

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13797 OF 2018

MANOHAR SUDAM PATIL AND ORS.)...PETITIONERS

V/s.

M/S.VISION E MALL CORPORATION & ORS.)...RESPONDENTS

Shri.Bhushan Walimbe, Advocate for the Petitioners.

CORAM : A. M. BADAR, J.

DATE : 11th NOVEMBER 2019

P.C. :

1 Despite service of notice of final disposal, respondent nos.1 and 2/original defendants remained absent. Hence, Rule. Heard finally in absence of respondents/original defendants.

2 The learned counsel for petitioners/plaintiffs drew my attention to the plaint in the summary suit and argued that specific amount of Rs.6,27,500/- was claimed by plaintiffs in the summary suit towards refund of amount paid by them to

defendants. It is argued that defendants/respondents herein applied for leave to defend and by the impugned order, leave came to be granted unconditionally. According to the learned counsel for petitioners, the learned trial court ought to have rejected the application for grant of leave in the wake of admission of part of claim by defendants and non-deposit of the said amount by them for getting leave to defend.

3 I have considered the submissions so advanced and perused the copy of plaint as well as copy of application for leave to defend the summary suit. Petitioners/plaintiffs have averred that they had deposited an amount of Rs.6,27,500/- with respondents/defendants for purchase of plots. However, ultimately, those transactions were cancelled and respondents/original defendants agreed to refund the entire amount to them. However, the said amount is not refunded.

4 After receipt of summons, respondents/defendants appeared before the learned trial court and applied for leave to defend. In paragraph 4 of the application for leave to defend,

respondents/defendants have specifically accepted the fact that plaintiffs had decided to cancel the transaction and they had decided to withdraw the amount invested for Vihang City Project. It is further averred by respondents/original defendants that defendants had agreed to refund the entire amount deposited by plaintiffs without making any deductions. In paragraph 5 of the application for leave to defend, respondents/original defendants further contended that for extracting additional money from defendants, plaintiffs raised technical difficulties and refused to compromise the matter.

5 It is, thus, clear from application for leave to defend filed by defendants before the learned trial court that defendants are accepting atleast part of the claim made by plaintiffs.

6 Sub-rule (5) of Rule 3 of Order 37 which deals with leave to defend, reads thus :

“Order 37 Rule 3

Procedure for the appearance of defendant -

(1)

(2)

(3)

(4)

(5) The defendant may, at any time within ten 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 :

Provided that 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 :

Provided further that, where a part of the 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 Court.”

7 It is, thus, clear that when part of the amount claimed by plaintiffs is admitted by defendants to be due from defendants, then leave to defend can be granted only when the admitted amount is deposited by defendants in the court. In the case in hand, though in the application for leave to defend there is admission of amount due by defendants to plaintiffs, the said amount was not deposited by defendants before the court. The learned trial court, as such, ought not to have granted leave to defend the suit and that too unconditionally. The impugned order, as such, suffers from error of law and cannot be sustained. Therefore, the order :

ORDER

Rule is made absolute in terms of Prayer Clause (a).

(A. M. BADAR, J.)