**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO. 43 OF 2013
IN
SUMMARY SUIT NO. 324 OF 2013**

1. Arjan K. Ramnani & Ors. .. Applicants

<u>In the matter between :</u>

Pratima Prakash Wagh &
Rajesh Prakash Wagh .. Plaintiffs
Vs.
Arjan K. Ramnani & Ors. .. Defendants

Mr.Rohaan Cama a/w. Mr.Gobinda Mohanty i/b Mohanty & Associates for plaintiffs.

Ms.Deepti Panda a/w. Mr.Jayesh Gawade i/b Thakore Jariwala & Associates for defendants.

**CORAM : K.R.SHRIRAM, J.
RESERVED FOR ORDERS ON : 1ST JULY, 2015
FOR PRNOUNCEMENT ON : 10th AUGUST 2015**

P.C.

1 The plaintiffs, pursuant to a Memorandum of Understanding (MOU) dated 17.10.2001 with the defendants, agreed to purchase from the defendants a piece of agricultural land for a total consideration of Rs.1,44,68,467/-. The plaintiffs paid to the defendants a sum of Rs.1,01,06,700/-. The balance of Rs.43,61,767/- the plaintiffs were unable to pay to the defendants due to various reasons and requested the defendants to terminate the MOU. The defendants agreed to terminate the MOU.

It is the case of the plaintiffs that the defendants agreed to refund of Rs.1,01,06,700/- and to that extent paid a sum of Rs.1,45,000/- and the balance amount of Rs.99,61,700/-, the defendants agreed to repay within a period of 24 months in installments.

2 It is the case of the plaintiffs that the parties entered into an MOU titled 'Deed of Surrender' dated 18.03.2003 where the understanding of the parties was written. The defendants paid various amounts from time to time and according to the plaintiffs, a sum of Rs.79,36,700/- is due and payable as principal amount to the plaintiffs. It is the case of the plaintiffs that the defendants were, every year issuing confirmation letter for income tax purposes and had issued six such confirmation letters dated 1.04.2003, 1.4.2004, 1.4.2006, 1.4.2008, 1.4.2010 and 1.4.2011. As per the confirmation letter dated 1.4.2011, the plaintiffs alleged that the defendants have admitted a closing balance of Rs.79,36,700/- as on 31.03.2011 due and payable to the plaintiffs. The plaintiffs have filed this suit under Order 37 of Code of Civil Procedure, 1908 based on the Deed of Surrender dated 18.03.2003 read with confirmation letters which are at Exhs. 'D' to 'I' to the plaint. It is the case of the plaintiffs that the defendants have no defence tto the claim. The plaintiffs have, of course, also claimed interest at 18% p.a. on the amount of Rs.79,36,700/-.

3 The counsel for the defendants states that unconditional leave has to be granted since (a) the parties had not agreed for any interest and the Deed of Surrender expressly provides refund of the money without interest and (b) the claim is time barred.

4 The case of the plaintiffs is based on Deed of Surrender read with Confirmation letters duly signed by the defendants. The defendants deny having executed the confirmation letters dated 1.04.2010 and 1.04.2011. The defendants also deny having executed the Deed of Surrender (Exh.'C') to the plaint based on which the present suit has been filed. Admittedly also the plaintiffs do not have the original of the deed of confirmation letters dated 1.04.2010 and 1.4.2011 to give inspection because, according to the plaintiffs, these documents are with the defendants.

5 Let us explore as to whether the defendants' stand are justifiable or not. It is true that the plaintiffs have not been able to produce the original of these three documents. As regards, the Deed of Surrender (Exh.'C'), it is the case of the defendants, that they never executed the document and were never present before the Notary Public before whom the parties are supposed to have signed. The counsel for the defendants have also relied on

the matter ***H.K. Taneja & Ors. Vs. Keshavrao J. Bhosle***[1] to submit that a document that does not reflect the serial number and the register number in which entry is made by the notary public cannot be relied on. As it appears from the document annexed to the plaint, the serial number and the register number in which the entry is made by the Notary Public is not mentioned. It may be so, but the fact is the defendants have relied on these documents in the proceedings that were pending before the Income Tax Authorities against the defendants.

