

(2022) 03 GUJ CK 0057

In the Gujarat High Court

Case No : R/Special Civil Application No. 2961 Of 2022

M/S Shashwat Marketing & 1 Other(S)

APPELLANT

Vs

M/S Bhoomi Food Products

RESPONDENT

Date of Decision : 16-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 37 Rule 3

Citation : (2022) 03 GUJ CK 0057

Hon'ble Judges : Dr.Ashokkumar C. Joshi, J

Bench : Single Bench

Advocate : K I Kazi

Final Decision : ?Dismissed

Judgement

Dr. Ashokkumar C. Joshi, J

1. The Petitioners / Original Defendants have filed this Petition under Article 227 of the Constitution of India and under the provisions of Order 37 of the Code of Civil Procedure challenging the order dated 30.11.2021 passed below Exh.14 by the learned 3rd Additional Civil Judge, Kalol ("learned Trial Judge") in Regular Summary Suit No. 24 of 2021 and prayed to grant the Petitioners unconditional leave to defence as prayed in the leave to defence application, which came to be rejected by the learned Trial Judge.

2. Learned Advocate for the petitioner has submitted that the Respondent / Original Plaintiff has filed Regular Summary Suit No.24 of 2021 against the present Petitioners / Original Defendants alleging that the Respondent / Original Plaintiff has sold goods on different dates by issuing different bills for the period from 1.4.2020 to 8.9.2021. Upon supplying all the goods, there is total dues of Rs. 8,40,610 against the Petitioners for which the Respondent herein made various demands from the Petitioners, however, there was no payment by the Petitioners. It is submitted that it is the case of the present Petitioner that the

averments and the allegations mentioned in the plaint are not correct. Further, the Petitioner has also denied the case of the plaintiff and stated that the Petitioner put demand to supply ghee with good quality, in turn, the Respondent herein supplied ghee but its quality is not good, for which the present Petitioner intimated to the present Respondent and requested to get it back and supply the proper good with good quality, in response to which the Respondents informed to keep those goods for some time until the present Respondent would take it back and supply fresh good with good quality, but the Respondents did not take any steps for supply of good quality ghee as promised, even there is no due amount upon the present Petitioner. The Respondent on the contrary issued notice to the Petitioner. It is therefore prayed that the Petitioner is entitled for unconditional leave to defense.

3. Learned Advocate for the Petitioner has submitted that the order passed by the learned Trial Judge is illegal and arbitrary. It is submitted that learned Trial Judge has grossly erred in not considering the evidence available on record and the provision of law. It is submitted that the learned Trial Judge has erred in observing that as the Petitioners / Original Defendants have not produced any documents, therefore the defense of the Petitioners / Original Defendants cannot be considered as substantial and genuine. It is further submitted that the Petitioners have raised a triable issue indicating a fair and reasonable defense. It is further submitted that the learned Trial Judge ought to have considered that from the documents produced by the Plaintiff with the Suit the transaction narrated by the Respondent / Original Plaintiff is doubtful as it is evident from the evidence placed on record. It is therefore urged that the learned Trial Judge ought to have granted unconditional leave to defense to the Petitioners. It is further submitted that the Petitioner is having a good prima facie meritorious case in his favour and there are all chances to succeed finally in the matter. It is submitted that if the stay as prayed for is not granted, the Petitioner will have to suffer great hardship as the Petitioner will not get chance to present his case. On the other side if the stay as prayed for is granted, the Respondent herein will also get fair chance to present the case.

4. This Court has considered the submissions made by the learned Advocate for the Petitioners and also perused the order dated 30.11.2021 passed by the learned 3rd Additional Civil Judge, Kalol below Exh.14 in Regular Summary Suit No. 24 of 2021.

5. It is the cardinal principle of entertaining the application under Order 37 Rule 3 for leave to defense that the Applicant must prove ex facie triable issue, then only, leave to defense can be considered unconditionally. In the present case on hand, as per the say of the Petitioner / Original Defendant, the ghee supplied by the Respondent / Original Plaintiff is of poor quality, but there is nothing on record about the quality of ghee. On the contrary, the Petitioners / Original Defendants have admitted that the captioned ghee was received but the same was of poor quality. Upon such premises, in the opinion of this Court, the learned

3rd Additional Civil Judge, Kalol on 30.11.2021 has rightly arrived at the conclusion that there is no substance to consider the leave to defense unconditionally under the provisions of law.

6. This Court has come across the judgment passed by the Hon'ble Apex Court in the case of Kamlesh Kohli and Ors. v. Escotrac Finace and Investment Ltd. & Ors. Reported in (2000) 1 SCC 324 wherein the Hon'ble Apex Court has dealt with the similar issue and has held in paragraph 8 of the judgment as under:

"Learned Counsel further submitted that this is a fit case in which Court ought to have granted leave to defend. In our view, the High Court rightly arrived at the conclusion that defence, is on the face of it, dishonest and mala fide. The reason is not too far to find out because in a writ petition filed by the plaintiffs, a memorandum of agreement was arrived at, which was duly signed by the plaintiffs and Smt. Kamlesh Kohli as well Rajiv Kohli as attorney of Smt. Kamlesh Kohli. The Division Bench of the High Court, after recording the presence of constituted attorneys of the parties and considering the Memorandum of agreement accompanied by application containing annexures A and B, permitted the plaintiffs to withdraw the writ petition. The plaintiffs acted upon the said agreement and paid Rs.65 lakhs to the plaintiff. In view of these facts it is unreasonable to permit the defendant to raise an illusory contention that the said settlement is not binding on her. Therefore, the Court rightly rejected the application of defendant Nos. 1 and 2 for grant of leave to defend."

7. Yet, in another judgment of the Hon'ble Apex Court in the case of Apollo Zipper India Limited v. W.Newman & Co. Ltd. reported in (2018) 6 SCC 744, wherein the Hon'ble Apex Court has dealt with the similar issue and has held in paragraph 72 and 73 as under:

"72 . In the light of the foregoing discussion, we are of the view that the Respondent failed to raise any arguable and substantial defense as required under Rule 6 read with Rule 9 of the Rules and the three grounds raised for seeking leave to defend the suit were only for the sake of raising and had no factual or / and legal foundation to stand for trial in the suit and hence no leave can be granted to the Respondent on such grounds under Rule 9 of the Rules. It was, therefore, rightly declined by the Single Judge but wrongly granted by the Division Bench.

73. In view of the foregoing discussion, the appeal succeeds and is allowed. Impugned judgment is set aside and that of the Single Judge is restored."

8. In view of the discussion made herein above and considering the judgment of the Hon'ble Apex Court, the Petition is devoid of any merit and deserves to be dismissed and accordingly stands dismissed. No order as to costs.