IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.132 OF 2021

M/s. Auto Hangar (India) Private Limited ..Applicant (Original Defendant)

Versus

Mr. Madanmohan Murarilal Kotia ..Respondent (Original Plaintiff)

WITH
INTERIM APPLICATION NO.175 OF 2022
IN
CIVIL REVISION APPLICATION NO.132 OF 2021

Mr. Madanmohan Murarilal Kotia ..Applicant/Respondent (Original Plaintiff)

IN THE MATTER BETWEEN

M/s. Auto Hangar (India) Private Limited ..Applicant (Original Defendant)

Versus

Mr. Madanmohan Murarilal Kotia ..Respondent (Original Plaintiff)

Mr. Kunal Dwarkadas a/w Mr. Neveille Mukerji, Mr. Asim Tirmizi & Mr. Rahil Shah i/by Veritas Legal, for the Original Applicant.
Mr. Vikramjeet Garewal a/w Umesh Tawari & Ms. Tejal Harsora i/by S. Ashwinikumar & Co. LLP, for the Original Respondent in CRA & Applicant in IA.

CORAM : NITIN W. SAMBRE, J.

DATE : 10th FEBRUARY, 2022

P.C.

1. This revision is by the defendant/applicant questioning the legality and validity of the order dated 25th

January, 2021 passed by Bombay City Civil Court, Borivali Division at Dindoshi, Goregaon, Mumbai on Summons for Judgment No.171 of 2017 in Summary Suit No.466 of 2016.

2. The non-applicant/plaintiff claimed to be owner of the suit property and alleged to have entered into leave and licence agreement with the applicant on 11th July, 2006.

3. Another understanding agreement was entered into on 1st May, 2009 between the parties hereto thereby providing additional amenities.

4. As the leave and licence agreement dated 11th July, 2006 has expired, a fresh leave and licence agreement was entered into on 23rd June, 2009.

5. The suit premises were surrendered by the applicant vide letter dated 30th October, 2014 with request for refund of security deposit after expiry of the leave and licence agreement.

6. The non-applicant/plaintiff was served with a notice dated 13th January, 2016 calling upon him to pay service tax of Rs.15,96,186/- on the aforesaid amenities. The non-applicant claiming that the said liability as regards all the taxes arising out of the aforesaid agreement are to be borne by applicant/licensee issued him a notice on 21st April, 2015 demanding the said amount of tax as the said liability was discharged by non-applicant/plaintiff on 4th February, 2016.

Since the said liability i.e. reimbursement of the tax with interest was not honoured, the suit in question for recovery of amount was brought into action by the non-applicant, in which under the provisions of Order XXXVII Rule 2 of the CPC, Summons for Judgment being No.171 of 2017 was taken out.

7. The Summons for Judgement was resisted by the applicant and sought unconditional leave to defend.

8. The Court below vide order impugned dated 25th January, 2021 was pleased to reject the prayer for issuance of Summons for Judgment, however, allowed the application of the present applicant for grant of leave to defend on certain conditions.

9. Feeling aggrieved, the applicant/defendant to the aforesaid suit has preferred this revision.

10. Heard.

11. The contentions of counsel for the applicant are, the issue involved in the proceedings can be resolved by taking recourse to the arbitration proceedings.

It is claimed that whether the service tax can be levied on the licence fees is an issue which is pending adjudication before the appropriate forum and that being so, the Court below committed an error in putting the applicant to the condition of deposit. Apart from above, by drawing support from the judgment of the Apex Court in the matter of ***Avinash Kumar Chauhan Vs. Vijay Krishna Mishra*** reported in ***(2009) 2 SCC 532***, he would urge that the document which consist of clause with regard to the liability of the applicant to reimburse/to pay the tax amount since is not resisted, ought not to have been considered or relied on by the Trial Court while granting conditional leave to defend. He would further claim that since the said document is neither registered nor stamped, lacks evidential value and cannot be considered even for collateral purpose. Apart from above, he would urge that the first agreement which speaks of liability was of 1st May, 2009 and 23rd June, 2009 and as such the claim for recovery of amount of tax is barred by limitation as brought after the expiry of the limitation period i.e. three years. Further contentions of the counsel for the applicant are, the issue is squarely covered by the judgment of the Apex Court in the matter of ***IDBI Trusteeship Services Limited Vs. Hubtown Limited*** reported in ***(2017) 1 SCC 568***, as according to him, once the Summons for Judgment is rejected, the Court below ought to have granted unconditional leave to defend even in absence of positively good defence as the applicant has raised a triable issue that he has a fair and reasonable defence.

