

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

925 WRIT PETITION NO.3357 OF 2018

1. Mohd. Burhan S/o Mohd. Isaq
Age: 51 years, Occu.: Business
2. Taherabee W/o. Mohd. Burhan
Age: 46 years, Occu.: Business

Both R/o. Infront of Siraj Hotel,
Hajam Galli,, House No.5-8-35,
Quaiser Colony, Aurangabad.

..Petitioners
(Orig. Defendants)

VERSUS

Shaikh Nasir S/o Shaikh Ismail
Age: 46 years, Occu.: Rickshaw Driver,
R/o. Shah Bazar, Aurangabad.
Tq. & Dist.Aurangabad.

..Respondent
(Orig. Plaintiff)

...
Advocate for Petitioners : Shri R.R. Shaikh
Advocate for Respondent : Shri Punit S. Mehta
...

CORAM : P.R.BORA, J.

DATE: 24th July, 2019

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith. The petition is heard finally with the consent of learned counsel appearing for the parties.

2. Aggrieved by the order passed by the Court of Joint Civil Judge, Senior Division, Aurangabad in Summary Suit No.53 of 2017 on 03.02.2018, the petitioners have preferred the present petition.

3. Petitioners are the defendants in the aforesaid Summary Suit. It is the grievance of the petitioners that the application filed by them seeking leave to defend Suit has been erroneously rejected by the Trial Court without assigning any reason therefor. The learned Counsel for the petitioners submitted that in fact Summary Suit would not lie in the present matter. The learned Counsel further submitted that the Suit filed by the respondent - plaintiff is based on oral agreement and it is enough to bring out the said Suit from the class of Summary Suit. The learned counsel submitted that taking hyper technical view, the Trial Court has rejected the application filed by the present petitioners. The learned counsel, in the circumstances, prayed for allowing the Writ Petition and thereby directing the Trial Court to decide the application filed by the present petitioners seeking leave to defend the Suit on merits.

4. Submissions made on behalf of the petitioners are strongly opposed by learned counsel Shri P.S.Mehta appearing for the

respondent. The learned counsel tendered across the bar a copy of the order passed below Exhibit-1 in Summary Suit No.53 of 2017, on 20.08.2017. The same is taken on record. The learned counsel submitted that the petitioners - defendants have suppressed the fact that prior to filing of application at Exhibit-13, the Trial Court has passed an order on 28.08.2017, recording the fact that the defendants did not seek leave to defend as per Order 37 Rule 3 Sub-Rule 5 of the Code of Civil Procedure. The learned counsel submitted that since the leave was not sought for within the time stipulated under Order 37 Rule 3 Sub-Rule 5 of the Code of Civil Procedure and since aforesaid fact was not disclosed by the petitioners even before this Court, no relief is liable to be granted in favour of the petitioners.

5. After having considered the submissions advanced by the learned counsel appearing for the parties and on perusal of the record, it is revealed that the Trial Court had already passed an order on 28.08.2017, below Exhibit-1 in the aforesaid Summary Suit recording therein that the defendants though appeared on 28.07.2017, they did not seek leave to defend as per Order 37 Rule 3 Sub-Rule 5 of the Code of Civil Procedure and the Suit was therefore directed to proceed further, application at Exhibit-13 was filed by the petitioners on 08.12.2017. Even that application

was not filed within the period of limitation though the contention of the petitioners is accepted that the summons for Judgment was served upon them on 15.11.2017. In the circumstances, it does not appear to me that any case is made out by the petitioners to cause any interference in the order so passed by the Trial Court. The Writ Petition being devoid of any substance deserves to be dismissed and is accordingly dismissed. Rule is discharged.

(P.R.BORA)
JUDGE

SPT