

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 80 OF 2016

M/s. ESDS Software Solution Pvt. Ltd. ...Applicant

versus

The Commissioner,
The Jalgaon City Municipal Corporation ...Respondents

.....
Mr. Rohit P. Karhadkar, advocate for the applicant
Mr. P.R> Patil, advocate for the respondent
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 03.04.2017**

**Date of pronouncing
the Order: 13.04.2017**

PER COURT :-

1. Being aggrieved by the common order dated 2.5.2016, passed below Exh. 21 and 22, in Summary Suit No. 1 of 2016, by learned 3rd Joint, Civil Judge, Senior Division, Jalgaon, the original plaintiff has preferred this civil revision application.

2. Brief facts giving rise to the present civil revision application are as follows:-

a) The respondent - Jalgaon City Municipal Corporation issued/ floated a tender document dated 17.07.2011 regarding implementation and execution of e-Governance project and the applicant company/original plaintiff participated in the said bidding process. The said proposal involved specifications and services for providing various e-Governance services under e-Governance project. Electronic Governance or e-Governance is the application of information and communication technology (ICT) for delivering government services, exchange of information communication transactions, integration of various stand-alone systems and services between government-to-customer, government-to-business, government-to-government as well as back office processes and interactions within the entire government framework.

b) The applicant/ plaintiff and the respondent/defendant have mutually executed an agreement to that effect on 28.3.2012 initially for a period of three years and thereby the terms and conditions were finalized between them. The contract was concluded between them and accordingly the work order dated 30.3.2012 to that effect has been issued by the respondent/defendant in favour of the applicant/plaintiff. As per the terms and conditions of the said tender, the plaintiff had furnished bank guarantee of Rs.25,00,000/-. Acting in furtherance of the aforesaid terms and conditions, the

applicant/plaintiff and the respondent/defendant started working on the aforesaid project. The important term and conditions, *inter alia*, enumerated in clause 4.11 under the aforesaid agreement and in terms of the said conditions, the payment against invoices submitted by the applicant/plaintiff to the finance department of the respondent/defendant shall be paid to the applicant/plaintiff within a period of 30 days. However, the respondent/defendant has not honoured the aforesaid terms and conditions of the agreement in its true spirit.

c) According to the applicant/plaintiff, the respondent/defendant never bothered to pay to the applicant/plaintiff, according to the terms and conditions of the agreement and to the utter surprise of the applicant/plaintiff, respondent/defendant has shockingly invoked the bank guarantee of Rs.25,00,000/- on 10.8.2015. According to the applicant/plaintiff, total amount outstanding against respondent/defendant for service provided is to the tune of Rs.21,34,130/- and the respondent/defendant is also liable to pay the total amount of bank guarantee illegally invoked alongwith interest at the rate of 24% p.a. w.e.f. 13.8.2015.

d) The applicant/plaintiff therefore, constrained to institute Summary Suit No. 1 of 2016 before the Joint Civil Judge, Senior

Division, Jalgaon under the provisions of Order XXXVII of C.P.C. 1908 for recovery of amount of Rs.50,57,399/- together with future interest calculated at 24% p.a. from the date of filing of suit till realization of entire decree amount. The learned Illrd Joint Civil Judge, senior division, issued summons for appearance of the respondent/defendant in said Summary Suit No. 1 of 2016 and also permitted the applicant/plaintiff to serve the summons for appearance through R.P.A.D. The applicant/plaintiff served the respondent/defendant the summons for appearance on 30.1.2016 and also sent the same through R.P.A.D. simultaneously in addition to regular mode of service through the Court.

e) The respondent/ defendant has received summons for appearance sent through R.P.A.D. by the applicant on 1.2.2016 and also served with summons for appearance through bailiff of Jalgaon court on 2.2.2016. On 12.2.2016, the respondent/defendant has appeared in summary suit No. 1 of 2016 through its advocate and also submitted adjournment application below Exh.11. No notice of appearance has been served on the applicant/plaintiff. Even the applicant/plaintiff has filed pursis below Exh.13 before the Court for bringing on record the fact of non service of notice of appearance. On 11.3.2016, the court issued summons for judgment in the above referred summary suit and also permitted the applicant/plaintiff to

serve the same upon respondent/defendant through R.P.A.D. The said summons for judgment has been duly received by the respondent/defendant on 15.3.2016.

f) On 23.3.2016, the respondent/defendant filed another vaklatnama of different advocate and submitted adjournment application below Exh.23. The respondent/defendant has not filed any application seeking leave to defend the suit. The applicant/plaintiff has filed an application below Exh.22 requesting therein to the Court to decree the suit on account of failure of respondent/defendant in applying for leave to defend the summary suit within statutory/mandatory period of 10 days from the date of receipt of summons for judgment on 15.3.2016. However, on 29.3.2016 itself, the respondent/defendant has filed written statement in the suit and also filed an application below Exh.21 stating therein that as written statement was filed within a period of 90 days, the same may be taken on record.

g) Learned 3rd Joint Civil Judge, Senior Division, Jalgaon by impugned common order dated 2.5.2016, below Exh. 21 and 22 respectively, in Summary Suit No.1 of 2016 allowed application filed by respondent/defendant Exh.21 and rejected the application of the applicant/plaintiff at Exh.22. Hence, this civil revision application.