6 The defendants had challenged an order dated 4.02.2011 passed by the CIT (Appeals), Mumbai for assessment year 2007-08 before the Income Tax Appellate Tribunal (ITAT), A-Bench, Mumbai. The Income Tax Authorities had added a sum of Rs.88,86,700/- as income of the defendants. In addition to this amount, there were certain other heads in respect of computation of capital gain and sale of property that was subject matter of the appeal. For the present suit, we are only concerned with the first part of the appeal, i.e., addition of Rs.88,86,700/-. As it appears from the order passed by the ITAT, pronounced on 30.11.2011 (date of hearing was 22.11.2011), the ITAT had allowed this part of the appeal of the defendants. The order also reflects the submissions made by the defendants.

1 2009(2)M.h.L.J. 855

7 In the return filed by defendant no.1 in the balance-sheet, it was noticed by the Assessing Officer that the original defendant no.1 had shown an outstanding liability of Rs.88,86,700/- payable to plaintiff no.1. When the assessment Officer sought the details, the original defendant no.1 has informed the Assessment Officer that he entered into an MOU for sale of his agricultural land with the plaintiffs and received an advance amount of Rs.69,26,700/- and the advance was towards part of sale consideration of agricultural land. It is also mentioned that the said agreement was cancelled on 18.03.2003 which is the date of Exh.'C', i.e., the Deed of Surrender. It s also stated that the amount received from the plaintiffs could not be returned due to severe financial problems, but part of the amount had been paid to the plaintiffs from time to time. The defendants has submitted that the amount payable to the plaintiffs as of 31.03.2007 should be treated as unpaid liability and should be considered for tax purpose. The date of 31.03.2007 is mentioned because the assessment was for Financial Year 2006-2007 (Academic Year 2007-2008). The Assessment Officer, however, treated the entire outstanding dues of Rs.88,86,700/- as an income of the defendants against which an Appeal to CIT also was filed. As that Appeal was dismissed, the defendants preferred an appeal to the ITAT. Paragraphs 4, 5, 6 and 7 of the order of ITAT read as under :

> 4. We have heard rival submissions of the parties and

perused the records. The Ld. Counsel vehemently submits that the amount was received as an advance towards land deal and the said amount cannot be taxed as benefit or perquisite u/s. 28(iv) of the Act. He submits that as per the MOU, the assessee agreed to sale his agricultural land in Village : Karla, Taluka: Maval, District : Pune for the consideration of Rs.1,44,68,467/-. Subsequently, the said agreement could not be materialised as the purchaser did not pay the balance amount as per the terms of the MOU and hence, the amount remained outstanding. He submits that there is not business deal and hence, no addition can be made. The Ld. Counsel relied on the following decisions to support his argument that no addition can be made u/s. 24(i) of the Act.

(i)	CIT vs. T.V. Sundaram Iyangar & Sons Ltd.	-	222 ITR 344 (SC);
(ii)	Solid Container Vs. Dy. CIT	-	178 Taxman 192;
(iii)	Helios Food Impr000000.overs P. Ltd.	-	14 SOT 546 (Mum.);
(iv)	Mahindra & Mahindra Ltd. Vs. CIT	-	261 ITR 501 (Bom.);
(v)	G.P. International Ltd.	-	186 Taxman 229 (P & H)