12. While countering the aforesaid submissions, it is the contention of the counsel for the non-applicant that the very conduct of the applicant in response to the notice of demand reflects admission of the debt and the condition in relation to the liability in the agreement. According to him, the claim is

within limitation as the suit was initiated immediately after the demand was received and satisfied. According to him, the payment of service tax by the non-applicant is not disputed and that being so, the Court below was justified in imposing condition of deposit of the principal amount of tax which is in tune to the judgment of the Apex Court in the matter of *IDBI Trusteeship (cited supra)*. As such, he has sought dismissal of revision.

13. Considered submissions.

14. The issue as regards insufficient stamped document or instrument is concerned, the Court below while passing order impugned was sensitive to the very provisions of Order XXXVII of the CPC. As regards impounding of the agreement based on which the liability of tax is sought to be imposed on the applicant is concerned, the fact remains that its evidential value, the process of impounding can be looked at an appropriate stage. The fact remains that while dealing with the prayer for grant of unconditional leave to defend, the Court below is required to appreciate whether the applicant/ defendant's good faith or the genuineness of the triable issue.

15. The fact as regards the execution of the agreements referred in the submissions i.e. 11th July, 2006, 1st May, 2009, 23rd June, 2009 and handing over of possession vide letter dated 30th October, 2014 are the admitted facts.

16. In the said eventuality, if we appreciate the very fact

that the amenities letter dated 1st May, 2009 is duly signed by the applicant and the non-applicant i.e. plaintiff and the defendant, the condition mentioned therein as regards the liability of the applicant about payment of taxes arising out of the said agreement can be *prima-facie* inferred.

17. In this background, the Court below, in my opinion, was justified in imposing condition as regards deposit of the principal amount of tax.

18. Though, it is claimed that the possession was received on 30th October, 2014 by the non-applicant without any reservations, and as such there is waiver of right on the part of the non-applicant, this Court is required to be considerate about the very triable issue in the matter.

19. The fact that the tax amount is paid by the non-applicant demand of which was raised for a period and based on the terms of the agreement *inter se* between the parties can be very much inferred.

20. In this background, the claim of the applicant that a triable issue indicating that he has a fair and reasonable defence for the purpose of granting him unconditional leave to defendant cannot be inferred. Merely because prayer for grant of Summons for Judgment is not allowed that by itself will not entitle the applicant to unconditional leave to defend.

21. In the aforesaid background, it can be easily inferred

that the order of the Court below in granting conditional leave to defend is based on the appreciation of the nature of defence raised and assessed in the backdrop of the terms of the judgment of the Apex Court in the matter of *IDBI Trusteeship (cited supra)*.

22. As regards admissibility of the said document being unstamped for the purpose of *prima-facie* inferring liability to pay on the applicant is concerned, it is worth to mention here that the suit is at its initial stage and that recovery of tax which is admittedly paid by the licensor, the amount is secured before the Trial Court considering the very object of providing summary remedy under Order XXXVII of the CPC.

23. As such, whether the document needs to be impounded or can be or cannot be accepted in evidence will be looked into at the appropriate stage of the suit, however, that by itself will not preclude the Court below to rely on the admitted contents of the documents i.e. amenities agreement.

24. Apart from above, the claim that the suit is barred by limitation cannot be accepted, as the suit claim is based on the demand notice for the service tax dated 13th January, 2016 and the payment of the same by the plaintiff so as to avoid further complication, penalty or prosecution. In that view of the matter, even if the possession of the suit premises was surrendered vide letter dated 30th October, 2014, the suit initiated on 5th August, 2016 cannot be said to be barred by

limitation.

25. As regards the claim that the liability to pay service tax under cloud in an independent proceedings which are subjudice in relation to some other matter is concerned, the same can be looked into by the Court below at the time of deciding the suit on merit. However, it cannot be said that Court below cannot secure the amount of claim based on the *prima-facie* agreement of the liability as could be inferred from the agreement of amenity.

26. In this background, in my opinion, no error of jurisdiction could be noticed in the order impugned. The revision as such fails, dismissed.

27. As a consequence of dismissal of revision, pending application also stands disposed of.

[NITIN W. SAMBRE, J.]