3. Learned counsel for the applicant/plaintiff submits that the suit instituted by the applicant/plaintiff falls within one of the classes of suit enumerated in Order XXXVII Rule 1(2) and in terms of sub-Rule (5) of Rule 3 of Order XXXVII, the respondent/defendant is not entitled, as of right, to put defence. The respondent/defendant should move within ten days from the service of summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit. In absence of same, the applicant/plaintiff is entitled for decree. However, learned Judge of the trial court has completely overlooked the provisions of Order XXXVII and allowed application Exh.21 and rejected application Exh.22 filed by the applicant/plaintiff.

4. Learned counsel for the applicant/plaintiff submits that the important terms and conditions, *inter alia*, enumerated in clause 4.11 under agreement was that the payment against invoices submitted by the applicant/plaintiff to the Finance department of the respondent/defendant, shall be paid to the applicant/plaintiff within a period of 30 days. However, respondent/defendant never honoured aforesaid terms and conditions of the agreement in its true spirit. The respondent/defendant never bothered to pay applicant/plaintiff

according to the terms and conditions and to the utter surprise of the applicant/plaintiff, the respondent/defendant has shockingly invoked the bank guarantee of Rs.25,00,000/-, though huge outstanding amount was due and payable by respondent/defendant to the applicant/plaintiff. The respondent/defendant has done so without issuing any notice to the applicant/plaintiff. Learned counsel submits that the respondent/defendant had no unfettered right to invoke the bank guarantee. The terms of contract will have to be strictly construed and when terms of contract prescribed the manner in which the performance is to be claimed, it will have to be seen as to whether performance is claimed in the manner so prescribed.

5. The learned counsel for the applicant/plaintiff submits that in ordinary suit, the defendant requires no leave of the court to defend the suit and the defendant is entitled to defend it as of right. While in Summary suit, the defendant is required to apply for leave to defend within 10 days of service of summons. In summary suit, the defendant has no right to defend per-se unless leave is granted by the court to defend the suit. In terms of provisions of Sub Rule (5) Rule 3 of Order XXXVII, the defendant may, at any time within 10 days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend

such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. As per proviso to said Sub Rule (5), leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. Learned counsel submits that in the instant case, the respondent/defendant has not filed any affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend the suit. The respondent/defendant has merely filed an application Exh.21 stating therein that within 90 days, written statement has been filed and the same be accepted. The approach of the trial court is contrary to the provision of Order XXXVII of C.P.C. The trial court has erred in treating the suit of the applicant/plaintiff as regular civil suit and eventually entertained the written statement of the respondent/defendant.

6. Learned counsel for the applicant/plaintiff has placed its reliance on the following cases:-

- I) Gokulprasad Poddar vs. Ramrikhdas Parasrampuriah, reported in AIR 1955 Bom. 276
- ii) Western Coalfields Limited and Anr. vs. Rajesh Nandlal

Biyani and Anr, reported in 2012 (1) Mh.L.J. 394

- iii) Eskay Enterprises vs. Suresh P. Hinduja, reported in 2005 (3) Mh.L.J. 620

7. Learned counsel for the respondent/defendant submits that the provisions of Order XXXVII Rule 1(2), applies to the specific classes of the suit. However, the applicant/plaintiff instituted a said suit under Order XXXVII even though none of the ingredients as contemplated under Order XXXVII are fulfilled. Learned counsel submits that though there was an agreement between the parties, about performance of work, under work order, the performance of the applicant/plaintiff for completion of project under work order was not up to the mark and there were several lapses. In spite of specific communication to the applicant/plaintiff to start the work as per work order and the agreement, the applicant/plaintiff has not started work for considerable period. The said issue was also discussed in the standing committee as well as general body meeting of respondent/defendant. Even the applicant/plaintiff was called upon to show cause as to why the earnest money and security deposit as per clause 4.2 should not be forfeited, as no work was started till 16.8.2012. Even though notices were given to the applicant/plaintiff for improvement of performance, there was no improvement. Therefore, ultimately on 6.8.2015, the respondent/defendant was

constrained to invoke the performance guarantee furnished by the applicant/plaintiff. The applicant/plaintiff has suppressed all these material facts in the suit. There is no question of liquidating amount to be paid to the applicant/plaintiff. In any case, it is not within the parameters of Order XXXVII of C.P.C. Learned counsel submits that the public money is at stake and same cannot be wasted in such a manner.