5 We have also heard the Ld. D.R. We find that the assessee is a Director in M/s. Dhankrishna Enterprises Pvt. Ltd., M/s. Sana Holidays Resorts Pvt. Ltd., M/s Dhankrishna Estates Pvt. Ltd. and Darbari Constructions Pvt. Ltd. As per the copy of MOU dated 17.10.2001; Mrs. Pratima P. Wagh and Mr.Rajesh P. Wagh (Pages 22, 23, 24, 25, 26 & 27) the assessee was the owner of the agricultural land bearing survey No.73 at Village Karla, Taluka Maval, Dist. Pune admeasuring 20080 sq.mtrs. and the assess agreed to sale the said land to Mrs.Pratima P. Wagh and Mr.Rajesh P. Wagh for the sale consideration of Rs.1,44,68,467/-. As per the clause 4 of the said MOU, the assessee agreed to complete all the formalities for

transferring the possession of the said land on or before 17.10.2002. The terms of the payment of consideration are mentioned in clause 6 of the MOU. In sum and substance, the MOU is nothing but it is an agreement to sale the agricultural land of the assessee. At the time of Execution of the MOU, the assessee received Rs.69,26,700/- the asessee has filed the copies of the confirmation from Mrs.Pratima Wagh for the accounting year 2001-02, 2002-3, 2003-04, 2004-05 & 2005-06. As per the confirmation letters, the assessee has made the repayment of the following amounts :

(i)	31.3.2002		Rs.1,45,000/-
(ii)	17.06.2003		Rs.1,07,000/-
(iii)	18.07.2003		Rs.40,000/-
(iv)	11.09.2003		Rs.3,00,000/-
(v)	29.3.2003		Rs.2,00,000/-
(vi)	13.9.2005		Rs.50,000/-
(vii)	25.10.2005		Rs.25,000/-
(viii)	28.11.2007		Rs.50,000/-
(ix)	20.03.2007		Rs.50,000/-
(x)	29.11.2007		Rs.1,00,000/-
(xi)	14.12.2007		Rs.1,00,000/-
(xii)	12.02.2008		Rs.4,00,000/-

6 The assessee has also filed a copy of the Balance-sheet for the year ending 31st March, 2007. In the current liability (Schedule-I), outstanding liability to Mrs.Pratima Wagh is shown at Rs.87,86,700/-.

7 We further find that as per the confirmation letter signed by the assessee, the balance is shown at Rs.90,86,700/- as on 31.03.2007. Though the Ld. CIT (A) has observed that the assessee has also in the hospitality business and hence, he entered into a MOU with Mrs.Pratima P. Wagh with the object to develop the property into holiday resort, but as per the document on record we find that the assessee received the amount as part of the sale

> consideration towards MOU to sale the agricultural land. Both the authorities below have not disputed the genuineness of the transaction.
> …......”

(emphasis supplied)

Therefore, it is quite clear that the defendants had entered into the Deed of Surrender dated 18.03.2003 and also paid to the plaintiffs amounts from time to time in furtherance to the Deed of Surrender. Therefore, it is quite obvious that the defendants have agreed and also relied upon the Deed of Surrender before the ITAT. It is difficult to accept the specious argument of the defendants that they never executed the Deed of Surrender dated 18.03.2003.

8 On the submission that the document is not properly notarised, it is no issue inasmuch as notarisation was not compulsory. Even if the document had not been properly notarised because the serial number and register number of the Notary Public is not reflected, the fact is that the document has been executed by the defendants because they have acted upon the document and also they have relied upon the document to gain benefit under the income tax proceedings. Having acted upon the said document and made part payment and having used the document to get tax advantage, it is absolutely fraudulent and dishonest on the part of the defendants to deny

having executed the said document.

