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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13607 OF 2017

Yogesh Babanrao Vedpathak	]	
age: 42 yrs. Occn. Business,	]	
R/AT Flat NO.101 “B” Building	]	Petitioner
Sai Luxuria, Opp. Sankalp	]	Original
Multispeciality Hospital, Gorakh Maruti	]	Defendant
Gondabe road, Rahatni,	]	
Pune 411 017	]	

V/s.

Mr. Ranjeet Singh Pyara Singh Kaura	]	Respondents
age:45 ears, Occ. Business	]	Original
r/at plot 109, Mahatma Gandhi Nagar,	]	Plaintiff
Deluxe road, Pimpri, Pune 411 017	]	

Mr. Vaibhav R. Gaikwad, for the Petitioner.
Mr. Surel S. Shah, for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR ORDER ON : 24th JANUARY, 2018.

JUDGMENT PRONOUNCED ON : 30th JANUARY, 2018.

JUDGMENT :

1] Heard learned counsel for the petitioners.

2] Rule.

3] Rule is made returnable forthwith with the consent of learned counsel for both the parties.

4] A very short question raised for consideration in this Writ Petition is, "Whether the Summary Suit for recovery of earnest money paid, in pursuance of oral agreement of sale, can be filed under Order 37 Rule 1 of Code of Civil Procedure?.

5] Factual matrix leading to this question are to the effect that the respondent herein has filed Special Civil Suit No.120 of 2017 before the Court of Civil Judge Senior Division, Pune, contending inter alia that he and the present petitioner is having friendly and family relations since last several years. He was in need of the residential premises. The petitioner-plaintiff put up a proposal of his residential house for sale. Respondent personally visited the said premises and decided to purchase the same for consideration of Rs.35,00,000/- and as petitioner was badly in need of financial help, respondent immediately transferred an amount of Rs.10,00,000/- in the bank account without any written agreement. Thereafter on one or the other count, petitioner started raising dispute about execution of agreement of sale, therefore, the respondent was, after issuing necessary notice to the petitioner, constrained to file the suit before the trial Court, for recovery of the amount of Rs.10,00,000/-plus interest at the rate of 18% per annum, totalling Rs.2,00,000/-. The entire suit claim was, therefore, for recovery of Rs.12,00,000/- with further interest thereon.

6] The suit was filed under the provisions of Order 37 Rule (2) of the Code of Civil procedure contending that the suit is simpliciter for the monetary decree, for recovery of the amount and respondent has not claimed any relief, which does not fall within the ambit of Order 37 Rule (2) of the CPC. It was also averred that the petitioner-defendant does not have any defence of civil nature, to defend the suit, as receipt of the amount of Rs.10,00,000/- is proved, the said amount being directly deposited in the bank account of the petitioner.

7] Petitioner-defendant herein, on his appearance, filed application at Exh.20, seeking unconditional leave to defend the suit on the count that the suit in the present form is not maintainable.

8] The trial Court, vide its impugned order dated 15.9.2017, allowed the leave to defend to the petitioner, but it was made conditional leave, subject to deposit of the amount of Rs.5,00,000/- in the Court or subject to giving bank guarantee of Rs.5,00,000/-, within one month.

9] This order of the trial Court is challenged in this writ petition by learned counsel for the petitioner by submitting that the suit filed in the present form as a Summary suit under Order 37 Rule 1 of CPC, itself is not maintainable as, it is not based on any “written contract” and therefore, the trial Court has committed an error in imposing condition on the petitioner—defendant for defending the suit. According to learned counsel for the petitioner, the trial Court should have treated the suit as Regular Suit and granted unconditional leave to the petitioner to defend the suit.

10] Per contra, learned counsel for the respondent has supported the impugned order passed by the trial Court by submitting that when the petitioner is admitting or otherwise also can not dispute the receipt of the amount of Rs.10,00,000/- as the said amount is deposited in his bank account and admittedly petitioner has not returned the said amount. The only contention raised by petitioner is that the said amount was received as an investment in Cashew business, however, to that extent there was no material. Hence, the trial Court was justified in granting conditional leave in view of triable question raised by the petitioner.

11] Now as the very maintainability of suit before the trial Court in the present form is in question, it is necessary to consider the provisions of Order 37 rule (1) of the CPC, which can be reproduced as under:-

"**ORDER XXXVII (1) Courts and classes of suits to which the Order is to apply** (1) This Order shall apply to the following Courts, namely:-

(a) High Courts, City Civil Courts and Courts of Small Causes and

(b)other Courts.

Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(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, hundies 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.
(iv) suit for recovery of receivables instituted by any assignee of a receivable.

12] Sub clause (2) of Rule (1) of Order 37 CPC, makes thus, clear that the provisions of this Order 37 CPC apply only to certain category of suits. First category, detailed in clause (a) being suits based upon bills of exchange, hundi, promissory note, Second category is mentioned in clause (b) pertains to suits in which plaintiff seeks only to recover the debt or liquidated demand in money payable by the defendant, with or without interest arising on, (i) 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, and (iv) where suit is for recovery of receivable is instituted by any assignee of a receivable.

13] The case of respondent can be only considered under clause (b) of sub rule (2) of rule 1 of Order 37 CPC as the suit is only for recovery of liquidated demand of money payable by the petitioner with or without interest. However, for such suit, it has to be based on "written contract", or on an enactment or any guarantee or by showing of any receivable. In the instant case, the suit of the respondent is neither based on enactment, nor on guarantee, nor for receivable. Significantly, it is also not based on "written contract" though it may be based on contract which according to respondent was on oral agreement.