8. Learned counsel for the respondent/defendant submits that Order XXXVII of C.P.C. provides for expeditious summary trial and therefore, very stringent procedure is prescribed to be followed so as to cut down the avoidable delay in lengthy procedure otherwise required to be followed in suit. The summary suit is provided in very few crystallized claims suit so to say for the convenience. In terms of Rule 5 of Order XXXVII, which makes it incumbent upon the court to grant leave to defend in all cases where there is indication of substantial defence, leave to defend shall not be refused unless the court is satisfied that the fact disclosed by the defendant do not indicate that he has substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. The respondent/defendant since raised triable issue/reasonable defence, entitle to unconditional leave as provided under Order XXXVII Rule 3. Learned counsel submits that upon considering entire aspects of the

case, learned Judge of the trial court has rightly allowed application Exh.21 and rejected application Exh. 22. Learned Judge of the trial court has exercised discretion in accepting written statement thereby granting unconditional leave to the respondent/ defendant to defend upon the grounds which prima facie appear to be reasonable. Learned counsel submits that it is not appropriate at this stage to consider whether the defence raised by respondent/ defendant is honest and bonafide. Any decision on such question, even before evidence has been led by the two sides is generally hazardous. It would not be appropriate to pronounce the opinion in such matter before the evidence of the parties is recorded. The respondent/defendant has denied, inter-alia, liability to pay anything to the applicant/plaintiff. Respondent/defendant is not intending to prolong litigation by raising untenable and frivolous defence. Learned counsel submits that no interference is required in the impugned order passed by the trial court. Civil revision application has no substance and the same is liable to be dismissed.

9. Learned counsel for the respondent/defendant in order to substantiate his contentions, placed his reliance on the following cases:-

I) Sanjay Hiralal Shah vs. HDFC Bank Limited, reported in

- ii) State Bank of Hyderabad vs. RABO Bank, reported in (2015) 10 SCC 521
- iii) M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation, reported in (1976) 4 SCC 687
- iv) Santosh Kumar vs. Bahi Mool Singh reported in AIR 1958 SC 321
- v) Oil and Natural Gas Corporation Ltd. vs. SBI, Overseas Branch, Bombay, reported in (2000) 6 SCC 385

10. The applicant/plaintiff has instituted the summary suit under the provisions of Order XXXVII of C.P.C. 1908 for recovery of amount of Rs.50,57,399/- together with future interest calculated at the rate of 24% p.a. from the date of filing of suit till realization of entire decree amount. The applicant/plaintiff has preferred separate Special Civil Suit claiming damages of Rs.10,00,000/-, as the relief of damages may not be claimed under the provisions of Order XXXVII of C.P.C. 1908. As per the applicant/plaintiff's contention the suit is based on supply of services through the bills/invoices in terms of conditions of the agreement dated 28.3.2012 duly executed between

the plaintiff and defendant amounting to written contract falling within the provision of Order XXXVII Rule 1 of C.P.C. 1908 and the same is liquidated demand of sum of money and no relief, which does not fall within the ambit of Order XXXVII of C.P.C., has been claimed in the suit. According to the plaintiff, in terms of the said contract the defendant is liable to pay total amount of Rs.21,34,130/- outstanding against the defendant for the services provided by the plaintiff and amount of Rs.25,00,000/- towards bank guarantee illegally involved by the defendant. According to the plaintiff, the important terms and conditions, inter-alia, enumerated in clause 4.11 under the aforesaid agreement was that the payment against invoice submitted by the plaintiff to the Finance department of the defendant shall be paid to the plaintiff within a period of 30 days. However, the defendant never honoured the aforesaid terms and conditions of the agreement in its true spirit. Further as per the terms and conditions of the said agreement, the plaintiff had initially furnished bank guarantee of Rs.25,00,000/-. As per the pleading in the suit, since beginning of the project under the agreement, the defendant was not paying to the plaintiff and the defendant had consistently delayed the payment to be paid to the plaintiff. The defendant was expecting the services from the plaintiff without releasing the legal dues of the plaintiff payable under the invoice/bills raised by the plaintiff from time to time. The defendant never bothered to pay the plaintiff according to

the terms and conditions of the agreement and further shockingly invoked the bank guarantee of Rs.25,00,000/- on 10.8.2015 illegally.