9 The counsel for the defendants also submitted that they have not executed the documents at Exh.'H' and 'I' to the plaint and therefore, the plaintiffs cannot rely upon the the two documents for the purpose of limitation. The said two documents have been signed by defendant no.1. I am saying it has been signed by defendant no.1 because the signature on the two documents of defendant no.1 is exactly same as in the other documents relied upon in the plaint. Moreover, in both the documents, the amount paid and the date of payment are reflected. The plaintiffs have produced their bank statements in the rejoinder and the payments shown in Exhs. 'H' and 'I' to the plaint can be correlated to the payment reflected in those two documents. There are 8 entries in the statement of accounts of the plaintiffs issued by HDFC Bank for the period from 1.08.2010 to 30.11.2010. The plaintiffs have filed a copy of one counterfoil of cheque deposit to the affidavit in rejoinder at page 50 and the remaining counter foils are annexed to further affidavit of plaintiff no.2 affirmed on 25.06.2015. In those counterfoils, the rubber stamp of the bank is put and also it shows the cheque details that those are cheques issued by defendant no.1. All this go to show that the defendants have in fact made these payments. The counsel for the defendants also submitted that the plaintiffs not having produced the

original of Exh.'C' and Exhs.'H' and 'I' of the plaint, this Court should grant unconditional leave to defend. The counsel relied on a judgment of the Apex Court in the matter of ***Neebha Kapoor Vs. Jayantilal Khandwala & Ors.***[2] to submit that order 37 of the Code requires original documents to be produced and where originals are not available, the plaintiffs was obliged to prove loss of documents and therefore, unconditional leave ought to be granted.

10 First of all, in Neebha Kapoor (supra) the judgment at paragraph 11, it is stated that for the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. It does not say in every case. When the Court has used the expression 'ordinarily', it would mean that in certain situations based on facts and circumstances, it is permissible for the Court to give summary judgment even where the original documents are not available.

11 In this case, even though the defendants have denied executing the Deed of Surrender (Exh.'C'), the defendants have acted upon the document and also relied upon the said document to gain benefit from the income tax authorities. Even as regards Exh.'H' and 'I', the confirmation letters, the entries therein tally with the bank statement and the bank's pay in slip book.

2 (2008)3 SCC 770

Even assuming for the sake of argument that the defendants have not signed Exh.'H' and 'I', still the last payment made has reflected in Exh.'G' was made on 2.03.2008 and Exh.'G' shows a closing balance of Rs.84,96,700/- due and payable to the plaintiffs. As could be seen from the ITAT's order, the order that was impugned before the ITAT was dated 4.02.2011 which is less than 3 years period from 12.02.2008. Also as could be seen from the ITAT's order, the stand of the defendants was, the amount of Rs.88,86,700/- was due and payable and that would amount to acknowledgment of liability. Under Section 18 of the Limitation Act, 1963, where, before the expiration of the prescribed period, an acknowledgment of liability has been made in writing signed by the party, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. In the explanation (a) to the Section 18, it is also provided that an acknowledgment may be sufficient though it is addressed to a person other than a person entitled to the property or right. The CIT Appeal whose order was impugned before the ITAT has considered the Appeal filed by defendant no.1 and also the balance-sheet filed by defendant no.1. The defendants have not produced the balance-sheet to contradict the findings in the order of ITAT. The defendants have not challenged the said order. Therefore, in my view, there is an acknowledgment of liability by the defendants and the plaint having been lodged on 29.04.2013 is well within limitation.

12 The defendants did raise various other points by relying on Section 33 of the Evidence Act to submit that order passed by the ITAT cannot be used in the present proceedings and that the plaintiffs had not written a single letter demanding the amount that it was an accommodation arrangement with the plaintiffs and that there were various other transactions between the plaintiffs and the defendants and the entries related to those transactions etc. It is also necessary to note that the defendants not only deny having executed the documents but also say in their reply that these were accommodation documents. But that is also not their case before the Income Tax Authorities. All these submissions are without any documentary evidence.

It has been held by the Full Bench in the matter of ***Jyotsna K. Valia Vs. T.S. Parekh & Co.***[3] a contract in writing need not always be a contract signed by both the parties and may consist of exchange of correspondence of a letter or letters written by one and assented to by the promiser without signature or even of a memorandum or printed document not signed by either party. As reproduced by the Full Bench from Black's Law Dictionary, an acknowledgment of debt means recognition by a debtor of existence of a debt, a recognition of something as being factual, an acceptance of responsibility, the act of making it known that one has received something.