14] The use of the word "written" prefixing the word "contract" in this Rule makes it clear that the contract has to be "written" and not oral or otherwise. It has to be remembered that the Legislature in its wisdom uses the words very carefully and each word used in the Statute has its own significance and meaning. The Court cannot by its its interpretation make any word as redundant or superfluous. Conversely, the endeavour of the Court has to be to give the meaning to each and every word. Hence when sub rule (2) uses the word, "written" before the word, "contract", Legislature makes its intention clear to exclude "oral contracts" from the purview of Order 37 CPC. The Court cannot read the law which is not written. The primary duty of the Court is to give effect to the intention of the Legislature as expressed in the words used by it. The Legislative Casus omissus cannot be supplied. Moreover keeping in view the object of having such summary procedure for particular class of suits only, it appears that the omission to include “oral” contract is deliberate and not accidental. It is because the very object of providing summery procedure for the particular class of money disputes, is that, in these suits, the dispute between the parties does not involve detail enquiry or disputed questions of facts on law. Like in a suit based on negotiable instruments or based on contract when it is written, in such suits, once receipt of amount is admitted or is otherwise easily proved, there remains nothing further to be decided. Hence for expeditious and speedy disposal of these types of money suits, summary procedure is provided, so that money becomes free in the market and not get locked in the litigation. In order to ensure that in such suits defendant should not create unreasonable obstruction, he is not given right to defend like in any other suit. To get such leave, he has to raise triable issues and only if he does so, to the satisfaction of the Court, the trial Court may grant such leave to him, which is subject to reasonable conditions. Where however the dispute is not based on such negotiable instrument or written contract, the suit involves several complex questions of law and facts, as in such cases mere admission of receipt of amount may not be sufficient to foist liability for repayment thereof on the defendant. Such suits require detail and in depth enquiry. Hence the Legislature has wisely excluded those suits from purview of Order 37 CPC and confined the application of the provisions of the said Order only to certain suits, based on negotiable instruments, written contract, guarantee and receivable. As the suit of respondent in this case is admittedly based on "oral" agreement and not on "written" contract, such suit cannot be maintainable in summary form.

15] This legal position is confirmed and upheld by the Full Bench of this Court in **Jyotsna K. Valia -vs- M/s T.S.Parekh & Co., [2007 4 M hLJ 517,],** wherein it was categorically held that,

> "In order to bring the suit within provisions of Order 37 CPC, the following requirements must be satisfied,
>
> 1) there must be a concluded contract ;
> 2) the contract must be in writing;
> 3) the contract must contain an express or implied promise to pay".

It was further held that:-

> "An implied contract is not a written contract and hence summary suit cannot be maintainable on an implied term in a written contract".

16] Thus, in this judgment, the suit in a summary form was held not maintainable on implied consent though it was based on written contract. In the present case, there is no “written” contract at all; hence no question of invoking the provisions of Order 37 CPC.

17] Learned counsel for respondent, has however, relied upon Rule 3 and 5 of Order 37 CPC, to submit that when a part of amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted, unless the amount so admitted to be due is deposited by the defendant in the Court It is urged that in this case, as petitioner has admitted that he has received an amount of Rs.10,00,000/-, first he has to deposit the said amount in the Court. However, as defendant has contended that receipt of the said amount was towards investment in cashew business and hence he has raised some triable issue, leave to defend is granted, but it is subject to deposit of the half of the admitted amount which is Rs.5,00,000/-. Hence there is nothing wrong in the impugned order of the trial Court. According to learned counsel for respondent, when the liability is admitted and therefore, the triable issue is raised about the maintainability of the suit, this Court should not disturb the impugned order passed by the trial Court, which is just and legal.

18] However, in my considered opinion, this submission cannot be accepted for the simple reason that in this case the suit in the summary form is not maintainable at all. Therefore, if respondent has not satisfied the condition laid down in Rule (I) of Order 37 of the CPC for bringing the suit in the summary nature, then there is no scope for the Court to proceed further with the provisions of Rule 3 sub clause (5) of above provision.

19] Admittedly, in this case, as the suit is not based on the written contract, there is no question of considering whether leave to defend to be granted or not and whether it was to be granted conditionally. As the suit is not based on the written contract, the suit in present summary form is not maintainable. Therefore, reliance placed by learned counsel for the respondent on the authorities of Supreme Court in cases of i) **Southern Sales and Services and others -vs- Sauermilch Design and Handels GMBH [(2008) 14 SCC 457** ii) **IDBI Trusteeship Services Ltd -vs- Hubtown Ltd, [(2017) 1 SCC 568]** which deal with as to when leave to defend can be granted and on which conditions can be granted, cannot be applicable to the facts of the present case. In order to consider the question whether leave to defend should be granted or not, the suit should have been based on "written" contract, as per provisions of Order 37 Rule (1) CPC.

20] As in this case suit is not maintainable in the summary nature, the impugned order passed by the trial Court granting conditional leave to the petitioner to defend the suit needs to be quashed and set aside. It is held that the petitioner-defendant is entitled to defend the suit, it being an ordinary Regular Suit. Accordingly petitioner is entitled to defend the said suit without any permission as such.

21] The writ petition is allowed.

22] The impugned order passed by the trial Court granting conditional leave to defend the suit is quashed and set aside.

23] The suit filed by the respondent be converted to Regular Civil Suit.

24] The petitioner is entitled to defend the said suit without any permission as such.

25] Rule is made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]