

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1857 OF 2015

K R Patel HUF

**through its Karta Mr. Kirit R Patel,
Adult, Indian Inhabitant, residing at
603-B, Cross Gate, 4th Cross Lane,
Lokhandwala Complex, Andheri (W),
Mumbai-400 053**

.. Petitioner

Versus

- 1. M/s. M. M. Developers, a partnership Firm,
under the Partnership Act 1932, having its
office at CST Road, Kurla (West), Mumbai
400 070 through its partners**
- 2. Mohammed Masroor Shaikh, Adult,
Bombay Indian Inhabitant**
- 3. Mohammed Salim Tanwar, Adult,
Bombay Indian Inhabitant**
- 4. Salim Shaikh, Adult,
Bombay Indian Inhabitant.**
- 5. Mohammed Sajid Tanwar, Adult,
Bombay Indian Inhabitant**
- 6. Mohammed Mustafa Shaikh, Adult,**

**Bombay Indian Inhabitant,
all carrying on business in the
name and style of M M Developers,
having their address at CST Road,
Kurla (West), Mumbai-400 070**

.. Respondents

**Shri. Sharan Jagtiani with Ms. Sheetal Shah & Shri. Aditya Pimple
i/by M/s. Mehta & Girdharlal, for the Petitioner.**

**Shri. Javeed Hussein with Ms. Mubashir Hussein, Shri. Sangram
Lotankar, Shri. Alice Shaikh, for the Respondents.**

CORAM : R.M. SAVANT, J.

DATE : 09th MARCH, 2015

ORAL JUDGMENT

1. Rule, with the consent of the Learned Counsel for the parties
made returnable forthwith and heard.

2. The cause for invocation of the writ jurisdiction of this Court
is the order dated 18.02.2015 passed by the Learned Judge of the City
Civil Court, Greater Mumbai which is reflected in the Roznama of the said
date i.e. 18.02.2015, wherein the noting is made to the following effect-

“Adv. Lotankar for Defendant present.

Compilation of documents filed by Plaintiff.

Defendant failed to file W/s. Hence, suit to proceed
without W/S of Defendant

Adjd for hearing to 10/03/2015”

3. The said order has been challenged on the ground that the course of action sought to be followed by the Learned Judge of the City Civil Court is not contemplated by Order XXXVII Rule 3(6)(b) of the CPC. In the said context, it is required to be noted that the Respondents herein were granted conditional leave by the City Civil Court by order dated 04.08.2014 on the condition that the Respondents i.e. Defendants deposit an amount of Rs.64,63,096/- in the said Court within six weeks. The said order came to be challenged in this Court by way of Writ Petition No.9973 of 2014. The said Writ Petition came to be dismissed by this Court by order dated 13th November, 2014. The said order was thereafter challenged by the Defendants before the Apex Court by way of SLP No.35412 of 2014. The Apex Court whilst dismissing the said SLP granted time of six weeks from the date of its order to deposit the said amount of Rs.64,63,096/-. The Defendants thereafter filed an application Exh.6 for seeking extension of time in the City Civil Court, Mumbai. A Learned Judge of the City Civil Court extended the time by two weeks from 4th February, 2015 by order dated 4th February, 2015. The said order came to be challenged in this Court by the Plaintiff by way of Writ Petition No.1244 of 2015. The said Writ Petition came to be allowed by this Court, as the Learned Counsel appearing on behalf of the Defendants fairly conceded in the light of the order passed by the Apex Court in SLP

No.35412 of 2014 that the City Civil Court did not have the jurisdiction to extend the time. However, after the said Writ Petition came to be disposed by this Court by order dated 6th February, 2015, wherein the statement made by the Learned Counsel for the Defendants Shri. Javeed Hussein was recorded, the Defendants did not approach the Apex Court for seeking extension of time, though time had already expired long prior thereto. The upshot of the aforesaid facts is that the Defendants have not complied with the conditional order dated 4th August, 2014 in the matter of making deposit of the amount of Rs.64,63,096/- in the City Civil Court which was a condition imposed on the Defendants so as to entitle them for leave to defend the suit.

4. The suit was thereafter listed before the City Civil Court on 18.02.2015, where the Plaintiffs have filed the documents in original. However, the Trial Court has recorded that the suit to proceed without the written statement of the Defendants meaning thereby that the Trial Court seems to be labouring under an impression that the suit is to be proceeded on the basis that the written statement has not been filed by the Defendant and therefore, the provisions which are applicable when the Defendant does not file the written statement would have to be followed.

5. Heard the Learned Counsel for the parties. The Learned Counsel appearing on behalf of the Petitioner/original Plaintiff Shri.

Sharan Jagtiani would contend that the procedure adopted by the Trial Court is contrary to the procedure prescribed by Order XXXVII Rule (3)(6) (b) of the CPC. The Learned Counsel would contend that once the condition by which leave was granted has not been complied by the Defendants, the Plaintiffs are entitled to a judgment. The Learned Counsel seeks to rely upon a judgment of the Division Bench of this Court reported in AIR 1989 Bombay 150 in the matter of M/s. D. Shanlal and etc. Vs. Bank of Maharashtra and also the judgment of a Learned Single Judge of the Delhi High Court reported in AIR 1995 Delhi 252 in the matter of Standard Chartered Bank Vs. M. S. Handa and others.

6. Per contra, the Learned Counsel Shri. Javeed Hussein would seek to justify the recording made by the Trial Court in the Roznama namely that the suit to proceed without the written statement of the Defendants and would contend that the Plaintiff would have to prove the documents in question before the Trial Court.

7. Having heard the Learned Counsel for the parties, in my view the course of action that is proposed to be followed by the Trial Court can be said to be in contravention of the mandate of Order XXXVII Rule (3)(6) (b) of the CPC. A reading of the said provision makes it clear that on failure of the Defendant to comply with the condition imposed by the Court, the Plaintiff is entitled to judgment forthwith. The said provision

was the subject matter of the judgment of a Division Bench of this Court in *M/s. D. Shanlal's case (supra)*, where the Division Bench has observed that when the Defendant fails to comply with a conditional order passed under Order XXXVII, the Defendant is precluded from further contesting the plaintiff's claim and that the facts stated in the plaint must be considered to have been admitted by the Defendant and the Plaintiff becomes entitled to judgment. The Division Bench has further observed that Order XXXVII not only provides for abridgment of the procedure of suits covered by the said provisions but also the said provisions restrict and/or curtail the rights of the Defendants in these suits to contest the Plaintiff's claims.

8. In so far as the judgment in *Standard Chartered Bank's case (supra)* is concerned, a Learned Single Judge of the Delhi High Court in the said case has relied upon the judgment of the Division Bench of this Court in *M/s. D. Shanlal's case (supra)*, the Learned Single Judge has reiterated the proposition of law that the condition having not been fulfilled by the Defendant, leave to defend would be deemed to have been refused to the said Defendant and the Plaintiff becomes entitled to a judgment. In the light of the aforesaid judgments, it is not possible to countenance the submissions urged on behalf of the Defendants by Shri. Javeed Hussein. There is no scope for any further enquiry and the Plaintiff

would be entitled to judgment forthwith. The Trial Court would therefore have to proceed on the basis that the claim in the plaint is accepted and has to proceed to pass judgment in terms of the law which has been enunciated by the Division Bench of this Court in *M/s. D. Shanlal's case (supra)*. With the aforesaid observations, the Writ Petition is disposed of. The Learned Counsel to inform the developments in the above Writ Petition to the Trial Court when the suit comes up for hearing. The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms, with parties to bear their respective costs.

[R.M. SAVANT, J]