3 2007 (3) Bom. C.R.772

The action of acknowledging is a thing done or given in recognition of something received. The defendants have, for reasons mentioned above, acknowledged having received the amount claimed by the plaintiffs. The defendants have also acknowledged, for reasons mentioned above, that those amounts are payable to the plaintiffs.

13 The counsel for the defendants submitted that the order of ITAT cannot be even looked into, I see no reason why it should not be considered. Once an admission of a claim is made in whatever manner, in my view, the same can be used by the plaintiffs to prove their case. The object of Order 37 is to avoid a matter lingering in the Courts. In the present case there is an admission by the defendants. This Court (Coram : Smt. Roshan Dalvi, J.) in an unreported judgment in the matter of ***H.K. Taneja Vs. Mr.Bipin Ganatra*** [4] on which reliance has been placed by the plaintiff, has held that reliance on other pleadings/orders in other matters can be considered to determine where there has been an admission of liability.

14 Though that judgment was on an application under Order 12, Rule 6 of the Code of Civil Procedure, in my view the object of the said provision is similar to the object of Order 37. Paragraphs 11, 12, 13, 14, 18, 19, 20,

4 NMS/886/2009 a/w. NMS/1509/2011 in S/1094/2007 dated 22.11.2012

21, 22, 23, 24 to 31 and 35 read as under :

> 11 The application is under Order 12 Rule 6 of the CPC, which runs thus:
>
> > *"Order 12. Rule 6. Judgment on admissions. – (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.*
> >
> > (2) *Whenever a judgment is pronounced under subrule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."*
>
> 12 Bearing in mind that the suit is on trespass and the claim of the Plaintiffs is that they are owners of the suit property which is refuted and denied in the written statement and considering that the Defendant's case itself is of ownership pursuant to being the heir under the deceased's Will, yet unprobated or simplicitor as a heir on intestacy, the admission of the Defendant would be required to be seen.
>
> 13 The admission is contained in a criminal complaint filed by the Defendant in the Court of the Additional Chief Metropolitan Magistrate, 40th Court, Girgaon, Mumbai against one Keshavrao Bhosle under Sections 405, 406, 415, 418, 420, 441, 463, 464, 467, 468, 211, 192, 193 & 196 of the Indian Penal Code.
>
> 14 The complaint shows how the Defendant was

adopted by the deceased and his wife and how a tenancy right has been created in the flat bequeathed to him by the wife of the deceased. (This is despite the fact that the wife had only a life interest and was not the owner of the suit flat and could not create any interest in favour of any one including the Defendant). The Defendant, therefore, claims to be tenant and not an owner either by adoption or under a Will. In para 4 of a complaint the Defendant has specifically stated that the suit flat was owned by the Trust (an aspect denied in this suit) and that the trust filed the suit against the complainant claiming his eviction. The Defendant has relied upon this suit in the complaint.

….

18 The Plaintiffs came to learn about the complaint which the Defendant himself annexed to an affidavit in reply filed by the Defendant in the Chamber Summons taken out by the said Keshavrao Bhosle claiming to be a party Defendant in this Suit.

19 The admission, therefore, falls precisely under the provision of Order 12 Rule 6 necessitating and enjoining the Court not to wait to determine the issue of ownership, adoption and or possession of the Defendant, but to pass a judgment granting the aforesaid prayers which would no longer remain for adjudication upon such admitted facts.

20 Order 12 Rule 6 is a salutary provision. It is made not to get suits in which admissions of the claim of the Plaintiff are made in whatever manner enmeshed in legal and judicial delays by having the Plaintiffs to prove a case which is admitted. The rule is very wide. It includes admissions in the pleadings as also otherwise. It includes oral as well as written admissions. It includes admissions made at any stage of the suit and in any application of any party. It requires a judgment on admission to be passed by the Court on its own motion or on the application of any party having regard to such admissions. It allows judgment for the part or full of the claim of the Plaintiffs and requires the Court to pass the judgment without waiting for the termination of any other question between the parties and it also requires a decree to be

passed in accordance with law.

