unto themselves the wrong question and have therefore misdirected themselves in application of the above principles by granting conditional leave to defend without properly adverting and referring to the facts of the case and the materials on record. The fact that there was commercial dealing between the parties was not in issue at all. According to the plaint of the respondent, commercial dealings between the parties ended on 03.06.2011. It stands to reason why outstanding payment in respect of the same came to be made by cheque as late as 01.03.2014. It does not appeal to logic or reason much less to the usual practice in commercial dealings. In any event the respondent has not furnished any explanation with regard to the same. At this stage it becomes necessary to notice the contention of the appellant that the signatures and the contents of the cheques are in different writings. The respondent had the option to institute a summary suit at the very inception of the dispute. But it consciously opted for a prosecution under the Act which undoubtedly was a more efficacious remedy for recovery of any specified amount of a dishonoured instrument raising a presumption against the drawer, as in a summary suit the possibility of leave to defend could not be completely ruled out, in which case the recovery gets delayed and protracted.

15. Significantly on 29.10.2015, in the prosecution instituted by the respondent under the Act, the court required the respondent to file certain additional documents because the appellant denied the existence of any legal liability for any sum due. It is only thereafter that the Summary Suit was instituted on 24.11.2015. The prosecution under the Act was subsequently unconditionally withdrawn on 14.12.2015. These facts are not in dispute and are clearly discernible from the records. This coupled with the specific contention of the appellant, not denied by the respondent, that it had returned defective goods and paid the balance dues of Rs.5,00,000/-, we find the conclusion to grant leave to defend as perfectly justified.

16. But the defence raised by the appellant in the aforesaid background was certainly not a sham or a moonshine much less frivolous or vexatious and neither can it be called improbable. The appellant had raised a substantial defence and genuine triable issues. The failure both by the Trial Judge and the High Court to notice and consider the aforesaid issues as discussed by us hereinbefore leaves us satisfied that there was

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- A no justification to grant conditional leave to defend. The fact that there may have been commercial relations between the parties was the ground for the institution of the summary suit but could not *per se* be the justification for grant of conditional leave *sans* proper consideration of the defence from the materials on record.
- B 17. In the result, the impugned orders granting conditional leave to defend are held to be unsustainable and are set aside. The appellant is granted unconditional leave to defend.

18. The appeal is allowed.

Devika Gujral

Appeal allowed.