

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

WRIT PETITION NO. 535 OF 2016

1. Manoj V. Wadhwa
2. Sylvex Cable Co. Pvt. Ltd.,
Both at - Happy Home, 1st flr., 244,
Waterfield Rd., Bandra (W), Mumbai-50. ... Petitioners

v/s

Praveen Hirabhai Patel,
Flat No.C-701, Harshavardhan CHS Ltd.,
Saki-Vihar Rd., Tufa Village, Mumba-72. ... Respondent

Mr.Kiran Jain along with Ms.Ish Jain and Ms.Bindi Parikh i/by Kiran Jain & Co. for the petitioners.

Mr.Amol Tembe for the respondent.

Coram: N.M. Jamdar, J.

Dated: 19 SEPTEMBER 2016

ORAL ORDER:

Rule. Rule made returnable forthwith. Respondent waives service. By consent, taken up for final disposal.

2 By an order dated 9 October 2015, the learned City Civil Court Judge, Borivali, has granted the application for leave to defend the suit taken out by the Petitioner/Defendant, subject to condition that the Petitioner will deposit an amount of Rs.20,00,000/- in the Court

within one month.

3 Heard learned counsel for the parties.

4 The Respondent/Plaintiff has filed a Summary Suit No.2725 of 2013 under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of an amount of Rs.20,00,000/- and Rs.4,78,333/- as interest and future interest, totalling to an amount of Rs.24,78,333/-.

5 It is the case of the Respondent/Plaintiff that the Petitioner is in the business of construction. According to the Respondent, the Respondent was interested in acquiring two parking spaces having purchased Flat No.701 from the Petitioners. It is the case of the Respondent that, an amount of Rs.20,00,000/- was given to the Petitioner through R.T.G.S. on 24 October 2011, however, neither the parking space was given nor the amount was refunded. In response to the writ of summons, the Petitioner appeared and the Respondent/Plaintiff took out summons for judgment in which the Petitioner filed an application for leave to defend. In the application for leave to defend, it was contended that the amount of Rs.20,00,000/- was received by the Petitioner, however, it was towards extra amenities.

6 The learned City Civil Court Judge has accepted the position

that there is no written contract between the parties. This being the position, the rival contentions were whether the amount was received towards parking or it was towards the extra amenities for the flat. The learned Civil Judge also answered the issue as to whether the Petitioner has substantial defence and had raised triable issue. After holding this basic position in favour of the Petitioners, the learned Civil Judge straight way directed the Petitioners to deposit an amount of Rs.20,00,000/- only on the ground that, admittedly, that this amount is received. Firstly, there is no written contract; secondly, receipt of the amount is not disputed and the triable issue is raised as to for what reason the amount was received. Therefore, the learned Civil Judge could not have ignored the position which was held in favour of the Petitioners before passing an order to deposit the entire amount sought for by the Respondent. If the Petitioners are unable to pay the amount or is likely to move out of jurisdiction, the Respondent/Defendant, like any other litigant, has his remedies in law. Therefore, I am of the opinion that, in the facts of the case, the use of discretion by the learned Civil Judge directing the Petitioners to deposit the entire principal amount as a condition for granting leave to defend, is not warranted. In fact, such exercise of discretion is contrary to the observations made by the learned Civil Judge in the impugned order itself.

7 Therefore, the impugned order to the extent that it directs the Petitioners to deposit the amount of Rs.20,00,000/- within a period

of one month from the date of the order, cannot be sustained and accordingly this condition is quashed and set aside.

8 Rule made absolute in above terms. No order as to costs.

9 The learned counsel for the Petitioners undertakes to file written statement within a period of four weeks from today. This statement, on instructions, is accepted.

(N. M. Jamdar, J.)