21 This is in consonance with the rule of evidence that admitted facts, as also documents, in a given suit need not be proved under Section 58 of the Indian Evidence Act, 1972. Section 58 runs thus:

> *"Section 58. Facts admitted need not be proved. –*
> *No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:*
>
> *provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."*

22 Hence the facts which are admitted in the suit itself must also result in termination of the proceedings either fully or partly upon such admissions.

23 This is a fit case in which the entire dispute between the parties of the Plaintiffs' claim, denied in the written statement in this suit, is admitted in another proceeding with regard to the suit property. It is required not to be adjudicated in the normal course by having the Plaintiffs to prove the claim in the normal course when the suit would reach hearing, but upon the admission of the Defendant himself. Of course, in this case, in any event, the Plaintiffs would require only the tendering of the probate, since unchallenged, as a judicial record having a presumption of its correctness. Once it is seen that the Defendant has admitted that the trust owns the suit flat and has shown his inability to sell the suit flat to Kesharvrao

Bhosle as the Defendant was not the owner of the suit flat and unequivocally claimed that the flat did not belong to him, but to the trust, who had sued him for eviction, no further issue remains between the parties.

24 The admission of the Defendant, if made in this suit itself, would require to be recorded under the provisions of Order 10 Rule 1 of the CPC. Order 10 Rule 1 runs thus:

> *" Order X Rule 1. Ascertainment whether allegations in pleadings are admitted or denied. – At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials."*

25 Since the admission is not made in the written statement in this suit itself, but is specifically unequivocally and clearly, made in another proceedings, such admission enjoins the Court to pass the judgment thereon under Order 12 Rule 6 of the CPC as having been made in writing otherwise then in this pleadings but in the criminal complaint sought to be brought to the notice of the Plaintiffs in the Chamber Summons referred to above.

26 The purpose and object of Order 10 Rule 1 is also similar – it is to narrow down the issues between the parties, the issues being the material facts pleaded by one party which are denied by the other under the provisions of Order 14 Rule 1 of the CPC the relevant part of which runs thus:

> ***"Framing of issues**. – (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*
> *(2) Material propositions are those*

propositions of law or fact which a plaintiff <u>must allege</u> in order to show a right to sue or a defendant must allege in order to constitute his defence.
(3) Each material proposition affirmed by one party and denied by the other shall form the <u>subject of a distinct issue.</u>
(4) …..
(5)…..
(6) …..

27 <u>The issue with regard to the ownership of the Plaintiffs as Trustees would have been required to be framed upon the denial of that material fact in the written statement, but for the admission of that fact in the criminal complaint. The admissions, therefore, negate the denials. They expose the truth of the case set out by the Defendant himself. If the suit were to proceed the Plaintiffs would be required to do things:</u>

<u>One positive and one negative – to produce the probate, since unchallenged, to show their legal right, title and interest in the suit premises and to confront to the Defendant with the criminal complaint which he cannot back out from. It is this redundant exercise which is statutorily enjoined to be done away with.</u>

28 It is seen that the parties are seen not to be at issue with regard to the fact that the trust is the owner of the suit flat, that the Defendant is not the owner, and that the suit flat does not belong to him and so he cannot sell the suit flat to Keshavrao Bhosle,(or for that matter to any other party).