11. In the affidavit in reply filed on behalf of the respondent, it has been contended that the performance of applicant was not up to the mark and there were several lapses on its part. The applicant has not started the work even though communicated by the respondent to that effect from time to time. Even the said issue was also discussed in the standing committee as well as general body meeting of the respondent Corporation and the directions have been given to the applicant to start the work immediately. It has been specifically contended in the reply that the applicant company is prolonging the work without justifiable reason. In spite of communications made from time to time, the performance of the applicant company did not improve. Therefore, ultimately, the respondent Corporation was constrained to invoke the performance of bank guarantee submitted by the applicant. There was no question of liquidating the amount to be paid to the applicant/plaintiff. In any case, it is not within the parameters of provisions of Order XXXVII of C.P.C.

12. The plaintiff may institute the suit specified in Sub Rule (2) of Rule 1 of Order XXXVII of C.P.C. at his option either as summary suit or as a suit in ordinary manner. Sub Rule (2) of Rule 1 of Order

XXXVII specifies the following classes of suits, which can be filed as summary suits:-

“(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundis and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract; or

(ii) On an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

13. The suit not filing within aforesaid classes of suits, cannot be instituted as summary suit and tried in summary procedure. The suit like the present one cannot be regarded to file within the classes of the suits triable in summary procedure. The applicability of the procedure for trial of the suit depends upon the classes of suit and not at the option of party. Where the applicability of Order XXXVII of

C.P.C. itself is in question and when the defendant has raised triable issue or reasonable defence, the Court before passing the decree, is entitled to take into consideration the consequences thereof. The approach of the Court while dealing with summary trial should be very careful taking a note of interest of both the parties.

14. There is no dispute that the procedure for trial of the summary suit prescribed in Order XXXVII of C.P.C. is different than the procedure prescribed for ordinary suit. In case of summary suit, the defendant is to file an appearance either in person or by pleader within 10 days of service of summons on him and file address for service of notice on him. On failure of defendant to make appearance within 10 days of the service of summons, the plaintiff is entitled to decree for the sum not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, and the costs. In terms of provisions of sub Rule (3) of Rule 2 of Order XXXVII of C.P.C., if the defendant appears, as above, the plaintiff is required to serve on the defendant summons for judgment in the prescribed form and within 10 days of the service of summons for judgment, the defendant may apply for leave to defend the suit. Further, leave to defend would ordinarily be granted to the defendant if on affidavit or otherwise disclose such facts, as may be sufficient to entitle him to defend. Such leave to defend may be granted either

unconditional or conditional. Ordinarily, the court will not refuse leave unless the Court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be set up is frivolous or vexatious. In summary suit, the defendant has no right to defend *per se* unless the leave is granted to him by the Court to defend the suit.

15. In the instant case, the defendant has served with summons for appearance on 2.2.2016, appeared in the said summary suit on 12.2.2016 and submitted an adjournment application below Exh.11 seeking time for filing written statement. In response to summons for appearance and summons for judgment, the defendant filed an application Exh.11 and Exh.20 and expressed its intention of filing written statement and sought time for the same.

16. As regards the entitlement of the defendant to grant leave to defend the suit, the law is well settled in the year 1949 in the case of ***Sm. Kiranmoyee Dassi and another vs. Dr. J. Chatterjee, reported in AIR 1949 Cal. 479.*** In para 24 of the said judgment, the Calcutta High Court has laid down the following propositions:-

“a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to

defend.

b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

c) If the defendant disclosed such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence yet shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend, but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

d) If the defendant has no defence or the defence set up illusory or sham or practically moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then, although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

17. It is clear that when the defendant has raised the triable issue

or reasonable defence, the defendant is entitled to unconditional leave to defend. In so far as the question of maintainability of suit in question under Order XXXVII of C.P.C. is concerned, the Supreme Court in the case of ***Neebha Kapoor vs. Jayantilal Khandwala and others, reported in (2008) 3 SCC 770*** observed that where the applicability of order XXXVII itself is in question grant of leave to defend may be permissible. The court before passing a decree is entitled to take into consideration the consequences thereof.

18. In the instant case, the defendant has denied inter-alia the liability to pay anything to the plaintiff and as such, the trial court has exercised discretion in favour of the defendant in granting unconditional leave to defend the suit. It is only in case of where the defence is patently dishonest or so unreasonable that it could not be reasonable to be expected to succeed then the exercise of the discretion by the trial court may be questioned. The defendant Corporation is dealing with the public money and entire project under contract involves of providing various E-governance service under E-government project to the customers/general public. Through E-governance, the Government services are made applicable to the citizens in convenient, efficient and transparent manner. The parties have mutually executed the agreement on 28.3.2012 for initial period of three years. The defendant has pointed out various lapses on the

part of the applicant company to start with the work and further performance of work as contemplated in the terms of the agreement.

19. In view of above, I do not find any substance in the present civil revision application. The Civil revision application is liable to be dismissed. Hence, I proceed to pass the following order:-

O R D E R

- I. Civil Revision application is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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