

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 474 of 2004****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE K.M.MEHTA**

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GUJARAT WATER SUPPLY & SEWERAGE BOARD - Appellant(s)**Versus****WADA ARUN ASBESTOS PRODUCTS PVT. LTD - Defendant(s)**

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Appearance :

MR HS MUNSHAW for Appellant(s) : 1,

MR CC KAMDAR for Defendant(s) : 1,

MR KETAN C KAMDAR for Defendant(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE K.M.MEHTA****Date : 31/08/2005****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE R.S.GARG)**

The present First Appeal under Section 96 of the Code of Civil Procedure has been filed by defendant who suffered decree under Order 37 Rule 3(6)(b) of the Code of Civil Procedure on 24.4.2003

under the hands of the Civil Judge (Senior Division), Gandhinagar, in Summary Civil Suit No. 3 of 2002.

The factual matrix necessary for disposal of the present matter is that the respondent plaintiff Wada Arun Asbestos Products Private Limited filed a Suit under the provisions of Order 37 of the Civil Procedure Code, 1908 for recovery of a sum of Rs. 21,18,335.65. After issuance of the summons, the defendant appeared before the Court and within the time as prescribed under the Code, made an application for grant of leave. Various defences were raised by the defendants. The plaintiff filed his rejoinder and challenged the grounds of the defence submitting inter alia that the affidavit filed by the defendants seeking unconditional leave were baseless and moonshine, the defendant was not entitled to any leave. The plaintiff was entitled to a decree under Order 37 Rule 3(6)(b) of the Code of Civil Procedure. After hearing the parties, the learned trial Court granted permission to the defendants to defend the Suit on condition that they will deposit 50 per cent of the Suit amount with the trial Court. The defendants did not deposit the said amount within the period of one month, they could not make the deposit within the extended period, therefore, the plaintiff made an application under Order 37 Rule 3(6)(b) of the Code of Civil Procedure that in view of the conduct exhibited by the defendants and non-depositing the amount, the plaintiff was entitled to a decree

in his favour, though some efforts to resist the applications were made by the defendants but the trial Court allowed the application and granted decree in favour of the plaintiff.

The defendant being aggrieved by the said judgement and decree filed the present appeal and as an execution for recovery was filed under Order 21 Rule 11 of the Civil Procedure Code, he made an application for grant of stay of the execution of the decree. This Court by an interim order allowed the application subject to the appellant-defendant depositing 50 per cent of the amount. It is not in dispute before us that said 50 per cent amount has already been deposited.

Mr. Munshaw, learned counsel for the appellant defendant, after taking us through the application submitted by the present appellant to the trial Court seeking leave to defend, submits that various valid defences were raised by the defendant, therefore, the trial Court was obliged to grant unconditional leave in favour of the defendant. He submits that in an agreement to supply particular items, question of the quality control, supply of the material, the quality and quantity of the material, the time at which the material was to be supplied, were questions germane to the final disposal of the matter and as the defendant was raising various pleas in relation to such defence, he was entitled to unconditional leave. He submits

that the decree deserves to be set aside and the appellant must be granted unconditional leave.

Mr. C.C. Kamdar, learned counsel for the respondent, on the other hand submitted that the defences raised by the defendant were absurd, contrary to the ordinary common sense and were absolutely moonshine and despite that the learned trial Court, if granted conditional leave then the defendant were obliged and duty bound to observe the order and the trial Court was justified in granting the decree in favour of the plaintiff in view of the non-observance of the conditional leave. He further submits that the defendant did not give any detail of his defence in his application for leave to defend. Therefore, the defence could not be appreciated.

From the application submitted by the defendant seeking leave to defend the suit, it would clearly appear that in paragraph No. 5 the defendant had raised plea that the plaintiff did not supply the total quantity of the material, in paragraph No. 6 it was submitted that in regard to place/destination of delivery of goods there was a dispute in connection with the terms/conditions of supply order, in paragraph No. 7 it was submitted that the representative of the plaintiff was very much available at the time of quality test which were carried out, besides there were dispute as regards quality of material, therefore, summons for judgement was

not required to be entertained. These question, in our considered opinion, did require some consideration by the Court. True it is that details of such defence were not given by the defendant, but non-supply of the material would not deter the defendant from raising a defence that the plaintiff did not perform his part of the agreement in supplying the material. True it is that the Court had granted the conditional leave in favour of the defendant and the defendant did not comply with the order but according to Mr. Munshaw, a big amount of Rs. 10,59,168/- was to be deposited and before the amount could be arranged after due negotiation, the plaintiff applied for grant of a decree in his favour. It is submitted by Mr. Munshaw, that present is the case where this Court should condone lapses in making deposit and remit matter back to the trial Court with a direction to decide matter on merits.

Though learned counsel for the plaintiff opposed the prayer but taking into consideration the totality of the circumstances and the fact that under the directions and orders of this Court 50 per cent of the Suit amount has already been deposited and further that the defendant is raising certain defences which if are allowed then same may non-suit the plaintiff, we are of the opinion that the decree granted in favour of the plaintiff under Order 37 Rule 3(6)(b) of the Civil Procedure Code deserves to be set aside. The matter is remitted to the trial Court with the direction that the amount already

deposited by the defendant under the directions of this Court shall be deemed to be amount deposited under the leave granted by that Court. The defendant would be allowed proper opportunity to submit his written statement. The appeal is allowed. No order as to costs.

Parties present in this Court shall appear before the trial Court on 19.9.2005. The trial Court shall give proper opportunity to the defendant to file the written statement and then shall proceed to decide the matter in accordance with law.

(R.S. GARG, J)

(K.M. MEHTA, J)

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