

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.9339 OF 2022**

SHAILESH TRADERS THROUGH ITS PROPRIETOR SANJAY
HARISHCHANDRA GHAR
VERSUS
PRABHAKAR DHARMAPAL KULLE THROUGH ITS
PROPRIETOR DILIP HANMANTRAV KHULLE

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Mr. Sudarshan J. Salunke, Advocate for the Petitioner.
Mr. V. H. Pathade, Advocate for Respondent.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 22nd DECEMBER, 2022.**

PER COURT:-

1. By this petition petitioner challenges the order dated 16.07.2022 passed by the Civil Judge, Senior Division, Latur allowing petitioner's application and granting him leave to defend subject to deposit of Rs.4,00,000/-. Petitioner is aggrieved by the conditional grant of leave and disputes the condition of deposit of Rs.4,00,000/-.

2. Learned counsel for petitioner relies upon the provisions of Order 37 Rule 3(5) of the Code of Civil Procedure, 1908 which reads thus:

“(5) The defendant may, at any time within ten days from 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.”

3. Learned counsel for petitioner would submit that under Second proviso to sub-Rule 5 of Rule 3 of Order 37, the conditional leave can be granted only where the amount claimed by plaintiff is admitted by defendant. He would submit that there is no admission on the part of petitioner, the Trial Court ought to have granted unconditional leave.

4. The Trial Court has relied upon the conduct of petitioner in issuing several Cheques in favour of plaintiff. Even though there is no specific finding recorded by the Trial Court that there is any admission on the part of petitioner of the amount due to plaintiff, the factum of issuance of Cheques by petitioner to plaintiff thus indicate a possible admission on the part of petitioner that some amount was due and payable to plaintiff. At this stage, the Trial Court is not suppose to record a final finding as to whether there is a admission of the amount or not. The same would be ascertained at the time of final decision of the suit.

5. The total amount due to plaintiff from defendant no.1 is Rs.8,13,468/- by adding interest to the said amount the outstanding amount would be even higher. The Trial Court has however directed deposit of amount of Rs.4,00,000/- only as a pre-condition for grant of leave.

6. The Trial Court in my view has not committed any error in passing the impugned order. The petition is devoid of merits. The same is dismissed without any orders as to cost.

(SANDEEP V. MARNE)
JUDGE

Devendra/December-2022