29 Hence, in fact, Order 15 Rule 1 of the CPC would also come into play.

Order 15 Rule 1 runs thus:

“ Order 15. Rule 1. Parties not at issue. – Where at the first hearing of a suit it appears that the <u>parties are not at issue</u> on

> *any question of law or of fact, the Court may at once pronounce judgment.*"
>
> The object of that provision is the same – not to try an issue, initially raised, that even later admitted as then the parties would no longer be at issue on such matter.
>
> 30 In this suit no material facts alleged by the Plaintiffs are seen to be denied by the Defendant.
>
> 31 All the aforesaid salubrious provisions are allowed for the purpose of smoothening and streamlining the trial procedure which need not be resorted to in the face of admissions by a party to a lis. Once an admission is seen nothing further remains to be adjudicated upon in the suit.
>
> …
>
> 35 There are few cases in which the admission of a Defendant in another proceeding is so clear and unequivocal with regard to the entire relief claimed by the Plaintiffs.

Therefore, the plaintiff can certainly rely on the order passed by the ITAT.

15 On the issue that the agreement does not provide for interest and hence unconditional leave to defend has to be granted, the counsel for the defendants relied on the judgment of a Division Bench of this Court in the matter of ***Hydraulic and General Engineering Ltd. & Anr. Vs. UCO Bank***[5] to submit that in such situation unconditional leave ought to be granted. But this judgment has been overruled by ***SICOM Ltd. Vs. Prashant S. Tanna &***

5 1998 ILJ 793

Ors. [6] wherein paragraphS 27 AND 28, the Court has held as under :

> 27 To hold to the contrary would defeat the object underlying the summary procedure to prevent unreasonable obstruction by a defendant who has no defence. It would result in the plaintiff being deprived of the benefit of the summary procedure merely because a part of the claim may have been wrongly quantified. This is too technical a view. It would denude Order XXXVII of its commercial efficacy. As we have observed earlier, the view that we have taken cannot possibly prejudice a defendant qua his case in respect of that part of the claim for which he has a valid defence or a triable case.
>
> 28 In the circumstances, we summarise the answer to the reference as follows:
>
> > (1) The judgments in Randerian & Singh v. Indian Overseas Bank and Hydraulic and General Engineering v. UCO Bank (1998) 1 L.J. 793 are overruled. The suit would be maintainable as a summary suit if it falls within one of the classes of suits enumerated in Order XXXVII, Rule 1(2) even if the claim made therein is not properly quantified or is in excess of what the plaintiff is entitled to.
> >
> > (2) In a summary suit filed under Order XXXVII of the Civil Procedure Code, the plaintiff is entitled at any time to abandon or give-up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the Court and without the necessity of the plaintiff making a formal application for the same by withdrawing the summons for judgment, amending the plaint and thereafter taking out a fresh summons for judgment or otherwise.
> >
> > (3) At the hearing of the summons for judgment, it will be open to the Court to pass a decree for a

6 AIR 2004 BOMBAY 186

> part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim.
>
> (4) At the hearing of the summons for judgment, it is open to the Court to grant conditional leave to defend in respect of a part of the claim and unconditional leave to defend for the remaining part of the claim. In such an order it would follow that in the event of the defendant failing to comply with the condition, he would suffer the consequences mentioned in Order XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of that part of the claim for which unconditional leave has been granted.
>
> (5) There may be further options available to the Court while passing an order on the summons for judgment. Our judgment does not exhaustively set out the options. Obviously, judicial discretion has to be exercised in consonance with the settled legal principles governing grant of leave to defend in summary suits.

16 Therefore in my view, the entire defence raised by the defendants is sham and moonshine. Nevertheless, I am inclined to show some mercy to the defendants by enabling him to try to prove a defence on the condition that the defendants deposit in this Court the principal amount of Rs.79,36,700/- within six weeks from today. Upon the defendants depositing the amount, the Prothonotary and Senior Master to invest the same in a fixed deposit with a nationalised bank initially for a period of six months.

17 Simultaneously with depositing the amount, the defendants to also file the written statement. Within two weeks of filing the written statement, the parties to file their respective affidavit of documents and also complete discovery and inspection. The suit to be placed thereafter for framing of issues on 23.09.3015. If the defendants do not deposit as directed above, the suit to be listed for ex-parte decree. Liberty to apply.

(K.R. SHRIRAM, J.)